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Submitted via email to *rule-comments@ sec.gov*

Comment on Proposed Rulemaking: Disclosure of Payments by Resource Extraction Issuers, File No. S7-24-19, RIN 3235-AM06

Thank you for the opportunity to comment on the Securities and Exchange Commission's (SEC) proposed rule "Disclosure of Payments by Resource Extraction Issuers", 2020-0060-0001.[1] Please accept this comment on behalf of Earthworks and our members.[2]

We respectfully urge the SEC to withdrawal this proposal and, in consultation with Congress, investors, and the public, issue a new Advanced Notice of a Proposed Rulemaking (ANPRM) more consistent with the intent and requirements of the law.[3]

Earthworks is a national nonprofit advocacy organization dedicated to protecting communities and the environment from the impacts of mineral and energy development while promoting a just, fair, and equitable energy transition. We advocate for good governance, transparency, and public participation.

Our perspective stems from our experience with minerals leasing, payment, and reporting procedures for resource extraction issuers on federal and some state public lands.

The Administration's Public Lands Payment Disclosure Policies Have Eschewed Transparency

First impressions are important. This Administration's commitment to opacity and poor governance is best illustrated by the very first piece of legislation signed by the President, the joint resolution disapproving SEC's previous resource payments disclosure rule.[4] This decision signaled a series of retreats from long standing commitments to transparency and accountability in public resource revenues, including dismantling the US Extractive Industries Transparency Initiative (USEITI).

Earthworks Board or staff members served on the Multi-Stakeholder Group (MSG) for USEITI from its 2014 inception until the United States withdrew as an EITI implementing country in November 2017.[5] We therefore regret this proposed rule's purported reliance now on portions of the standard in light of that withdrawal.

Instead of implementing EITI, the Department of Interior (DOI) attempted to replace it with a reconstituted advisory committee stacked with oil and gas interests (Royalty Policy Committee or RPC).[6] RPC too suffered from transparency deficiencies and, in August 2019, a Federal Court held the RPC violated Federal Advisory Committee Act (FACA), the Administrative Procedures Act (APA), and enjoined the RPC's recommendations.[7]

All the while, DOI pushed two rollbacks of oil, gas, and minerals rules that would have provided greater revenue transparency for investors and taxpayers: the Office of Natural Resource Revenue's (ONRR) coal valuation rule[8] and the Bureau of Land Management's (BLM) methane/flaring rule.[9]

Were SEC to finalize this proposal as written, and the United States reapply to become an EITI candidate country, our successful implementation of the standard might be in doubt.

SEC Should Adopt a Contract-Level or Lease-Level Project Definition

Response to Requests for Comment 35, 36, 43, 44: Modified Project Definition

SEC proposes to allow payment disclosures aggregated at the state (subnational) level rather than at the contract or lease level.[10]

In the final rule, SEC should adopt a project definition more consistent with DOI's nearly century-long tradition of contract (lease) level payment disclosures from lessees of our public minerals.[11] Resource extraction issuers in commercial development on public lands regularly disclose many contract-level payments to federal and state (and sometimes local) agencies. These payments include royalties, bonuses, and fees.

SEC's hypothetical example in Nevada[12] illustrates the ease with which issuers could disclose payments at the contract level.[13] The majority of oil, gas, and mineral development in Nevada takes place on public lands. Therefore, under state and federal laws, almost all resource extraction issuers currently disclose some royalty, tax, rent, bonus, fee and other payments to agencies often disaggregated by mine or well site. The reason is that mineral owners (the public) deserve to know how much money our governments receive for our resources.

This means, as in SEC's example, nearly every individual mine in Elko County and White Pine County, Nevada already report some contract-level project payments to DOI, Nevada, or both.[14] ONRR's royalty payment forms already require lease or contract level disclosure.[15] Adopting a similar contract-level project definition would streamline disclosure requirements and reduce compliance burden.

SEC proposes to allow issuers to disclose Community and Social Responsibility (CSR) payments at the contract level.[16] If contract-level disclosures work for CSR payments, and public lands payments, then SEC should adopt that commonsense project definition broadly.

SEC's proposal over relies on issuers' purported desires to avoid competitive harm from disclosure of proprietary information. As discussed supra, and as a practical matter, most public lands payments from resource extraction issuers are either publicly available or otherwise easily discernable. Nor is oil, gas, coal, and mining on private lands much of a proprietary secret. All of us know where the minerals are. Disclosing payments will not tip off competitors to a heretofore undiscovered gold rush.

Conclusion

SEC's proposal fails to deliver meaningful transparency to investors and the public. This is primarily because SEC overlooks that domestic oil, gas, and mining issuers already disclose contract-level payments to governments for mineral activities on public lands. DOI's experience here should model SEC's project definition in the new ANPRM. This approach will provide consistency and certainty to resource extraction issuers while maximizing good governance and transparency for investors and the public.

Thank you for your consideration.

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[1] Disclosure of Payments by Resource Extraction Issuers, 85 Fed. Reg. 2,522 (proposed January 15, 2020).
[2] On the comment deadline for this proposed rule, SEC issued an update graciously providing, inter alia, extra time for commenters citing SEC's Informal and Other Procedures (17 C.F.R. 202.6) https://www.sec.gov/sec-coronavirus-covid-19-response
[3] Section 1504 of the Dodd-Frank Act added Section 13(q) to the Securities Exchange Act of 1934

[4] See H.R.J. Res. 41, 115th Cong. (2017)

[5] Letter from Office of Natural Resources Revenue Director Gregory Gould to EITI Board Chair Fredrik Reinfeldt about withdrawing the United States as an EITI Implementing Country, November 2, 2017, 1. https://eiti.org/files/documents/signed_eiti_withdraw_11-17.pdf
[6] See https://www.doi.gov/rpc
[7] See Western Organization of Resource Councils vs. Bernhardt http://www.worc.org/worc-wins-lawsuit-against-federal-energy-committee/
[8] 82 Fed. Reg. 36934 (August 7, 2017). https://www.federalregister.gov/documents/2017/08/07/2017-16571/repeal-of-consolidated-federal-oil-and-gas-and-federal-and-indian-coal-valuation-reform
[9] 81 Fed. Reg. 83008 (November 18, 2016) https://www.federalregister.gov/documents/2016/11/18/2016-27637/waste-prevention-production-subject-to-royalties-and-resource-conservation
[10] 85 Fed. Reg. 2,527
[11] The General Mining Law of 1872 (30 U.S.C. § 22 et seq.) governs payments for most hardrock minerals. These payments include some fees and bonuses but no royalties. Some hardrock minerals on acquired lands may be subject

to lease. The Department of Interior has managed lease payments from oil, gas, and coal on public lands since the 1920 Mineral Leasing Act (30 U.S.C. § 181 et seq.).

[12] 85 Fed. Reg. 2538

[13] Nevada's Department of Taxation maintains annual reports of royalty payments from resource extraction issuers on a contract level basis. See https://tax.nv.gov/LocalGovt/PolicyPub/ArchiveFiles/Net_Proceeds_of_Minerals/

[14] Ibid at pages 48 and 72, respectively. Nevada tracks tax and royalty payments on a disaggregated. mine by mine basis.

[15] DOI's Office of Natural Resources Revenue provides forms for operators to report payments at the lease level. https://www.onrr.gov/ReportPay/PDFDocs/4430.pdf

[16] 85 Fed. Reg. 2532