

EARTHWORKS

May 1, 2015

East Smoky Panel Mine EIS
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Re: Scoping comments on East Smoky Panel Mine EIS

The following are the comments of Earthworks and the Crow Creek Conservation Alliance on the above-referenced project. Earthworks is a 501(c)(3) non-profit organization dedicated to protecting communities and the environment against the adverse effects of mining. The Crow Creek Conservation Alliance (CCCA) is a non-profit organization made up of land owners along Crow Creek. CCCA is dedicated to protecting water quality and quantity, fish and wildlife, and public health in the region.

As noted in the scoping notice, the EIS includes the 1) proposed development of federal mineral leases IDI-015259, IDI 026843, and IDI 012890 held by Simplot; and development and reclamation of an open pit phosphate mine and associated infrastructure on a combination of federal land and split estate property; 2) potential modifications of Lease IDI-015259 by adding 120 acres along the southwest side of the existing lease for mining related disturbance; 3) development, construction, and reclamation of portions of transmission lines, access roads, and other miscellaneous disturbances off lease on federal lands administered by the US Forest Service, requiring Special Use Authorizations and, 4) an amendment of the Caribou National Forest Revised Forest Plan that would relocate a designated utility corridor south around the southern end of the proposed open pit in order to relocate an existing 115 kilovolt line. The proposed mine related disturbance would affect 847 acres.

A. National Environmental Policy Act

In order to implement this proposal, the BLM and Forest Service (“Agencies”) will need to comply with the National Environmental Policy Act (“NEPA”). Enacted upon “recognizing the profound impact of man’s activity on the interrelations of all components of the natural environment,” NEPA seeks to “promote efforts which will prevent or eliminate damage to the

environment.” 42 U.S.C. § 4331; *id.* § 4321. NEPA implements its environmental protection objectives by requiring federal agencies to analyze the environmental impacts of a particular action before committing resources to the project. 42 U.S.C. § 4332(2)(C). “By focusing both agency and public attention on the environmental effects of those proposed actions, NEPA facilitates informed decision making by agencies and allows the political process to check those decisions.” New Mexico v. Bureau of Land Mgmt., 565 F.3d 683, 703 (10th Cir. 2009). “The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.” 40 C.F.R. § 1500.1(c). The specific requirements of NEPA have been laid out more precisely in longstanding regulations issued by the Council on Environmental Quality. They require that federal agencies shall “[u]se all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.” *Id.* § 1500.2(f). As part of this policy, agencies shall “[u]se the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.” *Id.* § 1500.2(e).

B. Reasonable Alternatives

NEPA also requires that an environmental analysis must “study, develop, and describe” reasonable alternatives to the proposed federal action. 42 U.S.C. § 4332(2)(E). This alternatives analysis is “the heart of” the environmental analysis, 40 C.F.R. § 1502.14, and NEPA’s implementing regulations emphasize that an environmental analysis must “[r]igorously explore and objectively evaluate all reasonable alternatives.” 40 C.F.R. § 1502.14(a) (emphasis added). The agency must consider a reasonable range of alternatives that would satisfy the stated “purpose and need” for a given project. *See, e.g., Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1520 (9th Cir. 1992) (“nature and scope of proposed action” determines the range of reasonable alternatives agency must consider).

NEPA requires discussion of alternatives to “provid[e] a clear basis for choice among options by the decisionmaker and the public.” 40 C.F.R. § 1502.14 (emphasis added); *see also* 42 U.S.C. § 4332(2)(E); 40 C.F.R. §§ 1507.2(d), 1508.9(b). The requirement for analysis of a reasonable range of alternatives applies to EAs as well as EISs. Akiak Native Community v. U.S. Postal Service, 213 F.3d 1140, 1148 (9th Cir. 2000). This requirement exists “to insist that no major federal project should be undertaken without intense consideration of other more ecologically sound courses of action, including shelving the entire project, or of accomplishing the same result by entirely different means.” Envtl. Defense Fund v. Corps of Eng’rs, 492 F.2d 1123, 1135 (5th Cir. 1974) (emphasis added); *see also Methow Valley Citizens Council v. Regional Forester*, 833 F.2d 810 (9th Cir. 1987) (agency must consider alternative sites for a project), *rev’d on other grounds*, 490 U.S. 332 (1989). “The existence of a viable but unexamined alternative renders an environmental impact statement inadequate.” Alaska Wilderness Recreation & Tourism v. Morrison, 67 F.3d 723, 729 (9th Cir. 1995).

We urge the agencies to consider an alternative that would require the clean up of existing operations via the CERCLA removal and remediation action, prior to the approval of any further phosphate mining activities at this operation.

C. Hard Look At Environmental Impacts

The Agencies must consider the environmental implications of the proposed action before making any decision. NEPA requires federal agencies to “consider every significant aspect of the environmental impact of a proposed action...[and] inform the public that it has indeed considered environmental concerns in its decisionmaking process.” Earth Island Inst. v. U.S. Forest Serv., 351 F.3d 1291, 1300 (9th Cir. 2003). NEPA’s procedural requirements “force agencies to take a ‘hard look’ at environmental consequences” (id.) and must be fulfilled “before decisions are made and before actions are taken.” 40 C.F.R. §§ 1500.1(b), 1502.5; Save the Yaak Committee v. Block, 840 F.2d 714, 718 (9th Cir. 1988). The Agencies, for example, must thoroughly evaluate the potential impacts to water quality and quantity, fish and wildlife and their habitats.

1. Water Quality/Quantity

The EIS should analyze the effects of the proposed project on water quality in all potentially effected surface and groundwater resources, including seeps, springs, and isolated wetlands. It should analyze the impacts to water quantity, alterations to groundwater aquifers and reductions or changes in surface water flows from mine operations, pit dewatering, or any other activity associated with the project. It should contain sufficient information to demonstrate how the project will be in compliance with all state and federal water quality standards and with all laws and regulations that apply to water rights. The EIS should also fully disclose the effectiveness, reliability and uncertainties of any mitigation measures. There is also potentially significant new information resulting from the CERCLA investigation, remediation and removal action regarding water resources at the site that should be considered in the EIS when disclosing current conditions, direct/indirect impacts, and cumulative effects. The EIS should also disclose the potential impacts of the project in relation to any 303(d) impaired waters.

2. Fish and Other Aquatic Life

The EIS should thoroughly evaluate potential impacts to aquatic life from all activities associated with mine operations, including but not limited to stormwater runoff, seepage, discharges, sediment, alterations in habitat, changes in flows, spills or other accidental releases of harmful materials, or any other potential impact to aquatic life. The EIS should include detailed analysis of the potential for adverse impacts to aquatic life from selenium or other heavy metals, and evaluate the cumulative effects of the proposed project along with the CERCLA removal and remediation facilities, and other phosphate mines in the region. The EIS should include extensive baseline data to fully characterize selenium concentrations in the existing aquatic populations.

3. Wildlife Impacts

The EIS should fully disclose the potential impacts to wildlife in the effected area, including but

not limited to loss or alteration of habitat, habitat fragmentation, restrictions to wildlife movement, impacts to seeps, springs and wetlands, and exposure to selenium or other harmful contaminants from water, vegetation, dust or other potential sources. The EIS should fully analyze short and long-term impacts to threatened and endangered (T&E) species and their habitat, candidate T&E species and their habitat, species of special concern and their habitat, and migratory birds and their nesting sites. The EIS should assess a full range of mitigation measures to offset these impacts, and fully assess and disclose the effectiveness of the proposed mitigation.

Heavy metal contamination, specifically from selenium, is of major concern. Impacts to terrestrial and aquatic species may occur via uptake of selenium in plant and prey animals. Seeps, spring and creeks that serve as sources of food and drinking water may become contaminated from surface water runoff and leaching of selenium to underlying groundwater. The EIS should discuss, in detail, the measures that will be implemented to avoid further deposition of selenium into the environment. It should fully evaluate and disclose the effectiveness of these mitigation measures, and the cumulative effects of the proposed operation, the CERCLA-related removal and remediation components, and with other phosphate mines in the region.

4. Air Quality

The EIS must discuss how the proposed project will impact air quality both for the project area and any related haul roads, processing facilities, etc. The EIS should fully disclose all site information, plans, descriptions, specifications, and drawings showing the design of the facilities, the nature and amount of emissions (including secondary or fugitive emissions), and the manner in which those sources will be operated and/or controlled.

5. Noise, Dust, Traffic

The EIS should evaluate the potential impacts of noise, dust and traffic from the mine operations and roads in and adjacent to the project area. It should provide information on the expected decibel levels resulting from various aspects of the proposed project, potential mitigation measures, and the process by which compliance will be measured and avenues by which disputes can be resolved. The EIS should evaluate the impacts of dust from mine operations, tailings impoundment, waste rock piles, haul roads, and other mine related activities, describe mitigation measures, the effectiveness of these mitigation measures and the process by which compliance will be measured.

6. Vegetation/Habitat Impacts

The EIS should fully disclose the landscape level changes to plant communities as a result of the proposed East Smoky Panel project and the cumulative effects of phosphate mining in the region. How will the alterations to plant communities in the short and long-term affect wildlife habitat in the region? The EIS should disclose the effectiveness of revegetation efforts to native plant species, including tree species. It should provide data to demonstrate that unconsolidated backfill will support tree species, and disclose the potential for conversion of forest to non-forest at the proposed mine and the cumulative effects of the proposed project with other regional

phosphate mines. With tens of thousands of acres already leased to mining, the EIS should disclose the effects of large-scale habitat fragmentation to wildlife in the region, as well as water quality and quantity.

7. Social Impacts

The EIS should fully disclose the potential impacts to recreational use of the area, including impacts to fishing, hiking, riding, wildlife viewing, from mine operations, haul roads, and other project-related impacts. It should disclose the potential adverse impacts to private property owners in the region, and the visual impacts of the proposed project.

8. Monitoring and Mitigation

The EIS should describe the monitoring and mitigation plan, which should include monitoring description, frequency, costs, source of funds, and responsibilities. The EIS should discuss remedial steps that will be taken should monitoring reveal a problem. The EIS should assess a full range of mitigation measures to offset these impacts, and fully assess and disclose the effectiveness of the proposed mitigation.

9. Reclamation

The EIS should fully disclose the effectiveness of reclamation measures over the short and long-term and evaluate a range of cover system alternatives in addition to the proposed store and release cover placement.

10. Financial Assurance

There is ample evidence throughout Idaho and the west, where reclamation bonds have been insufficient to cover the cost of clean-up, particularly post-closure long-term water treatment. NEPA provides for the disclosure of all information concerning environmental consequences of a proposed action to the public and decision-makers before the decisions are made and before actions are taken. Full disclosure of the amount and availability of financial assurance is critical to determining whether reclamation or mitigation will be implemented and therefore the significance of potential impacts.

The EIS should describe the reclamation bond and how it was estimated. It should fully disclose the potential for water treatment in perpetuity, and how the agency will assure that there is sufficient financial assurance to cover these costs, including contingency measures. The reclamation bond should be based on the actual costs for a third-party to complete cleanup.

11. Reasonably Foreseeable effects

The Agencies must disclose all reasonably foreseeable effects related to the proposed action. NEPA requires agencies to disclose all significant impacts from projects, whether they are “direct” or “indirect.” 40 C.F.R. § 1502.16; City of Davis v. Coleman, 521 F.2d 661, 676 (9th Cir. 1975). “Indirect” impacts include any “reasonably foreseeable” impacts. 40 C.F.R. §§ 1508.8(b), 1502.22. These disclosures must be specific and clear. Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1152 (9th Cir. 1998) (finding “vague and nonspecific” disclosures

inadequate under NEPA because they “provide no analysis for the public to review”). The Agencies should pay particular attention to indirect impacts to public resources in and around the project area. NEPA requires the Agencies to discuss these “reasonably foreseeable” impacts. 40 C.F.R. §§ 1508.8(b). The EIS should review current climate change models and incorporate the potential affects of climate change on all alternatives and all environmental effects in the EIS.

12. Cumulative effects

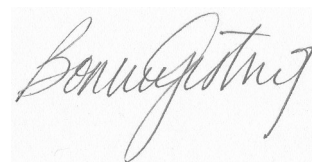
The Agencies must analyze and discuss all cumulative impacts, “regardless of what agency (Federal or non-Federal) or person undertakes such actions.” *Id.* § 1508.7. This includes all past, present, and “reasonably foreseeable future actions” “which when viewed with other proposed actions have cumulatively significant impacts.” *Id.*; see also *id.* 1508.25(a)(2). Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” 40 C.F.R. § 1508.7. The cumulative analysis must be reasonably detailed; “[g]eneral statements about ‘possible’ effects and ‘some risk’ do not constitute a ‘hard look’ absent a justification regarding why more definitive information could not be provided.” *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1379-80 (9th Cir. 1998). To satisfy this NEPA requirement the cumulative effects analysis should include the ongoing selenium contamination of water resources by previous mining at the Smoky Canyon Mine and other phosphates mines in the region.

13. The Agencies must reveal and analyze any connected actions.

The Agencies must also evaluate connected actions. NEPA requires proposals “which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.” 40 C.F.R. § 1502.4(a); *Kleppe v. Sierra Club*, 427 U.S. 390, 408 (1976). Thus, a NEPA document must analyze the impacts of “[c]onnected actions,” including actions that are “interdependent parts of a larger action and depend on the larger action for their justification.” 40 C.F.R. § 1508.25(a)(1). For example, courts have repeatedly rejected segmentation of proposed road building and timber projects, remanding to the agencies for preparation of a comprehensive NEPA document. See, e.g., *Save the Yaak Committee v. Block*, 840 F.2d 714 (9th Cir. 1988); *Thomas v. Peterson*, 753 F.2d 754, 758-60 (9th Cir. 1985) (EIS for road must address other projects related to road, such as timber sales); *Ecology Center of Louisiana v. Coleman*, 515 F.2d 860 (5th Cir. 1975); *Swain v. Brinegar*, 517 F.2d 766 (7th Cir. 1975); *Indian Lookout Alliance v. Volpe*, 484 F.2d 11, 16 (8th Cir. 1973).

We appreciate the opportunity comment on this proposal and look forward to reviewing the DEIS.

Sincerely,



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