

March 10, 2020

Mary B. Neumayr
Chair, Council on Environmental Quality
730 Jackson Place NW
Washington, DC 20503

Re: Docket No. CEQ-2019-0003, Notice of Proposed Rulemaking (NPRM), Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act

Dear Chair Neumayr:

Thank you for the opportunity to submit comments on the Council on Environmental Quality's (CEQ) proposed Update to the Regulations Implementing the Provisions of the National Environmental Policy Act (NEPA). On behalf of our members and mining impacted communities, we strongly oppose CEQ's proposed NEPA regulations.

CEQ's Proposal Threatens the Democratic Process at the Core of NEPA

This proposal reveals a brazen and deliberate design to subvert the values of and opportunities for public comment. Public comments help improve agency consideration of project alternatives and result in better environmental and health outcomes. They are drawn from the lived experiences and long histories of mining impacted communities facing obstacles from many Governments' land use decisions. These people, Native and non-Native, maintain wisdom that resides neither within agencies nor project proponents; and they bear a special relationship with the human environment.

For this reason, we find troubling CEQ's proposed change to the current meaning of "human environment"¹ from "people" to "present and future generations of **Americans**" (emphasis added).²

The current definition: Human environment shall be interpreted comprehensively to include the natural and physical environment and the relationship of **people** with that environment. (emphasis added)

Proposed definition: Human environment means comprehensively the natural and physical environment and the relationship of present and future generations of **Americans** with that environment. (emphasis added) 85 Fed. Reg. 1729

This proposal reveals CEQ's apparent position that *people* without the preferred immigration status do not belong to the *human environment*.³ It dehumanizes undocumented communities who disproportionately reside among minority and low-income populations.⁴ Worse, it raises the specter of similarly appalling xenophobic policies supported by this Administration. CEQ therefore erred in its determination that this proposal would not cause disproportionately high and adverse environmental justice effects.⁵

CEQ's proposal further insults the value of the public's opinions by advising agencies to forfeit comments our Government deems lack specificity or timeliness.⁶ This includes a new "exhaustion" provision purporting to close off comments post draft Environmental Impact Stage (DEIS) stage.⁷ The plain reasoning provided by CEQ explains, "(t)his reinforces that parties may not raise claims based on issues they did not raise during the public comment period."⁸

NEPA and democracy work best when the people tell the Government which opinions have value, not the other way around.

Mines affect people from all walks of life, including those who live in extremely remote areas with limited communication access or who rely on seasonal subsistence or employment, any of which can make it more difficult to devote the time necessary to meaningfully participate. The people in communities who live with the continuing impacts of hardrock mining are experts in their own right.

They deserve an equal voice in Government mining decisions near their homes and waters, and on our public lands. Listening to their expertise belongs among the internationally accepted guiding principles that support the Social License to Operate (SLTO)⁹ and Free, Prior, and Informed Consent (FPIC).¹⁰ CEQ should embrace these values and guide agencies on avoiding decisions that may disproportionately impact minority, tribal, rural and low-income populations. Some of these populations have comparatively fewer resources to engage in highly technical matters with the specificity CEQ proposes.

CEQ's Proposal Will Lead to Poor Agency Decisions and Potentially More Mine Disasters

CEQ's proposals presumptively limit the time and scope of an agency's environmental reviews and public comment periods.¹¹ Placing arbitrary limits on the time to conduct well-crafted, sound Environmental Assessments (EA) to one-year and Environmental Impact Statements (EIS) to two-years encourages only bare-minimum level analysis leading to poor scientific and environmental outcomes.¹² Limiting the amount of time to conduct an EA and EIS, is another attempt to silence the public's voice.

Mining has uniquely harmful impacts on communities and the environment. Studying mine proposals and their impacts needs to remain flexible in order to adjust to contingencies and challenges as they unfold. This is especially true for protecting cultural, historical, ecological, and tribal resources. Mines also produces vast quantities of toxic waste that often must be managed in perpetuity. Chronic seepage and sudden accidental releases to the environment are the norm.¹³

Mines vary in hydrology, geology, and engineering, requiring expert opinions across many technical disciplines. Occasionally, experts can conduct reviews concurrently. However, in some cases, the results of one study may form some of the inputs for another subsequent review. Where environmental reviews occur consecutively, rigid timelines could undermine the quality of the science. All of this suggests that we need more rigorous and flexible environmental reviews to reduce the damage and public costs imposed by mining.

In any case, Federal land managers already promptly process the vast majority of NEPA reviews for the hardrock mining sector. When one takes longer than average, GAO found that often responsibility fell upon project proponents for the lack or poor quality of information provided to the agencies.¹⁴ Sometimes delays result from routine changes sought in plans of operations or normal fluctuations in commodity prices. Regardless of a delay's reason, arbitrary time constraints pressure agencies to force decisions without all the best information. This may inadvertently result in more mine disasters.

CEQ's Proposals Ignore Indirect and Cumulative Impacts from Mineral-Related Projects

These proposals would no longer require agencies to consider indirect or cumulative impacts, like climate change, in their NEPA analysis. Instead, agencies would only study direct impacts with “a reasonably close causal relationship to the proposed actions.”¹⁵ NEPA’s “hard look” requires more, as decided over many years of precedent.¹⁶

Indirect impacts or effects “**are caused by the action** and are later in time or farther removed in distance, but are still reasonably foreseeable.” (emphasis added) ¹⁷

Indirect Impacts/Effects in Mining and Milling/Processing include:

- 1) Transport offsite and processing of 5 million tons of ore are a “prime examples of indirect effects” under NEPA.¹⁸
- 2) A proposed mine¹⁹ or mill²⁰ on private lands that could foreseeably process ore from public lands mining and mineral leasing.
- 3) Smelting of the copper ore as an indirect impact of the mine. ²¹

And cumulative impacts/effects are: “(T)he impact on the environment which results from the incremental impact of the action **when added to other past, present, and reasonably foreseeable future actions....**” (emphasis added) ²²

Cumulative Impacts/Effects from Mining include:

- 1) Other proposed mining in the region causes cumulative effects, NEPA requires a “quantifiable assessment of their combined environmental impacts”.²³
- 2) An EA must analyze environmental impacts from nearby “past, present, and future” mining.²⁴
- 3) A quantitative assessment of air emissions from nearby oil, gas, and mining operations, the EIS may not rely on state air permitting actions for NEPA cumulative review.²⁵

These decisions demonstrate substantial understanding by courts, project proponents, and the public that studying environmental impacts requires analysis of indirect and cumulative effects.

The proper scope of NEPA analysis should include direct, indirect, cumulative, and all past, present, and reasonably foreseeable future actions (RFFAs). For example, an agency should count a nearby power plant’s air emissions along with the proposed mine’s air emissions. Otherwise, an agency cannot know whether an applicable air quality standard will be met. The organic statutes

for our federal land management agencies prevent approval of a mine if it would violate an applicable water or air quality standard.²⁶ These agencies need baseline and background levels to factor in all the combined pollutant sources that might affect a resource. Robust NEPA review helps provide agencies the breadth of information needed to inform these decisions.

Conclusion

All mines warrant rigorous environmental review, ample public participation, and an empowered public to defend our rights in court. CEQ's proposal does away with most of this, and it disrespects the voices of Native and non-Native mining impacted communities. By not accounting for indirect and cumulative impacts, CEQ also punishes the health and well-being of the human environment.

For these reasons, we urge you to reject these proposals. The NEPA process works. It provides regulatory certainty, holds agencies accountable, and gives voice to the public. It further requires the consideration of direct, indirect, and cumulative impacts so agencies can make the best decisions for our environment.

Thank you for allowing us to submit comments on this important matter.

Arizona Mining Reform Coalition

Earthworks

Friends of the Inyo

Gila Resources Information Project

Great Old Broads for Wilderness

Idaho Conservation League

Information Network for Responsible Mining

LEAD Agency Inc. (Local Environmental Action Demanded), Inc.

Mountain Watershed Association

Patagonia Area Resource Alliance

Prairie Hills Audubon Society of Western South Dakota

Rock Creek Alliance

Save Our Cabinets

Save Our Sky Blue Waters
Southeast Alaska Conservation Council
Northeastern Minnesotans for Wilderness
The Lands Council
Weber Sustainability Consulting

¹ The current definition: §1508.14 Human environment shall be interpreted comprehensively to include the natural and physical environment and the relationship of **people** with that environment. (See the definition of “effects” (§1508.8). (emphasis added)

² Proposed definition: Human environment means comprehensively the natural and physical environment and the relationship of present and future generations of **Americans** with that environment. (See the definition of “effects.”) (emphasis added) 85 Fed. Reg. 1729

³ A series of cases have suggested that NEPA still applies to major federal actions in foreign countries. Please see *Natural Resources Defense Council v. Nuclear Regulatory Comm’n*, 647 F.2d 1345 (D.C. Cir. 1981), *Sierra Club v. Adams*, 578 F.2d 389 (D.C. Cir. 1978), and *National Org. for the Reform of Marijuana Laws v. United States*, 452 F. Supp. 1226 (D.D.C. 1978).

⁴ Many persons living in America are documented and yet are not citizens.

⁵ 85 Fed. Reg. 1711-12 (Jan. 10, 2020). Please see also 59 Fed. Reg. 7629 (Feb. 16, 1994) Executive Order 12898, Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations.

⁶ See generally, Sec. 1500.3(b), 1503.3, 1503.4. NEPA Compliance: 1500.3(B)(3) comments must be submitted within the comment periods provided and shall be as specific as possible (§§ 1503.1 and 1503.3). Comments or objections not submitted shall be deemed unexhausted (sic) and forfeited. Any objections to the submitted alternatives, information, and analyses section (§ 1502.17) shall be submitted within 30 days of the notice of availability of the final environmental impact statement.

⁷ Fed Reg. 85 Vol. 1693 “CEQ proposes to add a new § 1500.3(b), “Exhaustion,” which would provide that agencies must request comments on potential alternatives and impacts and identification of any relevant information, studies, or analyses of any kind concerning impacts affecting the quality of the human environment in the notice of intent to prepare an EIS. It would provide that comments on draft EISs and any information on environmental impacts or alternatives to a proposed action must be timely submitted to ensure informed decision making by Federal agencies. CEQ further proposes to provide that comments not timely raised and information not provided shall be deemed unexhausted (sic) and forfeited. This reinforces that parties may not raise claims based on issues they did not raise during the public comment period.”

⁸ Ibid.

⁹ According to Ernst & Young’s 2020 annual list of top 10 international mining investment risks, SLTO is #1 for the second year in a row. See https://www.ey.com/en_gl/mining-metals/10-business-risks-facing-mining-and-metals

¹⁰ See <https://earthworks.org/issues/fpic/>

¹¹ Fed Reg. 85 Vol. 1699 “CEQ is proposing in § 1501.10, “Time limits,” (current 40 CFR 1501.8) to add a new paragraph (b) to establish a presumptive time limit for EAs of 1 year and a presumptive time limit for EISs of 2 years.”

¹² See, Southeast Alaska Conservation Council Policy Review: Update to the Regulations Implementing NEPA, by Sally Schlichting (Feb. 21, 2020)
https://www.seacc.org/policy_review_nepa?utm_campaign=nepa_comment_2_20&utm_medium=email&utm_source=seacc

¹³ See Bonnie Gestring, US Copper Porphyry Mines: Track Record of Water Quality Impacts Resulting from Pipeline Spills, Tailings Failures, and Water Collection and Treatment Failures (Aug. 6, 2012)
https://earthworks.org/publications/us_copper_porphyry_mines/

¹⁴ GAO, Hardrock Mining: BLM and Forest Service Have Taken Some Actions to Expedite the Mine Plan Review Process but Could Do More, GAO-16-165 at 21 (Jan. 2016)

¹⁵ Sec. 1508.1(g).

¹⁶ See, Roger Flynn, Review of Indirect and Cumulative Impacts, and Connected Actions for Mineral-Related Projects Under NEPA Rocky Mountain Mineral Law Foundation Special Institute on The National Environmental Policy Act: November 2-3, 2017, Denver, Colorado

¹⁷ 40 C.F.R. §1508.8(b)

¹⁸ South Fork Band Council of W. Shoshone of Nev. v. U.S. Dep’t of the Interior, 588 F.3d 718, 725 (9th Cir. 2009)

¹⁹ Sierra Club v. U.S. Dept. of Energy, 255 F.Supp.2d 1177, 1185 (D.Colo. 2002)

²⁰ Colorado Environmental Coalition v. Office of Legacy Management, 819 F.Supp.2d 1193, 1212 (D. Colo. 2011)

²¹ Center for Biological Diversity v. United States Fish and Wildlife Service, Feb. 20, 2020 AZ District

²² 40 C.F.R. § 1508.7

²³ Great Basin Mine Watch v. Hankins, 456 F.3d 955, 971-974 (9th Cir. 2006)

²⁴ Te-Moak Tribe of Western Shoshone v. Dept. of Interior, 608 F.3d 592, 603 (9th Cir. 2010)

²⁵ Great Basin Resource Watch v. BLM, 844 F.3d 1095, 1104 (9th Cir. 2016)

²⁶ See generally, the Federal Land Policy Management Act (FLPMA) regulations at 43 CFR 3809 and the Organic Act regulations at 36 CFR 228