

November 22, 2021

The Honorable Brenda Mallory
Chair, Council on Environmental Quality
730 Jackson Place Northwest
Washington, DC 20506

Re: CEQ-2021-0002, Notice of Proposed Rulemaking (NPRM), National Environmental Policy Act Implementing Regulations Revisions

Dear Chair Mallory,

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).¹ On behalf of our members, representing mining impacted communities throughout the United States, we urge you to rescind the 2020 NEPA rules,² reinstate the 1978 rules³, and improve upon them in the second round of rulemaking.

We appreciate CEQ's proposal to restore NEPA's indirect and cumulative review. This kind of review is integral to understanding how mining affects the climate and communities and the natural resources they depend upon. Indirect and cumulative impact reviews must be thorough in scope, both in terms of geography and time.

NEPA's Cumulative Impacts Analysis of Hardrock Mining Projects Must Include a Hard Look at Structural Inequities

Mining is incredibly complex, with communities feeling impacts decades after NEPA review ends. The harm mining causes air, soil, and water are inextricably linked to the physical and emotional trauma felt by mining-impacted communities, particularly Indigenous communities. The CEQ 2020 NEPA rule's disregard for mining-impacted communities' concerns and objections to mining projects heightened this trauma.⁴

¹ 86 Fed. Reg. 55757 (October 7, 2021) Docket # CEQ-2021-0002.

² 85 Fed. Reg. 43304 (July 16, 2020).

³ 43 Fed. Reg. 55978 (November 29, 1978).

⁴ See also comments from mining-impacted communities on the 2020 NEPA rule.

<https://earthworks.org/publications/earthworks-comments-on-update-to-the-regulations-for-implementing-the-procedural-provisions-of-the-national-environmental-policy-act/>

Mining has enriched some and impoverished many for centuries. In the United States, the 19th century rush for precious metals, followed by the 20th century's rush for uranium, has killed or displaced untold numbers of Indigenous peoples. Congress enacted the 1872 law—that still controls public lands mining—one year after they ceased making treaties with Tribes within the United States.⁵ The mining law was meant to encourage colonization and settlement of what is now called the western US.⁶ The mining law's historic and current traumas, as experienced by those impacted, require a hard look when public lands managers perform NEPA's reviews.

Indigenous peoples interact with land with “the same kind of respect that [they] have for [their] cherished friends and families⁷,” a symbiotic relationship fundamentally different from settler colonialism. Land, in this context, is irreplaceable: once Chích'il Bìł Dagoteel (Oak Flat) or Peehee mu'huh (Rotten Moon/Thacker Pass) are gone, their connections to the San Carlos Apache or the People of Red Mountain, respectively, are gone forever. Destroying an Indigenous sacred place brings trauma and devastation akin to the murder of a family member.⁸ This trauma intersects and exacerbates the many public health crises Indigenous peoples face, including high rates of suicide⁹, gender-based violence¹⁰, and substance abuse¹¹.

CEQ's proposal to restore NEPA reviews of indirect and cumulative impacts should recognize these intersections, respecting the special relationship Indigenous and other mining-impacted communities have with their lands, including public lands.¹² NEPA offers the most “promising opportunities to begin to address and provide restorative justice” to Indigenous peoples in the short-term.¹³ NEPA is one of the few environmental justice tools the public can use to defend

⁵ “Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions” by the US Departments of Interior, Justice, and Army, US Government (2017), available at <https://www.achp.gov/sites/default/files/reports/2018-06/ImprovingTribalConsultationandTribalInvolvementinFederalInfrastructureDecisionsJanuary2017.pdf>.

⁶ See 30 U.S.C. §22 et seq. (May 10, 1872).

⁷ “Pueblo of Zuni Letter to President Biden July 1, 2021” by Governor Val R. Panteah, Sr. (2021), available at <https://bsnorrell.blogspot.com/2021/07/pueblo-of-zuni-letter-to-president.html>.

⁸ “Devastated' Indigenous owners say Rio Tinto misled them ahead of Juukan Gorge blast” by Lorena Allam, The Guardian (2020), available at <https://www.theguardian.com/business/2020/oct/12/devastated-indigenous-owners-say-rio-tinto-misled-them-ahead-of-juukan-gorge-blast>.

⁹ “Suicide Rates for Females and Males by Race and Ethnicity: United States, 1999 and 2017” by Sally C. Curtin and Holly Hedegaard, Centers for Disease Control and Prevention (2019), available at https://www.cdc.gov/nchs/data/hestat/suicide/rates_1999_2017.htm.

¹⁰ “Never Until Now: Indigenous and Racialized Women's Experiences Working in Yukon & Northern British Columbia Mine Camps,” CCSG Associates, Liard Aboriginal Women's Society, Yukon Status of Women Council (2021), available at <http://www.liardaboriginalwomen.ca/index.php/never-until-now-laws-mining-report/file>.

¹¹ “Alcohol & Substance Abuse,” National Congress for American Indians, available at <https://www.ncai.org/policy-issues/education-health-human-services/alcohol-substance-abuse>.

¹² “Rethinking Protections for Indigenous Sacred Sites” by Stephanie Hall Barclay & Michalyn Steele, Harvard Law Review (2021), available at <https://harvardlawreview.org/wp-content/uploads/2021/02/134-Harv.-L.-Rev.-1294.pdf#page=46>.

¹³ “Pueblo of Zuni Letter to President Biden July 1, 2021” by Governor Val R. Panteah, Sr. (2021), available at <https://bsnorrell.blogspot.com/2021/07/pueblo-of-zuni-letter-to-president.html>.

their own lands and ways of life. CEQ and NEPA implementing agencies must take a hard look at these intersections as part of their indirect and cumulative impacts analysis.

CEQ's 1978 NEPA Rules Required Indirect and Cumulative Review of Mining Impacts

Many years of precedents support CEQ's proposal to restore NEPA review of mining's indirect and cumulative impacts.¹⁴ Indirect impacts or effects "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable¹⁵."

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

- 1) Transport offsite and processing of ore are "prime examples of indirect effects" under NEPA¹⁶.
- 2) A proposed mine¹⁷ or mill¹⁸ 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 mine¹⁹.

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....*²⁰" (emphasis added)

Cumulative Impacts/Effects from Mining include:

- 1) Other proposed mining in the region, NEPA requires a "quantifiable assessment of their combined environmental impacts²¹."
- 2) Environmental impacts from nearby "past, present, and future" mining.²²
- 3) A quantitative assessment of air emissions from nearby oil, gas, and mining operations. The Environmental Impact Statement (EIS) may not rely on state air permitting actions for NEPA cumulative review²³.

¹⁴ 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.

¹⁵ 40 C.F.R. §1508.8(b)m.

¹⁶ 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).

¹⁷ Sierra Club v. U.S. Dept. of Energy, 255 F.Supp.2d 1177, 1185 (D.Colo. 2002).

¹⁸ Colorado Environmental Coalition v. Office of Legacy Management, 819 F.Supp.2d 1193, 1212 (D. Colo. 2011).

¹⁹ Center for Biological Diversity v. United States Fish and Wildlife Service, Feb. 20, 2020 AZ District.

²⁰ 40 C.F.R. § 1508.7.

²¹ Great Basin Mine Watch v. Hankins, 456 F.3d 955, 971-974 (9th Cir. 2006).

²² Te-Moak Tribe of Western Shoshone v. Dept. of Interior, 608 F.3d 592, 603 (9th Cir. 2010).

²³ Great Basin Resource Watch v. BLM, 844 F.3d 1095, 1104 (9th Cir. 2016).

These decisions demonstrate substantial understanding by courts, project proponents, and the public that NEPA 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 standard²⁴. 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 and ample public participation. NEPA gives communities on the frontlines of extraction access to their governments and opportunities for better environmental justice outcomes. These communities have a lived experience that belongs within NEPA's reviews. They are often Indigenous, or from rural areas with poor access to broadband infrastructure, some rely on seasonal subsistence, or face other challenges.

For these vulnerable communities, CEQ must rescind the 2020 rules, reinstate the 1978 rules, and incorporate their traditional knowledge and lived experiences. As CEQ considers the second round of rulemaking, we look forward to further improving NEPA's rule to better serve mining-impacted communities. Thank you for your consideration.

Sincerely,

Black Hills Clean Water Alliance
Center for Biological Diversity
Earthjustice
Earthworks
Friends of the Kalmiopsis
Gila Resources Information Project
Idaho Conservation League
Information Network for Responsible Mining

²⁴ See generally, the Federal Land Policy Management Act (FLPMA) regulations at 43 CFR 3809 and the Organic Act regulations at 36 CFR 228.

League of Conservation Voters
Lynn Canal Conservation
Malach Consulting
Mining Impact Coalition of Wisconsin
Montana Environmental Information Center
Multicultural Alliance for a Safe Environment
Northern Alaska Environmental Center
Patagonia Area Resource Alliance
Rivers Without Borders
Royal Gorge Preservation Project
Save Our Sky Blue Waters
Save the South Fork Salmon
WaterLegacy