Public Lands for the People
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Re: Comments to Proposed NEPA rulemaking

Public Lands for the People (PLP) is an advocate of responsible mining and prospecting upon federally managed lands. PLP is dedicated to preserving the rights of the public to the access and use of public land. We hereby submit our comments on the proposed National Environmental Policy Act (NEPA) rule making so that the interests of the United States mining community are better represented.

PLP has noted that in the last 30 years NEPA regulatory obstacles are one of the five main reasons mining and prospecting activities have been disappearing on the public lands of the United States. The other 4 obstacles are: road closures through agency travel management plans, inconsistent applications of section 402 of the Clean Water Act, the Mine Safety & Health Administration (MSHA) not exempting owner operators with no employees and duplicative permitting at the State level that has become prohibitive.

The United States has now become over 95% dependent on foreign sources of mined materials for our domestic and national security needs. This needs to end now.

Small miners and prospectors are often looked upon as unnecessary if they cannot comply with all the regulatory requirements of large corporate miners. As history has dictated, most prospects have not become producing mines because the regulatory environment was not predictably certain or reasonably obtainable. Case in point, a huge deposit of rare earth minerals is rediscovered in Southern California by small miners. Because it is within California, one of the most mining hostile States in the nation, its future development may be in jeopardy. https://www.theepochtimes.com/major-uranium-rare-earth-deposit-rediscovered-in-california_3234923.html
Present misapplications of NEPA upon activities carried out under the U.S. mining laws and their attendant delays are not acceptable nor compatible with the 1970 U.S. Minerals Policy Act (30 USCA § 21(a)).

Activities conducted under the U.S. Mining law are not "Agency Actions" within the meaning of NEPA and the ESA

The new proposed clarifying NEPA regulations should specifically state at a minimum that: "**Action with respect to any mining Notice of Intent (NOI) shall not be a 'major federal action' within the meaning of 42 U.S.C. § 4332 or 'agency action' within the meaning of 16 U.S.C. § 1536(a)(2).**" Please see PLP's education package section 103. https://www.publiclandsforthepeople.org/take-action/wp-content/uploads/2019/11/Critical-Minerals-Breaking-China's-Grip-on-American-Mining-and-Production-Through-The-NDAA-20191105-Inyokern-address.pdf

In 2012, in Karuk v. Forest Service (681 F.3d 1006), the 9th Circuit en banc devastated the small mining community by ruling a NOI inaction on the part of the agency is still an action within the meaning of NEPA and the ESA, subjecting the miner to full environmental review even if the operation is "de minimis," throwing out a 40-year precedent that provided a modicum of reasonable regulation. Dissenting Justice Smith explains why Congress or a new administration must act to reign in the 9th Circuit: *Until today, it was well-established that a regulatory agency's "inaction" is not "action" that triggers the Endangered Species Act's (ESA) arduous inter-agency consultation process. W. Watersheds Project v. Matejko, 468 F.3d 1099, 1108 (9th Cir. 2006). Yet the majority now flouts this crystal-clear and common-sense precedent, and for the first time holds that an agency's decision not to act forces it into a bureaucratic morass. In my view, decisions such as this one, and some other environmental cases recently handed down by our court, undermine the rule of law, and make poor Gulliver's situation seem fortunate when compared to the plight of those entangled in the ligatures of new rules created out of thin air by such decisions. No legislature or regulatory agency would enact sweeping rules that create such economic chaos, shutter entire industries, and cause thousands of people to lose their jobs. That is because the legislative and executive branches are directly accountable to the people through elections, and its members know they would be removed swiftly from office were they to enact such rules. In contrast, in order to preserve the vitally important principle of judicial independence, we are not politically accountable. However, because of our lack of public accountability, our job is constitutionally confined to interpreting laws, not creating them out of whole cloth. Unfortunately, I believe the record is clear that our court has strayed with lamentable frequency from its constitutionally limited role (as illustrated supra) when it comes to construing environmental law. When we do so, I fear that we undermine public support for the independence of the judiciary, and cause many to despair of the promise of the rule of law.*

Most mining operations upon public lands take place pursuant to the General Mining Law and the Surface Resources Act, which confers a statutory right upon miners (right of self-initiation) to enter certain public lands for the purpose of mining and prospecting. This distinction is significant, as it differentiates mining operations from "licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid," which are permissive in nature. Within the limits prescribed by the Constitution, Congress undoubtedly has the power to regulate all conduct capable of harming protected species. However, Congress chose to apply section 7(a)(2) to federal relationships with private entities only when the federal agency acts to authorize, fund, or carry out the relevant activity. Sierra Club v. Babbitt, 65 F.3d 1502, 1508 (9th Cir.1995).

Protection of endangered species would not be enhanced by a rule which would require a federal agency to perform the burdensome procedural tasks mandated by section 7 (of the ESA) simply because it advised or consulted with a private party. Such a rule would be a disincentive for the agency to give such advice or consultation. Moreover, private parties who wanted advice on how to consider the ESA would be loath to contact the federal surface management agency for fear of triggering burdensome bureaucratic procedures. As a result, desirable communication between private entities and federal agencies on

how to deal with the ESA would be stifled, and protection of threatened and endangered species would suffer.

NOIs are not "permits" that are "authorized" by the Forest Service or the Dept. of Interior, Bureau of Land Management. Mining operations were authorized by statute (30 USCA § 22) rather than merely permissive, and the agencies have no discretionary control over the NOI process. Endangered Species Act of 1973, § 7(a)(2), 16 U.S.C.A. § 1536(a)(2); 50 C.F.R. § § 402.02, 402.03. The U.S. Supreme Court in 2007 clarified the meaning of "discretionary agency action" in Home Builders v. Defenders of Wildlife 127 S.Ct. 2518 at 2534 where they stated:
Agency discretion presumes that an agency can exercise "judgment" in connection with a particular action. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415-416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971); see also Random House Dictionary of the English Language 411 (unabridged ed.1967) ("discretion" defined as "the power or right to decide or act according to one's own judgment; freedom of judgment or choice"). Not every action authorized, funded, or carried out by a federal agency is a product of that agency's exercise of discretion.

Courts within the 9th Circuit such as Baker v. USDA, 928 F.Supp.1513 (1996) have stated that the timeframes of the Forest Service's 36 CFR § 228.5 regulations (of 90 days) must yield to the longer statutory timeframes of NEPA before mining operations could proceed. The court deferred to the Forest Service in assuming NEPA's application but did not entertain numerous delay tactics on the part of the Forest Service.

For the reasons stated above, PLP requests updating NEPA regulations considering ESA consequences to truly clarify and define federal actions authorized, funded, or carried out by a federal agency. Private actions authorized by the federal mining statute should be held as a distinctly separate regulation (not a federal agency authorization action regulation) while reestablishing the simpler regulatory process as envisioned in the early 1970's, almost half a century ago.

Due consideration must be given to the "right of self-initiation" if investment backed expectations and domestic mining are going to be revived for our nation's future raw materials needs and national security.

Respectfully submitted,

Ron Kliewer,
President
Public Lands for the People
www.publiclandsforthepeople.org