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Mr. Horst Greczmiel  
Associate Director for NEPA Oversight  
Council on Environmental Quality  
722 Jackson Place  
Washington, DC 20503

Dear Mr. Greczmiel:

The National Mining Association (NMA) welcomes the opportunity to present its views on the Council of Environmental Quality's (CEQ) draft guidance on "Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act" (NEPA). 76 Fed. Reg. 77492. (Dec. 13, 2011). NMA applauds the CEQ's efforts to encourage federal agencies to improve the NEPA process.

NMA is the national trade association representing the producers of most of America's coal, metals, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and engineering, transportation, financial and other businesses that serve the mining industry. Since many NMA members conduct coal and mineral operations which require federal decisions or authorizations, they have extensive experience with the NEPA process, especially the protracted delays and escalating costs associated with NEPA compliance.

An inefficient NEPA process contributes to the lengthy and unpredictable permitting process that discourages the capital investments required for mineral exploration and mine development. This is not a new problem. As the National Academy of Sciences (NAS) found over a decade ago:

Th[e] process has become much slower and more costly than was originally intended or than it needs to be. It commonly imposes data collection and analysis requirements on the applicant and the regulatory agency that are poorly coordinated, excessively expensive, and of uneven

value in protecting the environment. Mining operators are entitled to a permitting process that is as timely and cost effective as possible while still achieving compliance with all statutes and regulations.

NAS, *Hardrock Mining on Federal Lands*, p. 54 (1999). Specifically, the NAS indicated the “most serious matter [in obtaining approvals of mining operations] is the excessive time required to complete a NEPA review.” NAS Report at 86.

Behre Dolbear, the international consulting firm that advises mining companies globally, has identified permitting delays in the United States are the most significant risk to mining projects as the US’ long permitting processes places domestic mining investments at a competitive disadvantage. Behre Dolbear, *Where Not to Invest* (2010). More recently, the Department of Energy identified the 7-10 year period to obtain permits in the United States—as compared to the average 1-2 years in Australia—as one of the principal barriers to new mining ventures in the U.S. USDOE, *Critical Materials Strategy* p. 104-05 (Dec. 2010). The impacts of these delays can be significant, not just for the mining industry but for US economic and national security. Permitting delays have contributed to the US’ growing import reliance on minerals necessary for manufacturing technology and innovation. In 2010, imports accounted for more half of the metals and minerals used by US manufacturers, with the US 100 percent import reliant for 18 of the 43 minerals commodities consumed here. Delays and inefficiencies in permitting also result in lost federal, state and local revenues, fewer jobs, and other lost opportunities.

Clearly, change is needed to make the permit process for mining projects, including the NEPA component, more efficient and timely. The draft guidance does not suggest new approaches for making the reviews more efficient but rather highlights existing tools that are underutilized by federal agencies. No doubt the NEPA process could be much improved through better agency implementation of such tools but CEQ must be prepared to take more aggressive steps, including revisions to its own regulation and recommendations to Congress regarding legislative amendments to NEPA in order to achieve its goal of a more efficient and timely NEPA process.

Attempts to make the NEPA process more timely and efficient are not new. CEQ itself has engaged in numerous efforts and reviews since NEPA was enacted. Congress has held a variety of hearings and even convened a task force to look at NEPA reforms. Furthermore, federal agencies have undergone review efforts, and amended regulations in the hopes of achieving improvements. The fact remains, however, that the NEPA process appears to only be getting more cumbersome. As the NAS noted, for mining projects, “NEPA comment and review requirements under the Council on Environmental Quality’s regulations could in theory allow a project to proceed from notice of intent to prepare an EIS to a record of decision in approximately six months, the committee found that large-scale mines on federal lands require between 18 months and 8 years to

complete both the EIS review and all the permitting and other approvals by state and federal agencies with jurisdiction over the mining operations.” NAS Report at p. 54.

The mining industry is not unique in experiencing a lengthy NEPA process. As recently noted by the American Association of State Highway and Transportation Officials (AASHTO):

Environmental reviews for transportation projects take far too long. The Federal Highway Administration estimated the average time required to complete environmental impact statements (EIS) between 1999 and 2010 as ranging between 63 and 83 months; approximately 5 to 7 years.

Testimony of the Honorable Debra L. Miller, Secretary of Kansas Department of Transportation, on behalf of AASHTO, at the Feb. 2011 Highways and Transit Subcommittee of the House Transportation and Infrastructure Committee hearing on “Accelerating the Project Delivery Process: Eliminating Bureaucratic Red Tape and Making Every Dollar Count.”

### **The Functional Equivalence Doctrine Provides the Best Opportunity to Improve Efficiencies**

NMA believes the best opportunity to improve efficiencies is to eliminate duplication among environmental analyses that are conducted for a project. This view goes beyond the recommendation in the draft CEQ guidance to integrate draft EIS with other related environmental analyses or to allow any environmental document that complies with NEPA to be combined with any other agency document to reduce duplication and paperwork. As explained below and in greater detail in the attached document, functional equivalence is concept that CEQ should recognize and endorse. To the extent that adoption of the functional equivalence doctrine requires legislative amendments to NEPA, CEQ should make the appropriate recommendations to Congress.

When NEPA was enacted in 1969, the United States had very few laws in place to protect the environment. NEPA’s goal was to ensure that information on the environmental impacts of any Federal, or federally funded, action is available to public officials and citizens before decisions are made and before actions are taken. Since NEPA’s enactment, numerous environmental laws have been enacted that prescribe substantive goals, standards and procedures to prevent or minimize adverse impacts to environmental resources, including the Clean Air Act (CAA), Clean Water Act (CWA), the Safe Drinking Water Act (SDWA) and the National Historic Preservation Act (NHPA) and the Endangered Species Act (ESA). These statutes apply to all industries, including mining. Other laws, such as the Federal Land Management and Policy Act (FLPMA), the Surface Mining Control and Reclamation Act (SMCRA), and the Forest

Service Organic Act, have produced comprehensive environmental programs requiring planning, analysis and performance for mining operations in order to protect a wide range of environmental resources. These laws and their corresponding regulations require a thorough analysis of the possible environmental effects of proposed projects and appropriate mitigation measures.

Building on the draft guidance's recommendations regarding reviews and documents under other applicable laws, CEQ should fully recognize the comprehensive environmental analyses required by the body of law that post-dates NEPA. Today, NEPA duplicates and distracts from many of the specific statutes that provide for plans and analyses of environmental effects for projects that require permits or authorizations. NEPA was intended to require that federal agencies take a "hard look" at the environmental consequences before taking major actions. These other specific statutes and their permitting requirements now supply the hard look and allow development only when it meets established environmental standards.

NMA therefore recommends that CEQ adopt the functional equivalence doctrine. The federal courts developed the "functional equivalence doctrine" to exempt federal agencies from conducting separate NEPA analyses when other "substantive and procedural standards ensure full and adequate consideration of environmental issues." The functional equivalence standard is met when: (1) the substantive standard of the enabling legislation emphasizes the protection of the environment; (2) the procedural standards of the enabling legislation provide for full and thorough consideration of the environmental issues involved in the agency's action, including opportunity for agency and public comment; and (3) the agency's responsibilities are judicially reviewable. Under the functional equivalence doctrine, as long as an agency's environmental assessment satisfies the primary goals of NEPA, duplicative NEPA regulatory hurdles can be avoided.

Federal permits required for mining operations under laws administered by the Bureau of Land Management (BLM), the Office of Surface Mining (OSM), the United States Forest Service (USFS), and other agencies cover the same environmental concerns as the NEPA review, leading to duplicative environmental analyses. The regulatory programs established under FLPMA, SMCRA, and the Forest Service's Organic Act all provide environmental performance and reclamation standards that minimize and mitigate environmental impacts from mining operations. The breadth of environmental standards embedded in these permitting schemes assures that the responsible federal agencies consider the environmental impacts of granting permits for mining operations. Moreover, this permitting process is further supplemented by additional permit requirements under the major environmental laws, including the Clean Air Act, Clean Water Act and Safe Drinking Water Act. Indeed, these permitting processes for mining operations include the integration of these resource specific environmental laws into the mine planning and operations. Altogether, these laws and regulations provide a rigorous framework for supplying even a "harder look" than NEPA, both substantively

and procedurally, at the potential environmental effects of federal decisions to grant permits or authorizations for mining projects. They also provide an opportunity for public participation and judicial review.

### **Need for Concise NEPA Documents**

The draft CEQ guidance highlights the need to agencies to prepare concise NEPA documents that focus on significant issues and then discusses such issues in proportion to their significance. The federal agencies often stray from the existing CEQ recommendations to stay within a 150 page limit for a normal EIS and 300 pages for a complex EIS. There seems to be so much focus on the NEPA process and endless analyses of any conceivable impacts and alternatives that federal agencies often forget that at the end of the day a decision is required.

The drift away from concise NEPA documents may be due to the agencies' attempts to "bullet proof" the environmental analyses in the mistaken belief that exhaustive analyses will prevent litigation. In this era, no level of thoroughness will avert litigation in the face of a determined plaintiff. For example, the over-1000 page **supplemental** EIS prepared in conjunction with the Marigold Mine Millennium Project in Nevada did not deter a challenge to the EIS. Furthermore, this NEPA "analysis paralysis" has obscured NEPA's original purpose. As noted in the draft guidance and in CEQ's regulations, "NEPA's purpose is not to generate paperwork – even excellent paperwork – but to foster excellent action." 76 Fed. Reg. 77494.

### **Time Limits for NEPA Reviews**

As CEQ correctly notes in the draft guidance, existing regulations encourage agencies to set time limits to promote the efficiency of the NEPA process. Yet, these provisions are rarely utilized. NMA endorses the establishment of mandatory time limits. Thus, CEQ should revise its regulations to require mandatory time limits. Mandatory time limits would eliminate the "paralysis by analysis" currently inhibiting the NEPA review process. NMA does not believe that incorporating such time limits forecloses public participation and/or consideration of certain issues. Many environmental statutes provide deadlines for final agency decisions without undermining public participation or precluding a full airing of the underlying environmental issues.

Furthermore, time limits for participation by cooperating or coordinating agencies should be established and enforced. Encouraging, rather than requiring, such agencies to participate in a timely manner has been insufficient to prevent delays caused by lack of deadlines for governmental entities to respond to an invitation to participate. CEQ should establish mandatory deadlines for responding to the invitation. If these deadlines are not met, the lead agency should be authorized to proceed with the NEPA

process using the best available information. Otherwise, as the NAS found significant delays can arise due to introduction of new issues by agencies that failed to participate in early consultation. NAS Report at p. 112. The U.S. Environmental Protection Agency (EPA) was frequently singled out as an agency that often creates such problems because of its unwillingness to participate early in the NEPA process. EPA and other agencies should also have firm timelines to comment on draft EISs.

### **Early Planning Promotes Efficiencies**

The draft CEQ guidance properly emphasizes the need for integrating NEPA into planning at the earliest possible time. Early planning should include initiation of early consultation with other federal agencies, tribes, states, local agencies and interested stakeholders as well as allow for identification of opportunities to coordinate NEPA reviews with other environmental reviews and related studies. As identified by the NAS, “The lack of early, consistent cooperation and participation by all the federal, state, and local agencies involved in the NEPA process results in excessive costs, delays, and inefficiencies in the permitting of mining on federal lands.” NAS Report at p. 111.

### **Federal Agencies Frequently Fail to Use Adoption/ Incorporation by Reference**

As the draft guidance points out, agencies have a significant opportunity to avoid duplication and promote a more timely NEPA process by adopting, in whole or part, another agency’s EIS or incorporating material by reference. It is not clear why agencies avoid use of these methods. NMA strongly supports using existing analyses to avoid duplication of effort, to control costs and to reduce delays. NMA recommends, however, that CEQ further clarify that reliance on existing analyses includes use of the underlying existing data, not just the analyses on which that data is based. The CEQ regulations should clearly indicate that existing data does not need to be supplemented by new data if there is no indication that the factual situation has changed since the prior data was collected.

### **Conclusion**

A lengthy and unpredictable permitting process discourages the capital investments required for mineral exploration and mine development – destroying US job opportunities and contributing to our increased reliance on foreign supplies of minerals to supply US manufacturing and technology companies. CEQ should do more than recommend increased use of existing tools to improve the NEPA process. Specifically, CEQ should revise its regulations to adopt the functional equivalence doctrine and mandate firm time limits for NEPA documents and participation by other federal agencies.