

Sequoia ForestKeeper
P.O. Box 2134
Kernville, CA 93238
760.376.4434

www.sequoiaforestkeeper.org

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Alfred Watson, District Ranger
Tim Kelly, Archeologist tkelly@fs.fed.us
Kern River Ranger District (760) 376-3781, extension 616
P.O. Box 9, 105 Whitney Road
Kernville, CA 93238

RE: La Paloma #1 and #2 Mining Plan of Operations Scoping Comment

Dear Mr. Kelly:

Thank you for providing the opportunity to comment on La Paloma #1 and #2 Mining Plan of Operations.

<http://www.fs.usda.gov/projects/sequoia/landmanagement/projects>

Located on the Kern plateau, the area is accessed from Sirretta Meadow Road (Road No. 22S21) and West Road (Road No. 22S24) off the Sherman Pass Road (Road No. 22S05).

The Proposed Action

Regarding the La Paloma #1 and #2 Mining Plan of Operations: file code 1950/2800.
This project is on the Kern Plateau near Rattlesnake Creek off of a closed road 22S24.
They will be mining for barite ore.

Purpose and Need

The Purpose and Need for this project is to assure public health and safety while allowing for mineral extraction from the existing La Paloma #1 and #2 barite mine. Barite is a very dense, non-metallic mineral used for drilling slurry, medical products, and other various purposes.

Procedural Concern

The scoping letter for the Paloma #1 and #2 Mining Plan of Operations says that: “the decision for this project is expected to be made by June of 2014.” On 5 and 7 May, 2014, because no EA was provided to the public for review, we asked how can the decision be in June 2014 when the comment period is still open for scoping and the decision will be for a permit that will last for five years not a short term mineral exploration lasting less than one year? On 7 May 2014, the Forest Service provided the following information regarding the meaning of the above quote from the scoping letter:

In response to your questions below, we have the following information:

1. The analysis for this project has begun, and staff is currently working on drafting an EA.
2. The June 2014 completion date is an optimistic estimate. If there are substantive comments or objections this timeframe would be extended. In this case, the decision date would be modified to address any comments or objections, as appropriate.

The notice in the Porterville Recorder did not appear until May 6, 2014.

Several Substantive Concerns to Consider

Water Requirements and Impacts

Non-source water trucked in – from where is the water coming? What effect will this water diversion have on area springs, watersheds, or other water sources? Will this water be injected or just used for surface dust control? This area is in the Rattlesnake and Bonita Creek drainages which flow directly to the North Fork of the Kern River.

Trucking Requirements and Impacts

Will vehicles be required to prevent invasive species introductions by cleaning vehicles prior to forest entry? How heavy will the ore trucks be? How many trucks would be required on what schedule to satisfy the project?

Road Use Impacts

Is the road that will be used currently suffering any trespass or has native vegetation grown up and will new tracks create an attractive nuisance? Are the roads that would be used of sufficient quality to support the weight of the trucks?

The Mines

Are they currently sealed to prevent human entry? Will they be resealed or guarded during the project to prevent accidental entry?

Wildlife Impacts

Are there bats in the cave? What species? Has any mitigation been proposed? There are Spotted Owls and fisher in the area, are there any light or noise restrictions? A full review of all potentially affected wildlife species is required.

Soil and Water Pollution Impacts

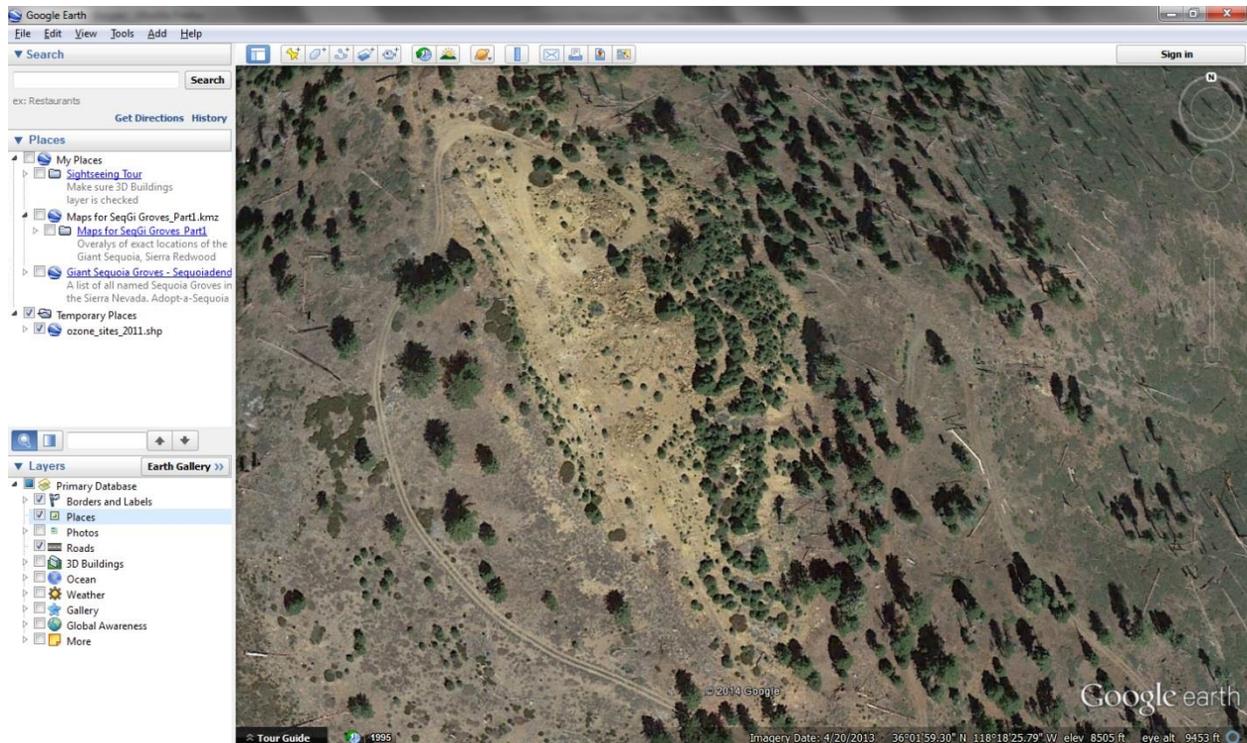
While the solubility of the Barite is low, over time could the material cause contaminated soil and cause the soil to become more acidic? Will the water used for mining become a pollution source for ephemeral streams, springs, meadows, or aquifers?

Tailings Impacts

Will there be tailing piles left in the vicinity?

Visual Characteristics

Will the permit contain a requirement placed on the permittee for the land to be re-contoured and brought back to natural conditions following implementation of the plan of operations?



Here is a Google Earth screen shot of the area: seems like recontouring has not been done and tailing piles appear there.

Rare Plant Impacts

According to the *California Natural Diversity Database* and observations, there are several rare plants in the immediate area around the mine that should be avoided.

Astragalus lentiginosus var. *kernensis*

Astragalus subvestitus

Boechera evadens

Boechera tularensis

Calyptridium pygmaeum

Corylanthus eremicus ssp. *kernensis*

Erigeron multiceps

Horkelia tularensis

Monardella linoides ssp. *oblonga*

Phacelia novemmillensis

Sidalcea multifida

Trifolium dedeckerae

At a minimum, the applicant should be required to do a full botanical survey of the project site, the area impacted by the travel route, and the immediate surroundings. Will this be required?

Climate Change Impacts

According to Wikipedia, 77% of Barite (BaSO₄) mined is used in oil exploration as a drilling mud weighting agent. The mining of this non-metallic mineral therefore is implicated as having a role in carbon induced climate change which the forest service must address.

Because this mine would be increasing the use of petrochemicals not only directly through the use of trucks and powered equipment that require petrochemicals and the production of greenhouse gasses (GHG's) but also indirectly through the production of hydrocarbons from oil and gas wells where the Barite will be used, which would exacerbate climate change and produce air pollution that is harmful to humans and the environment, which the forest service must address. <http://nca2014.globalchange.gov/>

Air Pollution Impacts on Forest Species

Trees and other plants in increasing elevation are negatively impacted by mobile and stationary source pollution from motor vehicles, housing development, roads, agriculture, mining, and other industries. Sequoia National Forest (SQF) and Sequoia-Kings Canyon National Parks (SEKI) are the most polluted parks and forests in the federal system. This pollution is directly attributed to activities in and around the San Joaquin Valley. The ecosystem is suffering debility and the economic base is suffering as the number of visitors is reduced. The visitors who hike the trails in SQF, the Giant Sequoia National Monument, and SEKI are harmed by prolonged exposure to ozone but plants suffer even more. River canyons funnel the pre-cursors to ozone from mobile sources. Tropospheric mixing of VOCs and NO_x creates acids which acidify forests and nitrify waterways. NO_x and PM assists the transport of pesticides which are carried high into the forests causing impacts to plants and animals (specifically amphibians and the now endangered yellow-legged frogs).

1. Mobile emissions are defined as "the NO_x and PM₁₀ emissions generated by motorized vehicles.
2. Ozone (O₃) is formed by chemical reactions between volatile organic compounds (VOCs) and oxides of nitrogen in the presence of sunlight and, often, elevated temperatures. The primary human sources of VOCs and nitrogen oxides are industrial and automobile emissions. Ozone can be transported hundreds of miles to remote areas of the country.
3. Fossil fuel burning emits air pollution in the form of sulfur dioxide (SO₂) and nitrogen oxides (NO_x). Oxidation occurs chemically altering the gasses. Wet (precipitation) deposition forms when NO_x and SO₂ are converted to nitric acid (HNO₃) and sulfuric acid (H₂SO₄). While sulfur dioxide is not as much of a problem in the west, oil production contributes some.

4. Ozone is one of the most toxic air pollutants to plants. It causes considerable damage to vegetation throughout the world. Plants are generally more sensitive to ozone than humans. The effects of ozone on native plants in natural ecosystems range from visible injury to the leaves and needles of deciduous trees and conifers to premature leaf loss, reduced photosynthesis, and reduced growth in sensitive plant species.
5. Other factors, such as soil moisture, presence of other air pollutants, insects or diseases, genetics, or topographical locations can lessen or magnify the extent of ozone injury. For example, higher elevations typically see higher ozone exposure levels leaving high elevation vegetation more at risk.
<http://webcam.srs.fs.fed.us/pollutants/ozone/index.shtml>
6. Visible foliar ozone injury to sensitive pine species occurs at Sierra Nevada sites that have average daily 1-hour maximum concentrations in the 80 to 100-ppbv range. This information is crucial for the setting of secondary air quality standards by environmental regulatory agencies and policymakers.
7. Ozone concentrations in severely impacted urban areas have declined over the past 20 years, but have remained flat or have been increasing at historically rural and remote sites. Policymakers and planners need to explicitly address this issue as the population expands into rural areas.
http://cfpub.epa.gov/ncer_abstracts/index.cfm/fuseaction/display.abstractDetail/abstract/5979/report/F
8. The consensus of the research community is that ozone damage occurs primarily to the cells within the stomata as a result of respiration of polluted air. Therefore, the stomatal conductance regulates the rate of ingestion of ozone... A comprehensive set of respiration and stomatal conductance measurements in Jeffery and Ponderosa pines is available to allow development of a stomatal conductance estimator for converting exposure to dosages.
http://cfpub.epa.gov/ncer_abstracts/index.cfm/fuseaction/display.abstractDetail/abstract/1840/report/0

An assessment of air quality in the southern Sierra Nevada: Ricardo Cisneros, Andrzej Bytnerowicz and Trent Procter; US Forest Service Sequoia-Kings Canyon National Park most affected Park in the nation by air pollution. Phytotoxic effects to pines and other plant species are expected in the San Joaquin River drainage and locations near the drainage at O₃ levels reported in this study. Phytotoxic effects to plants by HNO₃ (Nitric Acid) and NH₃ (Ammonia) at concentrations. HNO₃ (Nitric Acid) Predisposes plants to environmental stresses by changing wax chemistry and injuring leaf cuticle such as:

- Drought
- Air Pollution
- Other pathogens

Online PowerPoint Presentations

Distribution of ambient ozone and nitrogenous air pollutants in Sierra Nevada and Owens Valley - <http://www.wmrs.edu/projects/cerec/pdfs/BytnerowiczCEREC.pdf>

Air pollution effects on California mountain forests -

http://www.fs.fed.us/psw/topics/climate_change/publications/climate_wrksp/Bytnerowicz.pdf

An assessment of air quality in the southern Sierra Nevada -

<http://www.fs.fed.us/psw/southernsierrascience/speakers/pdf/cisneros.pdf>

Online Federally Funded Projects

Regional Transport of Air Pollutants and Exposure of Sierra Nevada Forests to Ozone -

http://cfpub.epa.gov/ncer_abstracts/index.cfm/fuseaction/display.abstractDetail/abstract/5979/report/0

Evaluation of Ozone and HNO₃ Vapor Distribution and Ozone Effects on Conifer Forests in the Lake Tahoe Basin and Eastern Sierra Nevada - <http://www.arb.ca.gov/research/apr/past/01-334.pdf>

Additional NEPA Issues That Must Be Fully Reviewed and Considered in the EA

The EA must fully analyze all issues associated with water quality and quantity. The EA must analyze where the water for the project would come from, that the proponent has a water right for the water, and that impacts from the removal of water are fully considered. The record also indicates the possibility of encountering groundwater from the drilling (up to 500 feet deep). Drilling core holes has the potential to alter the physical and chemical composition of surface and ground water through the mixing of waters from different sources. The Forest Service must consider the impact that drilling and drilling fluids will have on water quality, including the requisite baseline analysis. In Idaho Conservation League v. U.S. Forest Service, 2012 WL 3758161, *17 (D. Idaho 2012), the court concluded that the USFS violated NEPA by authorizing exploratory hardrock mineral drilling without adequately analyzing the baseline groundwater and hydrology. The court explained that the USFS cannot rely on assumptions or mitigation measures, such as a closed drilling system, to satisfy NEPA's obligations. Id. Instead, the EA must include "a baseline hydrogeologic study to examine the existing density and extent of bedrock fractures, the hydraulic conductivity of the local geologic formations, and [measures of] the local groundwater levels to estimate groundwater flow directions." Id. at *16. The court in Shoshone-Bannock Tribes of Fort Hall Reservation v. U.S. Dept. of Interior, 2011 WL 1743656, at *10 (D. Idaho 2011), reached a similar conclusion. There, the impact of a new mine waste dump was "highly uncertain" because BLM permitted it without studying groundwater "flows and potential contamination." Id.

The EA must "describe the environment of the areas to be affected or created by the alternatives under consideration." 40 C.F.R. § 1502.15. "Without establishing the baseline conditions . . . there is simply no way to determine what effect the [action] will have on the environment, and consequently, no way to comply with NEPA." Half Moon Bay Fisherman's Mktg. Ass'n v. Carlucci, 857 F.2d 505, 510 (9th Cir. 1988). The lack of an adequate baseline analysis fatally flaws an agency's NEPA review. "[O]nce a project begins, the pre-project environment becomes

a thing of the past and evaluation of the project's effect becomes simply impossible.” Northern Plains Resource Council v. Surf. Transp. Brd., 668 F.3d 1067, 1083 (9th Cir. 2011). “[W]ithout [baseline] data, an agency cannot carefully consider information about significant environment impacts. Thus, the agency fail[s] to consider an important aspect of the problem, resulting in an arbitrary and capricious decision.” Id. at 1085.

Thus, in addition to ground and surface waters, the EA must contain a complete baseline analysis for all potentially affected resources such as air quality, wildlife, recreation, Native American cultural/religious issues (including the consultation requirements of the NHPA), scenic/visual, transportation, etc.

The agency must require full-cost bonding/financial assurance (part of its 36 CFR Part 228 responsibilities), which should be subject to public review as part of the NEPA process.

The EA must fully review all direct, indirect, and cumulative impacts to all potentially affected resources, including but not limited to: air and water quality and quantity, wildlife, recreation, Native American cultural/religious issues (including the consultation requirements of the NHPA), scenic/visual, transportation, etc. NEPA requires that BLM fully consider all “direct,” “indirect,” and “cumulative” environmental impacts of the proposed action. 40 CFR §§ 1502.16; 1508.8; 1508.25(c). Direct effects are caused by the action and occur at the same time and place as the proposed project. 40 CFR § 1508.8(a). Indirect effects are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. 40 CFR § 1508.8(b). Impacts that must be analyzed include “effects on natural resources and on the components, structures, and functioning of affected ecosystems,” as well as “aesthetic, historic, cultural, economic, social or health [effects].” Id. Cumulative impacts 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 regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 CFR § 1508.7. As the Ninth Circuit held in rejecting an EA for a mining project:

In a cumulative impact analysis, an agency must take a “hard look” at all actions. ... An EA’s analysis of cumulative impacts must give a sufficiently detailed catalogue of past, present, and future projects, and provide adequate analysis about how these projects, and differences between the projects, are thought to have impacted the environment. General statements about “possible effects” and “some risk” do not constitute a “hard look” absent justification regarding why definitive information could not be provided.” ... Without such information, neither the courts nor the public ... can be assured that the [agency] provided the hard look that it is required to provide.

Te-Moak Tribe v. U.S. Dep’t of Interior, 608 F.3d 592, 603 (9th Cir. 2010) (EA failed to include detailed analysis of impacts from nearby proposed activities). “[A]dequate consideration of cumulative effects requires that EAs address them fully.” Id. (emphasis in original).

A valid cumulative effects analysis must include an analysis of the “incremental impact[s] of the [proposed] action when added to other past, present, and reasonably foreseeable future actions” on National Forest lands and nearby or adjacent lands. 40 C.F.R. § 1508.7. This analysis should address combined or synergistic effects in addition to isolated effects. See Klamath-Siskiyou Wildlands Ctr. v. BLM, 387 F.3d 989, 994 (9th Cir. 2004) (“[T]he total impact from a set of actions may be greater than the sum of the parts [T]he addition of a small amount here, a small amount there, and still more at another point could add up to something with a much greater impact”); Great Basin Mine Watch v. Hankins, 456 F.3d 955, 971-974 (9th Cir. 2006) (requiring “mine-specific ... cumulative data,” a “quantified assessment of their [other projects] combined environmental impacts,” and “objective quantification of the impacts” from other existing and proposed mining operations in the region).

[A] merely perfunctory cumulative impacts analysis is insufficient. Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt., 387 F.3d 989, 994 (9th Cir.2004). An analysis falls short if it only considers the impacts of the proposed action or only the beneficial impacts of cumulative actions. See Te-Moak Tribe of W. Shoshone v. U.S. Dep't. of the Interior, 608 F.3d 592, 603-04 (9th Cir.2010); Klamath-Siskiyou Wildlands Ctr., 387 F.3d at 994-96; Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 811 (9th Cir.1999) (per curiam). “General 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, 1380 (9th Cir.1998); see also Muckleshoot Indian Tribe, 177 F.3d at 811 (rejecting cumulative impacts analysis sections that “merely provide very broad and general statements devoid of specific, reasoned conclusions”). In particular, “some quantified or detailed information is required. Without such information, neither the courts nor the public, in reviewing the Forest Service's decisions, can be assured that the Forest Service provided the hard look that it is required to provide.” Neighbors of Cuddy Mountain, 137 F.3d at 1379; see also Klamath-Siskiyou Wildlands Ctr., 387 F.3d at 994 (cumulative impacts analysis inadequate where “there is no quantified assessment of [the] combined environmental impacts”); Muckleshoot Indian Tribe, 177 F.3d at 810 (requiring detailed analysis of cumulative impacts).

League of Wilderness Defenders v. U.S. Forest Service, 883 F.Supp.2d 979, 1008-09 (D. Oregon 2012).

Although the scoping letter mentions that the ore will be processed off-site, no information is given. The EA must fully analyze all issues associated with the transportation of the ore, as well as the processing (e.g. impacts from ore transportation on air quality, traffic, recreation, etc.). Under the USFS’s mining regulations, 36 CFR Part 228, implementing the Organic Act and other laws, the USFS cannot approve an unreasonable PoO, or a PoO that does not satisfy all submittal requirements (including the requirement that the Project complies with all federal and state laws, regulations, and policies).

The agency proposes to authorize a mining operation without knowing where, or how, the ore will be processed. Thus, the Forest Service is proposing to approve a mine that has no current plan to mill or process the ore. It is the agency’s duty to make sure that the PoO is complete, reasonable, and can be accomplished, which includes the mandate to require and analyze a

plan to mill/process the ore. Deferring the requirement to the company to submit a complete mine plan, and deferring any analysis of the connected actions and/or cumulative impacts from the smelter/mill, not only violates NEPA, it contradicts the USFS' own regulations and policies. See "*Anatomy of a Mine, From Prospect to Production*," USDA Forest Service, General Technical Report INT-GTR-35, Revised February 1995, at 64-65 (detailing how smelting/processing of ore is an integral part of a complete mining plan).

http://www.fs.fed.us/geology/anatomy_mine.pdf

It is well established that the Forest Service must reject an unreasonable PoO, especially one without a definite plan to transport and process the ore. "[T]he Forest Service clearly has the power to reject an unreasonable plan, and to impose conditions on the mining activity." Baker v. United States Department of Agriculture, 928 F. Supp. 1513, 1518 (D. Idaho 1996). "The Forest Service may reject an unreasonable Mine Plan of Operation." FEIS at G-39. The "reasonableness" of the PoO and the duty of the agency to protect surface resources are expressly linked together. According to the agency's mining regulations, upon receipt of a plan of operations: "[t]he authorized officer shall ... analyze the proposal, considering the economics of the operation along with the other factors in determining the reasonableness of the requirements for surface resource protection." 36 CFR § 228.5. It is impossible for the agency to adequately process the PoO, and to adequately involve the public in that review, when the absolutely critical processing plan is missing.

Even if the company has included processing in its PoO (which does not appear to be the case), the fact that a potential mill would be located somewhere off-site does not eliminate the applicant's duty to submit a complete mine plan, nor the agency's duty to ensure that it, and the public, have a complete plan to review in the EA (and scoping beforehand).

Here, there is no evidence that this mine can be reasonably operated, as there is no plan to mill and process the ore. Without such a plan, the ore is essentially of no value. The Forest Service would be violating its duties under the Organic Act and Part 228 regulations if it approved a plan without sufficient evidence that it was economic and therefore reasonable. At a minimum, the agency should not approve the PoO until it is satisfied that the Project is economically and environmentally reasonable – which requires that the PoO contain a plan to process the ore.

The current PoO (and scoping) are not "reasonable" because they are clearly incomplete. The applicant has not submitted a detailed mining plan of operation as required by 36 CFR § 228.4(c)(3) & (d), § 228.8, and § 228.12 and as defined by § 228.3(a). Among these requirements is the mandate that the PoO must include:

Information sufficient to describe or identify the type of operations proposed and how they would be conducted, the period during which the proposed activity will take place, and the measures to be taken to meet the requirements for environmental protection in § 228.8.

36 CFR § 228.4(c)(3). “The plan of operations shall cover the requirements set forth in paragraph (c) of this section, as foreseen for the entire operation for the full estimated period of activity.” 228.4(d).

“Operations” is defined to include “[a]ll functions, work, and activities in connection with prospecting, exploration, development, mining or **processing of mineral resources.**” 228.3 (a). A mining plan of “operations” is thus incomplete and unreasonable when it does not contain all necessary “operations” as defined by the agency itself.

The agency has the authority, and indeed the obligation, to delay or deny consideration of the PoO until it has received all relevant information about necessary aspects of the mine plan, including the processing.

The [agency] may require information beyond that submitted with an initial MPO [Mining Plan of Operations]. “[I]nsofar as [the agency] has determined that it lacks adequate information on *any* relevant aspect of a plan of operations, [the agency] not only has the authority to require the filing of supplemental information, *it has the obligation to do so.*” Great Basin Mine Watch, 146 I.B.L.A. 248, 256 (1998).

Center for Biological Diversity v. U.S. Dept. of Interior, 623 F.3d 633, 644 (9th Cir. 2010) (emphasis added).

Unsupported assertions from the company that it will mill the ore somewhere at some future time are clearly inadequate under NEPA, the Organic Act, and Part 228 regulations. “Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. 40 C.F.R. § 1500.1(b). General 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.” Western Watersheds Project v. Kraayenbrink, 632 F.3d 472, 491 (9th Cir. 2011).

The failure to properly analyze all of the impacts from the transportation and processing of the ore violates NEPA. Cumulative impacts must be reviewed “regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” 40 CFR § 1508.7.

The Ninth Circuit has recently and specifically rejected the argument that a NEPA review for a mining operation did not have to fully review the impacts from off-site ore processing and transportation. In 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), the Ninth Circuit required the agency to evaluate the environmental impacts of transporting and processing the ore at a facility 70 miles away. The court noted that “[t]he air quality impacts associated with transport and off-site processing of the

five million tons of refractory ore are prime examples of indirect effects that NEPA requires be considered.” Id.

In another recent decision considering a challenge to federal approval of mineral leasing and mining, the court required an agency to look at the impacts from the proposed mill that would process ore from mines/leases, despite the fact that the proposed mill would be on private lands and despite the fact that the mill was not directly associated with the mines/leases being proposed and was not included in the lease/mining proposals. The court held:

[The agency’s] other two arguments—that the effects of the mill need not be evaluated because (1) it is being built by a company on private land, and (2) approval of the mill is controlled by other governmental entities—lack merit. Regardless of whether an EA or EIS is being prepared, the agency conducting the analysis must consider the “cumulative impacts” of the proposed action. . . .

Nothing in this regulation suggests that “cumulative impacts” are limited to those occurring on [public] land, or that [the agency] need not consider the impacts from related activities that another federal agency is in charge of approving or disapproving.

Colorado Environmental Coalition v. Office of Legacy Management, 819 F.Supp.2d 1193, 1212 (D. Colo. 2011). *See also* Sierra Club v. U.S. Dept. of Energy, 255 F.Supp.2d 1177, 1185 (D.Colo. 2002) (agency must review impacts from “reasonably foreseeable” mine on private land when preparing NEPA document for federal land easement related to the future mine. “The fact that a private company will undertake the mining is irrelevant under NEPA regulations. *See* [40 C.F.R. § 1508.7](#) (‘regardless of what agency or person undertakes such other actions’)).

Due to causal connection between the Project (and the USFS’s approval) and the processing of the ore, the EA must fully review these activities as connected actions under NEPA (as well as review the direct, indirect, and cumulative impacts). Impacts must be analyzed when there is “‘a reasonably close causal relationship’ between the environmental effect and the alleged cause.” Department of Transportation v. Public Citizen, 541 U.S. 752, 767 (2004). In Border Power Plan Working Group v. Department of Energy, 260 F.Supp.2d 997 (S.D. Calif. 2003) the court found that the agency was required to consider the trans-boundary impacts of certain power turbines in Mexico in their EIS on a U.S. transmission line because the projects were “two links in the same chain.” Border Power Plant Working Group v. Dep’t of Energy, 260 F. Supp. 2d 997, 1016 (S.D. Cal. 2003) (“effects must be causally linked to the proposed federal action in order for NEPA to require consideration of those effects in an EA or EIS.”).

Agencies must analyze all indirect and cumulative adverse environmental effects that are “reasonably foreseeable” if it is sufficiently likely to occur. These impacts include the off-site adverse effects from the smelting/processing and transportation. “The Forest Service says that cumulative impacts from non-Federal actions need not be analyzed because the Federal

government cannot control them. That interpretation is inconsistent with 40 C.F.R. § 1508.7, which specifically requires such analysis.” Center for Biological Diversity v. National Highway Traffic Safety Administration, 508 F.3d 508, 517 (9th Cir. 2007)(agency must review of impact of greenhouse gases when setting vehicle fuel economy standards), *quoting* Res. Ltd., Inc. v. Robertson, 35 F.3d 1300, 1306 (9th Cir.1994). “[S]tatements that the indirect and cumulative effects will be minimal or that such effects are inevitable are insufficient under NEPA.” Ctr. for Biological Diversity v. U.S. Dept. of Interior, 623 F.3d 633, 640 (9th Cir. 2010). In one leading case, the agency was required to review the impacts from the burning of coal when reviewing the proposed railway access and transportation of the coal. Mid States Coalition for Progress v. Surface Transportation Board, 345 F.3d 520, 548-550 (8th Cir. 2003). This was required even though the power plants using the coal were hundreds of miles away.

Duty to Minimize All Adverse Impacts

In addition, the agency cannot approve the PoO without ensuring that all adverse environmental impacts have been minimized. The Organic Act authorizes the Forest Service to promulgate regulations for the national forests “to regulate their occupancy and use and to preserve the forests thereon from destruction.” 16 U.S.C. § 551. The Organic Act “specifies that persons entering the national forests for the purpose of exploiting mineral resources must comply with the rules and regulations covering such national forests.” Clouser v. Espy, 42 F.3d 1522, 1529 (9th Cir. 1994). The Forest Service’s mining regulations are found at 36 C.F.R. Part 228, which states that “all [mining] operations shall be conducted so as, where feasible, to minimize adverse environmental impacts on National Forest resources.” 36 C.F.R. § 228.8. “[T]he Secretary of Agriculture has long had the authority to restrict motorized access to specified areas of national forests, including to mining claims. *See Clouser [v. Espy]*, 42 F.3d 1522, 1530 (9th Cir. 1994).” Public Lands for the People v. U.S. Dept. of Agriculture, 697, F.3d 1192, 1198 (9th Cir. 2012) (upholding denial of access routes to mining claims in travel management plan). The agency must “reject an unreasonable plan and prohibit mining activity until it has evaluated the plan and imposed mitigation measures.” Siskiyou Regional Education Project v. Rose, 87 F. Supp. 2d 1074, 1086 (D. Or. 1999) *citing* Baker v. U.S. Dept. of Agriculture, 928 F.Supp. 1513, 1518 (D. Idaho 1996). “This court does not believe the law supports the Forest Service's concession of authority to miners under the General Mining Act in derogation of environmental laws and regulations.” Hells Canyon, at *6 (finding violation of Organic Act in Forest Service’s failure to minimize adverse impacts to streams). All Forest Plan standards must also be met under the National Forest Management Act. Id.

The 36 CFR Part 228 regulations state that in proposing a mining operation, the applicant must fully describe “measures to be taken to meet the requirements for environmental protection in § 228.8.” 36 CFR § 228.4(c)(3). That has yet to be done in this case.

The 36 CFR Part 228 regulations also require that “[I]n addition to compliance with water quality and solid waste disposal standards required by this section, the operator shall take all practicable measures to maintain and protect fisheries and wildlife habitat which may be affected

by the operations.” 36 CFR § 228.8(e). Thus, the 36 CFR Part 228 regulations impose an affirmative duty on the agency to reject any mining plan that does not fully protect water quality, fisheries, and wildlife habitat. However, a simple and generalized **reduction** of impacts does not equate to the strict requirements for **minimization** of impacts and protection of resources. As one federal court stated, the Forest Service’s duty to minimize impacts is **not** met simply by somewhat reducing those impacts. Trout Unlimited v. U.S. Dep’t. of Agriculture, 320 F.Supp.2d 1090, 1110 (D. Colo. 2004). In interpreting the Federal Land Policy and Management Act (FLPMA)’s similar duty on the agency to “minimize damage to ... fish and wildlife habitat and otherwise protect the environment,” 43 U.S.C. § 1765(a), the court specifically stated the agency’s finding that mitigation measures would “reasonably protect” fisheries and habitat failed to meet its duty to “minimize” impacts. Id. “The operator also has a separate regulatory obligation to ‘take all practicable measures to maintain and protect fisheries and wildlife habitat which may be affected by the operations.’ 36 C.F.R. § 228.8(e).” Rock Creek Alliance v. Forest Service, 703 F.Supp.2d 1152, 1164 (D. Montana 2010) (Forest Service PoO approval violated Organic Act and 228 regulations by failing to protect water quality and fisheries). “Under the Organic Act the Forest Service must minimize adverse environmental impacts where feasible and must require [the project applicant] to take all practicable measures to maintain and protect fisheries and wildlife habitat.” Id. at 1170. In this case, the agency must impose substantial mitigations and controls on the project to truly minimize its impacts.

Please keep us informed about any and all communications and decisions on this project and on all other projects in the Kern River Ranger District.

Respectfully Submitted,



Ara Marderosian
Executive Director,
Sequoia ForestKeeper
ara@sequoiaforestkeeper.org