



STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

January 22, 2019

SUITE 900
445 MINNESOTA STREET
ST. PAUL, MN 55101-2127
TELEPHONE: (651) 297-1075

David Bernhardt
Acting Secretary of the Interior
U.S. Department of the Interior
1849 C Street N.W.
Washington DC 20240

Brian Steed
Deputy Director, Policy and Programs,
Exercising Authority of the Director
U.S. Department of the Interior
Bureau of Land Management
1849 C Street NW, Rm. 5665
Washington, DC 20240

MN Hardrock Lease Renewal EA Project Manager
Northeastern States District Office
626 E. Wisconsin Ave., Ste. 300
Milwaukee, WI 53202

Re: Environmental Assessment Entitled *Addition of Terms and Conditions for Renewal of Hardrock Leases, MNES 001352 and MNES 001353*
NEPA #: DOI-BLM-ES-030-2018-0002-EA

Dear Acting Secretary Bernhardt, Deputy Director Steed and MN Hardrock Lease Renewal EA Project Manager :

I am writing to supplement my letter from last week, dated January 18, 2019, to provide you with the State of Minnesota's position on four issues regarding the above-captioned Environmental Assessment ("EA").

First, I write to expand on Minnesota's previous request that the Bureau of Land Management ("BLM") extend the public review and comment period for the EA. BLM should instate a 60-day public comment period beginning when the federal government fully reopens.

Second, I urge BLM and the United States Forest Service ("USFS") to prepare a detailed and rigorous Environmental Impact Statement ("EIS") that analyzes the potential effects of the renewal of hardrock mineral leases necessary for Twin Metals Minnesota LLC's ("Twin Metals") proposed mining project in the Superior National Forest. The State of Minnesota specifically requests that any such EIS fully analyze the impacts that Twin Metals' proposed copper sulfide-ore mining project will have on the environment, the economy, human health, and Minnesota-specific interests in preserving the integrity of both the Boundary Waters Canoe Area Wilderness ("Boundary Waters") and the Rainy River Watershed.

Third, I request that BLM coordinate with the State of Minnesota pursuant to the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. ch. 35, to ensure consistency between Minnesota's policies, programs and priorities for the Boundary Waters and all environmental review analyses and decisions regarding Twin Metals' mineral lease renewal and associated proposed copper sulfide-ore mining project.

Fourth, and finally, I submit the State of Minnesota's comments on the EA.

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BLM Must Extend Its Public Review And Comment Period For The EA

I request that BLM provide a 60-day public review and comment period for the EA based on the timing of the current comment period and the intervening federal government shutdown.

BLM's current public review and comment period began on December 20, 2018, and ends on January 22, 2019. This time of year is notoriously busy for the public and included three state and federal holidays: Christmas Day, New Year's Day, and Martin Luther King, Jr. Day. It is undisputed that Twin Metals' proposed mining project near the Boundary Waters is controversial, to say the least. Given the gravity of this project and the timing of the current environmental review, BLM should strive to maximize public input on the EA.

The day after BLM released its EA for public review and comment, the federal government experienced a partial shutdown, which remains ongoing. As a result, the majority of the staff at USFS, BLM, and the U.S. Department of the Interior were furloughed, thus depriving Minnesotans, Native Americans, and the general public from discussing the EA with federal workers. It is inequitable to expect complete and fulsome public review and comment where interested persons are prevented from obtaining assistance in submitting comments on the EA.

For these reasons, I ask that BLM offer a pragmatic solution: extending the comment period on the EA to 60 days, starting from the first day the federal government fully reopens.

BLM And USFS Should Prepare A Fulsome EIS

Given that the EA explicitly finds that Twin Metals' proposed copper sulfide-ore mining project "may become economically feasible," BLM acknowledges that its EA purports to include Twin Metals' "mining plan of operation . . . within [its] cumulative effects analysis." EA at 22. Despite that acknowledgment, however, BLM merely pays lip service to any potential effects related to such reasonably foreseeable mining activities, curtailing its analysis to the following general statement:

Negative environmental effects to resource areas relevant to this analysis include forest and vegetation removal, loss of wildlife habitat, potential impacts to water quality, additional air emissions, loss of recreational ability within the project footprint, and additional noise to the project area and its surroundings.

Id.

The National Environmental Policy Act ("NEPA") mandates an EIS for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Nine out of the ten considerations promulgated by the Council on Environmental

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Quality to assist in the BLM's "significance" determination strongly support preparing an EIS to analyze the potential effects of the renewal of Twin Metals' mineral leases and accompanying mining project. *See generally* 40 C.F.R. § 1508.27(b)(2)-(10); *see also* January 21, 2019 Comment Letter of Northeastern Minnesotans for Wilderness, The Wilderness Society, Center for Biological Diversity, National Parks Conservation Association, Sportsmen for the Boundary Waters, Voyageurs National Park Association, and Earthjustice, Part II.D. (hereinafter "1/21/19 NGO Comment Letter").

Accordingly, the State of Minnesota requests that BLM and USFS jointly prepare a detailed and rigorous EIS for the renewal of Twin Metals' mineral leases that fully analyzes the impacts that Twin Metals' proposed copper sulfide-ore mining project will have on the environment, the economy, human health, and Minnesota-specific interests in preserving the integrity of both the Boundary Waters and the Rainy River Watershed. *See generally* 1/21/19 NGO Comment Letter at Parts II.E. and V.

The preparation of an EIS is likewise supported by consistent past statements by all three branches of government. For example, in December 2016, Thomas L. Tidwell, then-Chief of USFS, denied consent to renew these same leases and concluded that the "inherent potential risk" of mining near the Boundary Waters was "unacceptable" and "might cause serious and irreplaceable harm to this unique, iconic, and irreplaceable wilderness area." USFS Decision Letter to BLM (Dec. 14, 2016) (hereinafter "12/14/16 USFS Decision"). In addition, in 2018, Congress explicitly requested an assessment of the risks of sulfide-ore mining in the Rainy River Watershed by completing "a thorough [EIS] . . . considering the economic, environmental, public health, and other related issues raised during the scoping process." Language from H.Rep. 115-238, accompanying the Consolidated Appropriations Act, 2018 (P.L. 115-141). Finally, the United States Supreme Court has long required that the federal government take a "hard look" at—and not merely gloss over—the environmental consequences of proposed actions, including their direct, indirect, and cumulative effects. *See, e.g., Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348–50 (1989); *see also* 40 C.F.R. § 1508.8.

In the intervening two years since the 12/14/16 USFS Decision, emerging scientific evidence suggests that renewal of Twin Metals' mineral lease and associated mining project would result in significant ecological harm to the Rainy River Watershed and significant economic harm to Northern Minnesota's recreation-based economy. *See generally* 1/21/19 NGO Comment Letter at Part V. Accordingly, the State of Minnesota likewise requests an EIS that fully analyzes how the renewal of Twin Metals' mineral leases and associated mining project would affect Minnesota's sovereign and regulatory interests, including, without limitation, the following general categories:

- **Minnesota's Outstanding Resource Value Waters.** All waters in the Boundary Waters are bestowed with this classification, which is intended to impart the highest level of anti-

degradation protection under Minn. R. 7050.0335, subp. 3, promulgated pursuant to the Clean Water Act and its federal rules. *See* 33 U.S.C. § 1313; 40 C.F.R. § 131.12;

- **Minnesota-Owned Land and Lakebeds.** All school trust and other state-owned lands within the Boundary Waters or such state-owned lands with hydrological connection to the Boundary Waters;
- **Minnesota's Waters of the State.** Regulatory oversight by state agencies over the use of, and pollution to, those waters pursuant to the definitions provided by Minn. Stat. §§ 103G.005, subd. 17, 115.01, subd. 22;
- **Minnesota's Mineral Management Corridor.** Prohibiting or severely restricting mining in a buffer area around the Boundary Waters. *See generally* Minn. Stat. § 84.523; Minn. R. 6132.2000;
- **Burntside State Forest.** Almost 80% of this forest is located in the Boundary Waters, it contains Minnesota's only State Wilderness Area. *See* Minn. Stat. § 84.523, subd. 6;
- **Minnesota's Fish & Wildlife.** Fisheries (including walleye, lake trout, bass, northern pike, whitefish, and other popular sport fish) and all wildlife (especially loons, otter, osprey, and bald eagles) are subject to regulatory oversight by state agencies;
- **Minnesota's Fishing License Revenue.** Almost half of the operating budget of the Minnesota Department of Natural Resources' Fisheries Section is generated from the sale of fishing licenses;
- **Minnesota's Constitutional Right To Fish and Hunt.** The Minnesota Constitution's right to fish and hunt "shall be forever preserved for the people and shall be managed by law and regulation for the public good." Minn. Const. art. XIII, § 12;
- **Minnesota's Noise Pollution Control Regulations.** The Minnesota Pollution Control Agency and all local law enforcement agencies are empowered to enforce noise pollution regulations found in Minn. R. ch. 7030; and
- **Minnesota's Wetland Conservation Act.** The Minnesota Department of Natural Resources' Natural Heritage Program must deny wetland replacement plans associated with proposed activities that will permanently adversely affect the natural community. Minn. R. 8420.0515, subp. 3.

The State Of Minnesota's Request To Coordinate With BLM Pursuant To FLMPA

As you are aware, FLPMA requires BLM to "coordinate [its] . . . management activities . . . with the land use planning and management programs . . . of the States and local governments within which the lands are located . . . and of or for Indian tribes . . ." 43 U.S.C. § 1712(c)(9). This coordination mandate includes, among other things, both the requirement to resolve "inconsistencies between Federal [land use decisions] and non-Federal Government plans" and the requirement to "provide meaningful public involvement of State and local government officials, both elected and appointed . . ." *Id.* FLPMA imposes a similar consistency requirement on BLM to "provide for compliance with applicable pollution control laws,

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including State and Federal air, water, noise, or other pollution standards or implementation plans.” *Id.* at § 1712(c)(8).

Accordingly, the State of Minnesota requests that BLM coordinate with state, local, and tribal government officials throughout the environmental review process related to Twin Metals’ mineral lease renewal and associated mining project. During this coordination, I urge BLM to ensure its environmental analyses and decisions are consistent with the State of Minnesota’s policies, programs and priorities, including those detailed above. Furthermore, to the extent BLM reaches any conclusions or decisions that are inconsistent with the State of Minnesota’s policies, programs and priorities, I request that BLM provide sufficient explanation for such findings.

The State Of Minnesota’s Comments On BLM’s EA

Minnesota submits the following comments on BLM’s EA, which it reserves the right to supplement in the event BLM extends the public review and comment period or otherwise ceases the EA process to prepare an EIS. In addition to the following comments, the State of Minnesota also incorporates by reference all comments raised in the 1/21/19 NGO Comment Letter and the reasoning contained within the 12/14/16 USFS Decision, and all materials discussed or referred to therein (including bibliographies).

In addition to all the reasons articulated above, BLM’s EA is deficient and not in compliance with NEPA in light of the following:

- **Insufficient Alternatives And Baseline Analysis.** The EA fails to articulate an adequate “No-Action Alternative” a prerequisite to forming the baseline necessary to achieve NEPA-compliant environmental review. BLM’s EA defines its currently proposed No-Action Alternative as lease renewal subject to the same terms and conditions as BLM’s 2004 lease renewal. EA at 9. BLM’s assumption that lease renewal is mandatory (which is disputed both in pending litigation and through public comments on the EA) does not permit BLM to avoid discussion of a no-renewal alternative. As a practical matter, without a no-renewal alternative baseline for comparison, BLM cannot adequately analyze the impacts of lease renewal in compliance with NEPA. *See, e.g.*, BLM NEPA Handbook at § 8.3.2 (noting that the “purpose and need statement frames the range of alternatives” and defines “the focus of the NEPA analysis” in the EA context); *League of Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 689 F.3d 1060, 1069 (9th Cir. 2012) (“Because they determine the range of reasonable alternatives, an agency cannot define the purpose and need of a project in unreasonably narrow terms”); *see also* 1/21/19 NGO Comment Letter at 14-16.
- **Failure To Take A Hard Look At Reasonably Foreseeable Direct, Indirect, And Cumulative Impacts To Water Resources, Cultural Resources, Noise, Recreation, Vegetation, Soils, Air Quality, And Wildlife.** NEPA mandates that BLM take a “hard

look” at the environmental consequences of lease renewals, including the direct, indirect, and cumulative effects, such as Twin Metals’ proposed mining project. *Robertson*, 490 U.S. at 348–50; 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1502.16, 1508.7, 1508.8. BLM’s “hard look” must consider effects that are “ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative.” 40 C.F.R. § 1508.8. BLM’s analysis of impacts to the aforementioned categories is incomplete and inadequate for myriad reasons. One glaring example of BLM’s failure to conduct sufficient environmental review is the lack of any meaningful scientific information justifying BLM’s impacts analysis. Instead, BLM either cites to past documents that do not contain impacts analysis related to either the Twin Metals’ lease renewal or associated mining project, or relies on hypothetical future actions that would mitigate any such potential impacts. As a result, with regard to most resource impacts, BLM’s EA concludes that there would be no measurable difference in potential impacts between the Proposed Action and the No-Action Alternative. *See generally* EA at ch. 3. BLM’s EA almost entirely fails to take a hard look at the impacts associated with Twin Metals’ lease renewal, which have never been subject to NEPA analysis. *See also* 1/21/19 NGO Comment Letter at 34-44.

- **Improper Exclusion of Reasonably Foreseeable Direct, Indirect, And Cumulative Impacts To The Economy, Public Health, Wilderness Values, Voyageurs National Park And Quetico Provincial Park, And Climate Change.** BLM has completely failed to satisfy its “hard look” obligation by entirely omitting from the EA any direct, indirect, and cumulative effects related to the foregoing impacts. One particularly egregious omission by BLM with regard to these categories of impacts concerns its economic impacts analysis. While acknowledging that the Boundary Waters’ watershed “contains pristine surface water and groundwater [that] . . . support the fisheries, wildlife, and scenic qualities that attract visitors to the [Boundary Waters] and create a vibrant tourist economic sector,” the EA concludes, without authority, that “the scope of the Proposed Action does not affect economics.” EA at 8, 13. Nevertheless, BLM’s EA later explicitly finds that Twin Metals’ proposed copper sulfide-ore mining project “may become economically feasible,” and therefore BLM acknowledges that its EA purports to include Twin Metals’ “mining plan of operation . . . within [its] cumulative effects analysis.” EA at 22. The extent of BLM’s economic analysis, however, is cabined to citations to two economic studies from 2007 and 2012 in the bibliography without discussion in the EA’s impacts analysis. EA at 31. As noted in the 1/21/19 NGO Comment Letter, “[a] 2018 independent study by Harvard economist James Stock analyzed the longer-term dynamic economic effects of a 20-year mining ban in the Boundary Waters watershed and concluded that protecting the Boundary Waters from a Twin Metals mine would result in dramatically more jobs and income over a 20-year period.” 1/21/19 NGO Comment Letter at 44. Much like its failure to analyze impacts to the economy, BLM’s EA likewise fails to analyze the other enumerated impacts categories, and is therefore deficient. *See id.* at 44-53.

- **Inadequate Stipulations And Mitigation Measures.** The U.S. Supreme Court has noted that “[i]mplicit in NEPA’s demand that an agency prepare a detailed statement on ‘any adverse environmental effects which cannot be avoided should the proposal be implemented,’ is an understanding that the EIS will discuss the extent to which such adverse effects can be avoided.” *Robertson*, 490 U.S. at 351-52 (quoting 42 U.S.C. § 4332(2)(C)(ii)). Accordingly, an environmental assessment “must . . . identify and analyze mitigation measures, if any, which may be taken to avoid or reduce potentially significant effects,” and “must describe and analyze the anticipated effectiveness of mitigation measures and any direct, indirect, and cumulative effects that remain after the application of all mitigation measures—that is, residual effects.” BLM NEPA Handbook, § 8.3.6. BLM’s EA and associated stipulations provide little assurance that they would provide meaningful, enforceable, or effective prevention or mitigation of significant adverse impacts. As a result, the EA fails to satisfy NEPA’s requirements. *See also* 1/21/19 NGO Comment Letter at 54-56.
- **Inconsistency With Other Legal Obligations.** As noted above, BLM’s EA is inconsistent with a variety of other federal environmental laws and policies in violation of FLPMA’s coordination and consistency/compliance requirements. *See* 43 U.S.C. § 1712(c)(8)-(9). For example, the 12/14/16 USFS Decision unequivocally asserts that renewal of Twin Metals’ mineral leases is incompatible with USFS’s obligations to maintain the quality and character of the Boundary Waters (and its associated Mining Protection Area) for present and future generations, as required by the Wilderness Act of 1964 and the Boundary Waters Canoe Area Wilderness Act of 1978. The EA also fails to address the 12/14/16 USFS Decision’s contention that renewing the mineral leases would be inconsistent with the Weeks Act (and Section 402 of the associated Reorganization Plan No. 3 of 1946), as it would be contrary to the purposes for which the land was acquired and also not in the best interests of the United States. Other examples of the EA’s inconsistencies or noncompliance with federal environmental laws and policies include the Clean Water Act, the Clean Air Act, the 1909 Boundary Waters Treaty between the United States and Canada, the Endangered Species Act, and the National Historic Preservation Act. *See also* 1/21/19 NGO Comment Letter at 65-90.
- **Impermissible Bias Or Predetermination.** Courts have consistently held that NEPA’s dual goals to facilitate informed decision-making and to ensure public transparency are undermined in violation of NEPA where an agency “predetermines” the outcome of the analysis by “irreversibly and irretrievably commit[ting] itself to a plan of action” before completing the necessary analysis. *See* 40 C.F.R. § 1500.1; *Robertson*, 490 U.S. at 349; *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 714 (10th Cir. 2010). As discussed above, BLM’s EA impermissibly prejudged or predetermined the outcome by committing BLM to renewal of Twin Metals’ leases despite ongoing litigation challenging the U.S. Department of the Interior’s (“DOI”) 2017 legal opinion withdrawing and replacing DOI’s 2016 legal opinion that found the lease renewal decision was discretionary. Indeed, BLM’s EA is largely, if not wholly, premised on the

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predetermined notion that the 2017 DOI legal opinion is sacrosanct. *See also* 1/21/19 NGO Comment Letter at 56-57.

- **Failure To Analyze Emerging Scientific Evidence.** As discussed above, in the intervening two years since the 12/14/16 USFS Decision, many peer-reviewed scientific reports support the finding that sulfide-ore copper mining has the potential to irreparably harm the aquatic and terrestrial ecosystems, public uses, and social values of the Boundary Waters and its associated watershed, in addition to irreparably harming the economy in the Arrowhead Region of Minnesota and beyond. BLM's EA, however, neglects to discuss any of these scientific sources in its direct, indirect, and cumulative effects impacts analysis. *See generally* 1/21/19 NGO Comment Letter at Part V.
- **Inconsistency With 2004 Superior National Forest Plan.** As BLM is aware, the 2004 Superior National Forest Plan (and associated EIS) did not contemplate, analyze, or anticipate sulfide-ore copper mining. Accordingly, that plan must undergo a supplemental EIS prior to amendment to comply with the National Forest Management Act's requirement that "[r]esource plans, permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans." 16 U.S.C. § 1604(i); *see also* 1/21/19 NGO Comment Letter at 63-65.

I look forward to a prompt response to the issues raised in this letter and hope that BLM and USFS decide to forgo the EA process and instead begin the preparation of a detailed and rigorous EIS for the renewal of Twin Metals' mineral leases. Such an EIS should fully analyze the potential impacts of Twin Metals' proposed copper sulfide-ore mining project on the environment, the economy, human health, and should assess Minnesota-specific interests in preserving the integrity of both the Boundary Waters and the Rainy River Watershed.

Sincerely,



KEITH ELLISON
Attorney General

cc: U.S. Congresswoman Betty McCollum
U.S. Congressman Dean Phillips
U.S. Congresswoman Ilhan Omar
Karen Mouritsen, BLM Eastern States Director
Derek Strohl, BLM Northeastern States District Office
Dean Gettinger, BLM Northeastern States District Office
Associate Deputy Secretary James Cason, DOI
Assistant Secretary of Land and Minerals Management Joseph Balash, DOI