Statement of the National Mining Association

The Need for National Environmental Policy Act Reform

Before the
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Committee on Resources
U.S. House of Representatives

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The Need for Reform of the National Environmental Policy Act

The National Mining Association (NMA) welcomes the opportunity to present its views on the reform of the National Environmental Policy Act (NEPA) to the House Resources NEPA taskforce. NMA applauds the taskforce's efforts to gather information and recommendations on improving 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. NMA's testimony today focuses on using existing permitting processes for mining operations to meet the goals of NEPA.

NEPA was enacted in 1969, when the United States had very few laws in place to protect the environment. NEPA's goal was to ensure more awareness about the environment in federal decision making. 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), and the Safe Drinking Water Act (SDWA). 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.

NEPA should be modernized, recognizing the comprehensive environmental analyses required by the body of law that post-dates NEPA. NEPA was intended to be a planning tool for agencies. Now, it 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.

As explained in greater detail in the attached document, NMA recommends that NEPA reform include a legislative recognition of 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.

Accordingly, Congress should not impose a duplicative NEPA process on certain decisions by federal agencies, such as BLM, OSM, and USFS. Congress could do so by mirroring the language in such statutes as the CWA and CAA, which specifically provide that certain EPA actions are not major federal actions within the meaning of NEPA. *See* 33 USC § 1371(c) and 15 U.S.C. § 793(c)(1). Alternatively, Congress could amend NEPA itself to preclude a duplicative NEPA process for federal agencies conducting functionally equivalent environmental reviews under their enabling legislation. As discussed above, when Congress enacted NEPA, the core goal was to force federal agencies to evaluate the environmental impacts of their actions and ensure public participation. Such an action-forcing statute is not necessary, however, when federal agencies complete the functional equivalent under their enabling legislation.

Overall, NEPA is no longer fulfilling its original intent and must be reformed. A legislative recognition of the functional equivalence doctrine is a sound solution for modernizing the NEPA review process. It would result in greater efficiencies in the permitting process by avoiding duplicative and costly environmental reviews. Currently, mining operations face a lengthy and unpredictable permitting process that discourages the capital investments required for mineral exploration and mine development. Application of the functional equivalence doctrine to BLM, OSM, and USFS will focus resources more effectively to ensure the development of our nation's natural resources while still assuring a thorough evaluation of environmental impacts as originally intended under NEPA.