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USDA-Forest Service
Attn: Director MGM Staff
1617 Cole Blvd, Building 17
Lakewood CO 80401

Submitted via www.regulations.gov

RE: Advanced Notice of Proposed Rulemaking, 36 CFR Part 228
FS—2018—0052
83 Federal Register 46451 (September 13, 2018)

Director MGM Staff,

The American Exploration & Mining Association (AEMA) is submitting this letter on behalf of its members in response to the request for comments with respect to the above captioned matter. AEMA is a 123-year old, 2,000-member national association representing the minerals industry with members residing in 42 U.S. states, seven Canadian provinces or territories, and 10 other countries, and are actively involved in exploration and mining operations on United States Forest Service (USFS) administered lands, especially in the West. AEMA is the recognized national voice for exploration, the junior mining sector, and maintaining access to public lands, and represents the entire mining life cycle, from exploration to reclamation and closure. Our broad-based membership includes many small miners and exploration geologists as well as junior and large mining companies, engineering, equipment manufacturing, technical services, and sales of equipment and supplies. More than 80% of our members are small businesses or work for small businesses. Most of our members are individual citizens.

AEMA's members have extensive first-hand experience with the 36 CFR 228A regulations (228A) and are directly and immediately affected by any changes to these regulations. We believe the 228A regulations have stood the test of time and have, for the most part, proven to be flexible, reasonable, and effective in accomplishing their stated purpose, which is to minimize adverse impacts to National Forest resources to the extent practical and feasible and to require reclamation during and upon termination of locatable mineral activities. Many of our members can personally attest to the success which the 228A regulations have had in promoting environmentally responsible mining, minimizing adverse impact to National Forest System resources to the extent practicable and feasible, and requiring effective reclamation. Revisions to these regulations and how they impact our members exploring and operating on National Forest System lands are very important to AEMA.

Unfortunately, the 228A regulations have not been implemented in a consistent manner across National Forest lands. Too many decisions have been left to the discretion of the District Ranger allowing personal agendas to drive decision making. The District Ranger or authorized officer has too much discretion in determining whether a plan of operations is required, when a plan of operations is complete, when to start the National Environmental Policy Act (NEPA) clock and determine the time it takes to process a plan of operations and issue an Environmental Assessment (EA) or Environmental Impact Statement (EIS) and Record of Decision (ROD).

It is not uncommon for adjacent national forests or even districts within a forest to have completely different methods, thresholds and triggers for more advanced and detailed environmental analysis for simple actions authorized under the 228A regulations. In many cases these decisions are clearly arbitrary, and in some cases are capricious, when personal bias by Authorized Officials or their staff takes the place of simple implementation of the regulations. Clarifying the regulations would minimize this problem which is in violation of Section 706(2)(A) of the Administrative Procedures Act.

Locatable mineral activities pursuant to the 1872 Mining Law are non-discretionary pursuant to statutory rights and the District Ranger's or authorized officer's discretion is limited to minimizing adverse environmental impacts to National Forest System surface resources. Many of our members have experienced Authorized Officers using the NEPA process to delay or condition non-discretionary locatable minerals projects. An example is requiring compensatory mitigation to offset reasonable and necessary disturbance pursuant to exercising 1872 Mining Law rights when compensatory mitigation is not required by a substantive environmental law. There is no authority to require compensatory mitigation in the Organic Act, the National Forest Management Act, the Endangered Species Act, or the Clean Air Act. The only statutory authority is in section 404 of the Clean Water Act for mitigating disturbances to wetlands. In some cases, this unauthorized conditioning or delay has resulted in companies losing financing to advance their project.

NEPA is procedural only and provides a process for analyzing locatable minerals projects to ensure compliance with the 1872 Mining Law and applicable environmental laws and regulations. NEPA does not convey any substantive rights and cannot be used to delay, stop or condition a project that complies with all applicable laws and regulations. Furthermore, NEPA regulations, like all regulations, do not supersede statutory law and rights. The 228A regulations should be revised to more accurately reflect a miner's statutory rights, the District Ranger's limited discretion and that NEPA does not convey substantive rights.

Our comments provide numerous suggestions for improving administration of the USFS locatable minerals program. However, we do not believe the USFS needs to go through a comprehensive rulemaking to expedite and improve the efficiency of the permitting process for locatable mineral operations including exploration.

The USFS could, and should, immediately adopt a number of policy and guidance revisions to implement several Executive Orders (E.O.) and streamline the permitting process similar to the guidance and policy revisions recently adopted by the Department of the Interior (DOI). In addition, the USFS should sever the provisions related to notice-level exploration activities from

the ANPR process and submit them to the Office of Management and Budget (OMB) as a separate proposed rule. Both of these actions would appropriately implement the series of E.O.s related to regulatory reform and permit streamlining.

Implementing Relevant Executive Orders

AEMA appreciates the references to E.O.s 13783, 13807 and 13817 in the ANPR and the need for the USFS to provide a more timely and efficient process for approving exploration and mining on National Forest lands in order to achieve the policy objectives of those E.O.s. In addition to these 3 E.O.s, AEMA believes E.O. 13777 is relevant to improving the timing and efficiency of the permitting process.

- E.O. 13777, Enforcing the Regulatory Reform Agenda

  E.O. 13777 instructs federal agencies to evaluate existing regulations and make recommendations regarding their repeal, replacement, or modification. It further directs agencies to focus on regulations that meet key criteria including those that: (a) eliminate jobs or inhibit job creation; (b) are outdated, unnecessary; or ineffective; (c) impose costs that exceed benefits; or (d) create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies. While the ANPR does not reference E.O. 13777, it is important to keep these criteria in mind as you consider revisions to the 228A regulations. On Sept. 15, 2017, AEMA submitted comments in response to the USFS' review of regulations that may be appropriate for repeal, replacement or modification. Those comments are included as Attachment A and contain recommendations related to permit streamlining among others.

- E.O. 13783, Promoting Energy Independence and Economic Growth

  Similarly, E.O. 13783 directs federal agencies to review existing regulations that potentially burden the development or use of domestically produced energy resources and appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law. The ANPR references this E.O., indicating that providing a more efficient process for approving exploration activities for the energy-producing locatable minerals uranium and thorium would reduce regulatory burdens that unnecessarily encumber energy production. A more efficient process for approving exploration activities should apply to all locatable mineral activities.

- E.O. 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects

  The purpose of E.O. 13807 is to ensure that the federal environmental review and permitting process for infrastructure projects is coordinated, predictable, and transparent. Additionally, it directs federal agencies to make timely decisions with the goal of completing all federal environmental reviews and authorization decisions for major

infrastructure projects within 2 years. The ANPR references this E.O., but primarily focuses on its application to activities for the energy-producing locatable minerals uranium and thorium. This is an overly narrow view of the E.O. and ignores the facts that metals and minerals are the building blocks of our nation's infrastructure and the U.S. mining industry is the beginning of the infrastructure supply chain.

- E.O. 13817, A Federal Strategy to Ensure Secure and Reliable Supplies of Critical Minerals

  E.O. 13817 declares that it "shall be the policy of the Federal Government to reduce the Nation's vulnerability to disruptions in the supply of critical minerals, which constitutes a strategic vulnerability for the security and prosperity of the United States." The E.O. specifically acknowledges that permitting delays impact the ability of the U.S. mining industry to provide minerals and metals modern society requires. As such, the E.O. directs the streamlining of and permitting processes to expedite exploration, production and processing of critical minerals. In order to properly implement this E.O., encouraging locatable mineral exploration and production must become a priority for the USFS.

  The ANPR contains several references to the E.O. and discusses provisions designed to meet its obligations. In complying with this E.O., the USFS must not take an overly narrow view of "critical minerals" as there is no single definition for critical minerals or a universally accepted methodology for designating a mineral as critical. DOI immediately recognized the significance of this E.O. and released Secretarial Order 3359 the same week, requiring each bureau head with land management responsibilities to provide within 60 days recommendations for streamlining permitting and review processes related to critical minerals development.

Need for Reform of the Mine Permitting Process

The current permitting process is plagued by uncertainties and delays arising from duplication among federal and state agencies, the absence of firm timelines for completing environmental analyses and failures in coordination of responsibilities among various agencies. In the U.S., necessary government authorizations for major mining projects now take seven to 10 years to secure, resulting in decreased competitiveness and increased reliance on foreign sources of minerals. Permitting delays impact investment attractiveness, especially when other mineral rich nations with similar environmental standards such as Australia and Canada take between two and three years to approve the necessary permits. In 1993, the U.S. attracted 20 percent of the worldwide exploration investment dollars. In 2017, that eroded to just 7 percent while Canada and Australia attracted 14 and 13 percent respectively. The percentage of global exploration spending is a leading indicator of where future development capital will be deployed and high paying jobs created.

Near-term Actions

While the USFS has taken some initial steps to implement the E.O.s, very few actions have been completed and it is lagging far behind its sister agencies. Rather than awaiting the completion of

rulemakings that are only in the ANPR state, the USFS should proactively undertake near-term actions to meet the goals of the EOs.

- **Improvements to Policies and Guidance**

  While the ANPR references the need to expedite reviews of proposed mineral operations, its suggestions for doing so are unnecessarily limited. In addition to the rulemaking process, the USFS can provide efficient, timely and thorough permit reviews though policies that incorporate best practices for coordination among state and federal agencies; clarify responsibilities to avoid duplication and delay; and set binding timeframes. The USFS should evaluate the example set by DOI Secretarial Order (S.O.) 3355 as a possible approach to streamline environmental reviews through policy. S.O. 3355 includes a number of policy reforms to address NEPA delays. These reforms include completion of EISs within one year of issuance of the notice of intent (NOI) to prepare the EIS; use of previous NEPA or other environmental analyses when completing related subsequent analyses, including those conducted by state regulatory bodies; improved coordination with cooperating agencies and consolidation of efforts into One Federal Decision as called for under E.O. 13807; and increased use of categorical exclusions from NEPA where appropriate.

  In addition, implementation of various regulatory practices recommended in the CEQ regulations and guidance documents (CEQ March 2012, for example), and in this letter, could help meet the objectives of the E.O.'s. For example, CEQ regulations and guidance provide for use of processes such as mitigated FONSI's to reduce unnecessary paperwork and analyses and excessive costs and time delays when impacts can be mitigated. It is difficult to utilize these methods when operators are shut out of the process and cannot provide input into the mitigation strategy. This often results in costly, time consuming EIS's when a mitigated FONSI would suffice.

  On Feb. 2, 2018, AEMA submitted comments in response to the USFS' ANPR on NEPA compliance. Those comments are included as Attachment B to this letter and contain recommendations for changes in policies and regulations to streamline the NEPA process, a process that the National Academy of Sciences 1999 "Hardrock Mining on Federal Lands" report (NAS Report) identified as the "most serious matter" related to permitting delays. USFS revisions to its NEPA regulations go hand-in-hand with revisions to the 228A regulations. USFS' goal of expediting review of proposed locatable mineral operations will not be fully realized without revisions to its NEPA policies and regulations.

  Another important step the USFS can take to expedite reviews of locatable minerals projects is to include minerals in the annual review of USFS employees. It is human nature to prioritize the projects upon which one will be measured. If the annual review included mineral projects in an employee's annual review, district rangers, forest supervisors and other USFS employees are more likely work to advance projects through the process, instead of letting them always fall to the bottom of the stack.

- **Better Implementation of existing 228A Regulations**

  In addition to the above recommendations, the USFS can begin to accomplish the objective of a more efficient permitting process by implementing section 228.8(h), which has been in the 228A regulations since 1974:

  > Certification or other approval issued by State agencies or other Federal agencies of compliance with laws and regulations relating to locatable mining operations the authorized officer determines are similar or parallel to requirements of this subpart *will* be accepted as compliance with the applicable requirements of this subpart (Emphasis added).

  The intent of this provision seems clear, which is to reduce redundant regulation and permitting of mining operations by state and federal agencies. To our knowledge, USFS authorized officers have never used this provision as it was intended, and this lack of use is unfortunate. With the USFS's current situation of reduced budgets; fewer personnel with expertise in the regulation of mining; the congressional and administration mandates to be more efficient; and the USFS's own desire to reduce "analysis paralysis" and redundancies in the regulatory processes, AEMA believes now is an excellent time to emphasize this provision and require authorized officers to implement it. The proposed rule should include a statement that whenever a District Ranger receives a Plan of Operations for mining operations, the Ranger's first obligation is to evaluate whether his or her review of the proposed operation would be a duplication of State or other Federal agency efforts to regulate the activity in a similar or parallel way to the 36 CFR 228A regulations.

  If the operation is regulated by another agency, consistent with the 228A regulations, the Ranger would only need to accept the other agency's action as compliance with the 36 CFR 228A regulations. There are many excellent examples where this could be applied, such as the States of California and Oregon regulatory programs for suction dredge operations and the rigorous State regulatory programs for locatable mineral operations in states such as Alaska, Arizona, Colorado, Idaho, Montana, Nevada and Utah.

Expediting exploration disturbing 5 acres or less

AEMA believes the most important revision to the 228A regulations is the adoption a process identical or similar to the Bureau of Land Management's (BLM) Notice Level Operations at 43 CFR 3809.21 and 3809.301, *et seq*. In its 2008 Proposal (73 Fed. Reg. 15694), the USFS proposed adding a "Bonded Notice" provision to the 228A regulations in order to provide a process similar to BLM's Notice Level Operations. AEMA supports the proposal to add a Bonded Notice provision in so far as it relates only to exploration on National Forest System lands that disturb 5 acres or less.

We believe the Bonded Notice provision should be limited to exploration only, similar to the BLM's 3809 notice-level exploration provision, in order to fully comply and be consistent with the recommendations of the National Research Council 1999 Report, Hardrock Mining on Federal Lands (NRC Report).

NRC Report Recommendation 3 states: "Forest Service regulation should allow exploration disturbing less than 5 acres to be approved or denied expeditiously, similar to notice-level exploration activities on BLM lands." (NRC Report at 97). AEMA members have experienced significant delays in obtaining permission to conduct small-scale and initial exploration projects on Forest Service lands. Some of our members have reported that the same exploration project conducted on BLM land under notice-level exploration can take up to 4 years or more to obtain approval on Forest Service lands. This is unconscionable. The ability to conduct exploration in a timely manner is vital to exploration efforts on National Forest System lands.

In discussing Recommendation 3, the NRC Report states:

> Exploration companies informed the Committee that companies typically attempt to limit disturbance to less than 5 acres at a time on BLM lands because of the quick review from BLM for notice-level disturbances. Because such a provision doesn't exist in Forest Service regulations, there is less incentive to limit disturbance on these lands. In fact, because the review time is so lengthy, companies are likely to submit proposals for far larger exploration programs on Forest Service land than on BLM land in order to avoid further delays that would be caused in obtaining additional approvals. (NRC Report at 98)

The NRC Committee further states:

> The objective of this Recommendation is to allow exploration activities to be conducted quickly when minimal degradation is likely to occur. The Committee believes that, with reclamation bonds or other financial assurances in hand for land disturbance (see Recommendation 1) exploration should be able to proceed expeditiously. That is, the current BLM 3809 regulation with a 15-day response time for notice-level exploration activities should be maintained, and the similar procedure should be adopted by the Forest Service. (*Id*.)

Equally important is the Committee's belief that the requirement of financial assurance for exploration activities on less than 5 acres should not result in a federal action that would automatically trigger NEPA.

> The Committee does not intend that the requirement of bonding for exploration activities (Recommendation 1) result in a federal action that would automatically trigger an environmental assessment or an environmental impact statement. BLM does not currently require companies to supply an environmental assessment for notice-level activities. The Committee believes that not requiring environmental assessments for exploration with less than 5 acres of disturbance is appropriate for both BLM and Forest Service lands. (*Id*. at 98)

Also, the Forest Service should provide for an unlimited number of 2-year extensions, similar to the BLM 43 CFR 3809 rule (*see* 43 CFR § 3809.333) on notice-level exploration activities. We also believe the Forest Service should provide a definition of exploration in the 228A regulations. The BLM 43 CFR 3809 regulations define exploration at 43 CFR § 3809.5. We are

aware that there are definitions for exploration in the Forest Service Surface Use Determination handbook and *The Anatomy of a Mine, from Prospect to Production* publication. We recommend the Forest Service clarify the definition of exploration to comport with current industry practices. We recommend strongly that the USFS separate this provision from the rest of the proposed rulemaking and immediately send it to the Office of Management and Budget (OMB) for a determination of "non-significance" and proceed to publish it in the Federal Register as soon as that determination is made. Since the USFS is adopting a regulation similar to what BLM has been using for almost 20 years, it should be able to obtain a "non-significant" determination.

Taking this action is consistent with the NEPA reform and streamlining efforts of the White House discussed above. *See,* E.O. 13817, A Federal Strategy to Ensure Secure and Reliable Supplies of Critical Minerals; E.O. 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects; and E.O. 13783, Promoting Energy Independence and Economic Growth. Furthermore, separating the "Bonded Notice" provision from the ANPR and sending it to OMB is supported by the Council on Environmental Quality (CEQ), the Department of the Interior (DOI) and the Environmental Protection Agency (EPA) efforts to reform and streamline the permitting process.

Comments on the ANPR

As explained below, we recommend strongly that the USFS adopt the recommendations in the 1999 NRC Report. This includes the recommendation to provide for an expedited approval process for small mining operations:

> The Committee recognizes the valuable role that small miners play in the development of the nation's mineral wealth. Because of scale, small mines generally have less potential environmental impact than major mines. The Committee therefore believes that, with adequate bonding for reclamation, small miners should receive expedited schedules and services in permitting. For example, regulators should provide small miners with examples of generic permit applications that clearly explain the miner's responsibilities. The Committee believes that certain types of mineral extraction processes should be treated differently than others in terms of the speed with which Plans of Operations are reviewed and approved. Some should have rapid, check-off-the-boxes approaches to permit applications.… In addition, the land management agencies could assist small miners and mill operators by assigning more personnel to help complete permit applications, educate the operators in the permitting process and develop standardized easy-to-understand forms (Emphasis added, NRC Report at 96-97).

As mentioned above, AEMA believes the 228A regulations have proven to be flexible, reasonable and effective in accomplishing their stated purpose of minimizing adverse impacts to National Forest Service resources to the extent practical and feasible, and to require reclamation during and upon termination of locatable mineral activities. There are, however, some areas in which we believe consistency with BLM's 43 CFR 3809 regulations makes sense. In determining whether or not consistency with BLM's Surface Management Regulations is authorized, one must recognize the difference in statutory authorities. BLM's 3809 regulations

arise from the Federal Land Policy and Management Act of 1976 (FLPMA), whereas the Forest Service regulations arise from its Organic Act of 1897. There are some areas AEMA believes the USFS should amend its 228A regulations to bring consistency with BLM's 43 CFR 3809 regulations.

For example, there should be consistent interpretation of the rights granted by the 1872 Mining Law (30 U.S.C.) §21, *et seq*) and the Surface Resources Act of 1955 (U.S.C. §612). We commend the USFS for recognizing that the 1872Mining Law, the Surface Resources Act of 1955 and the Organic Administration Act of 1897 authorize prospecting, mining or processing operations and uses reasonably incident thereto on all lands open to mineral entry, on or off of mining claims. Also, the USFS may not unreasonably restrict the exercise of these rights. We encourage the Minerals and Geology Management Staff, with the support of USFS leadership, to take all steps necessary to ensure that all USFS line officers, Forest Supervisors and Regional Offices understand the rights established by these statutes.

1. **Classification of Locatable Mineral Operations**

   The USFS classification of casual use, notice and plan of operations is confusing and leaves too much discretion to the District Ranger. AEMA recommends the USFS adopt BLM's classification of casual use, notice level operations and plan of operations. USFS should adopt the similar criteria as BLM for each class of operations.

   With respect to casual use, USFS should provide that casual use includes suction dredges with an 8" opening or less. The NRC Report states:

   > ...small suction dredges used to recover placer gold from sediment and streams generally are allowed under various state laws to be in the streams only during certain times of the year, preventing disturbance of fish at critical stages in their life cycles. The Committee believes that BLM and the Forest Service are appropriately regulating these small suction dredging operations under current regulations as casual use or as causing no significant impact, respectfully. (NRC Report at 95-96)

   AEMA also believes that any excavation performed by hand methods (as opposed to mechanized earth moving equipment), where 10 horsepower or less motors are being used to provide either air or water for the purpose of processing the hand-excavated material should be added to the list of casual use activities.

   As long as the land is open to mineral entry pursuant to the Mining Law, other environmental concerns such as threatened or endangered species, or land status should not be determinative of the classification of proposed locatable mineral operations.

2. **Submitting, Receiving, Reviewing, Analyzing and Approving Plans of Operations**

   AEMA supports the requirement that the project proponent meet with the USFS to discuss the project and what is required before submitting a plan of operations. However,

we are concerned that the requirements for a completeness review may be used to delay the project and delay the start of the NEPA clock. Such a delay would not be consistent with CEQ regulations. The March 2012 CEQ guidance specifically states:

> For example, agencies can commence the process to prepare an EIS during the early stages of development of a proposal, to ensure that the environmental analysis can be completed in time for the agency to consider the final EIS before making a decision on the proposal.

Most importantly, the USFS should amend its regulations to provide that the project proponent is allowed to prepare all NEPA documents for independent USFS review. In addition, in the event a third-party contractor is hired to prepare the NEPA documents, the USFS regulations should be amended to specifically allow communication between the project proponent and the third-party contractor. This will improve the efficiency of the process and ensure the draft NEPA documents contain only alternatives that are technically and economically feasible.

3. **Modifying Approved Plans of Operations**

Although not explicitly stated, we believe that the current 228As do not preclude an operator from submitting a modification to a plan of operation. During the course of mining, certain conditions change and those changed conditions should be addressed in a modification submitted by the operator. In many cases those modifications to a plan are not significant and do not result in a change in the type and level of environmental impacts addressed in the original plan submission and environmental analysis. Explicitly stating in a revision of the regulation that an operator may submit a modification only makes sense.

The regulation revision should also recognize the use of the Supplemental Information Report process for plan modifications that do not significantly change the type and level of activities previously analyzed in either an EA or EIS. We believe that this will reduce the administrative burden of the regulation while continuing to protect the environment.

In addition to the above, AEMA recommends the USFS follow the NRC recommendation and adopt the BLM's process for modifying approved plans of operations.

4. **Noncompliance and Enforcement**

AEMA supports aligning the USFS regulations with BLM's 3809 regulations with respect to noncompliance and enforcement.

5. **Reasonably Incident Use and Occupancy**

30 U.S.C. § 22 and 30 U.S.C. § 612 authorize all uses and occupancies of National Forest System lands open to mineral entry, with or without a claim, that are reasonably incident

to prospecting, mining or processing operations. The USFS cannot deny those rights nor can it regulate those occupancy rights based solely on the length of stay. AEMA recommends the USFS adopt the following definition for mineral activities and uses reasonably incident to prospecting, mining and processing:

> "Mineral activities" means any activity on National Forest Lands on mining claims with or without a discovery, or off of claims, for mineral prospecting, exploration, development, mining, extraction, milling, beneficiation, processing, storage of mined or processed materials or reclamation activities for any locatable mineral and uses reasonably incident thereto, including the construction and use of roads, transmission lines, water wells, pipelines, utility corridors, tunnels, shafts, adits, and other means of access across or under Federal lands for ancillary facilities used in conjunction with mineral activities.

Furthermore, AEMA believes the USFS should adopt BLM's 43 CFR 3715 regulations for use and occupancy of mining claims.

6. **Financial Guarantees**

AEMA supports changing the title of section 228.13 to Financial Guarantees. We also support providing the authorized officer with the authority to review the amount of financial assurance whenever there is a change or modification to the plan of operation, and in any event, at least once every three years. The USFS also should amend this section to specifically provide for funding mechanisms, such as a long-term trust, for post-closure obligations such as long-term water treatment.

We also believe section 228.13 needs further revision to allow the use of state bonding pools such as pools available at the Nevada Division of Minerals or state agencies in other states and utilize Memoranda of Understanding to meet the financial assurance requirements. In addition, the USFS should accept irrevocable letters of credit, certificates of deposit, collateral trusts and insurance. The USFS should accept the same financial assurance instruments the BLM accepts.

The USFS should include specific provisions allowing phased bonding. The regulations should provide that when an operation will be constructed in phases, the operator may estimate the costs and provide financial assurance only for those phases that will be constructed at the time of bond approval. Subsequent cost estimates and bond approvals would be required before subsequent project phases are constructed. The BLM's 3809 regulations clearly allow for phased bonding and the Forest Service should do the same. See 43 CFR 3809.553.

AEMA believes the best way for the USFS to accomplish the above is to adopt BLM's section on financial guarantees or financial assurance set forth in 43 CFR 3809.500, *et seq*.

7. **Operations on Withdrawn or Segregated Lands**

AEMA supports the USFS adopting a provision similar to BLM's 43 CFR 3809.100 with respect to operations on withdrawn or segregated land. AEMA also supports allowing assessment work to be conducted on claims located within withdrawn or segregated portions of National Forest lands before the determination of valid existing rights has been completed. Furthermore, AEMA believes the USFS should specifically allow work necessary to prove a discovery of a valuable mineral deposit on claims with a physical exposure of mineralization.

8. Procedures for Minerals or Materials that May be Salable Mineral Materials Not Locatable Minerals

The USFS and Secretary of Agriculture must recognize that there is no statutory basis for the Secretary of the Interior or the BLM to make a determination with respect whether minerals are locatable or salable on lands managed by the Secretary of Agriculture. That decision rests solely with the Secretary of Agriculture. The Act of July 31, 1947, An Act to Provide for the Disposal of Materials on the Public Lands of the United States, specifies that, "Nothing in this Act shall be construed to apply to lands in any national forest…."

Similarly, the Act of July 23, 1955 (PL-167) states in Section 1:

> The Secretary, under such rules and regulations as he may prescribe, may dispose of mineral materials (including but not limited to common varieties of the following: sand, stone, gravel, pumice, pumicite, cinders, and clay) ….

Who is the Secretary? Section 1 of the Act makes it clear: "As used in this ACT the word "Secretary" means the Secretary of the Interior except that it means the Secretary of Agriculture where the lands involved are administered by him for national forest purposes of title III of the Bankhead-Jones Farm Tenant Act…." The statute does not say as used in this section, subsection, part, etc. It clearly states as used in this ACT.

The statutory language of PL-167 is consistent with that of the 1947 Act in that the Secretary of the Interior is excluded from mineral material/common variety determinations on lands managed by the Secretary of Agriculture. In the case of PL-167 the statutory words are crystal clear regarding the fundamental authorities of the Secretary of Agriculture.

Absent further Congressional statutory action, the Secretary of Agriculture, alone, has the authority for defining and disposal of common varieties mineral materials on national forest system lands. Any changes to the 228A regulations in this regard must recognize this limitation on the Secretary of the Interior.

The purpose of the existing 36 CFR 228 C common variety classification definitions is to add clarity to both USFS personnel and the public on materials that would either be disposed of by sale or by Mining Law disposition, and to reduce the time needed for the common/uncommon determinations. Use of the contest procedure is time-consuming and wasteful for both the operator and government. The regulation also made clear that those materials which were subject to Mining Law abuses in the past are identified as common variety - building stone, landscaping, fireplace/patio stone, etc. In addition, as the above authority makes clear, the DOI Office of Hearings and Appeals has no statutory authority to make those determinations on national forest lands or other lands under the management of the Secretary of Agriculture.

Should the Secretary of Agriculture opt to change how the determination of common/uncommon variety is made, he has the authority to do that. For example, the Secretary could determine that materials used in the chemical, industrial, manufacturing process is an uncommon variety of mineral material, he can do that.

Conclusion

There is great mineral wealth underlying National Forest lands. Producing minerals from these lands is part of the USFS multiple-use mission and needs to be prioritized in order to comply with the various E.O.s discussed above. That message must come from USFS leadership. There is no valid reason why review and approval, where required, of exploration and mining projects take 4 to 10 times longer on USFS managed land than BLM managed land. We recommend strongly that the USFS immediately begin to improve the efficiency and timing of permitting locatable mineral projects by implementing the suggestions in this letter. **Most importantly, the USFS should separate a proposal to expedite exploration disturbing 5-acres or less from this ANPR and send it to OMB for a determination of "non-significance."**

Thank you for the opportunity to comment on this ANPR.

Yours truly,

Laura Skaer

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1400 Independence Ave. SW.
Washington, DC 20250

SUBMITTED VIA: *www.regulations.gov*

Re: Identifying Regulatory Reform Initiatives

Please accept our unique comments on the USDA Identifying Regulatory Reform Initiatives. As an association representing members who participate in the entire life cycle of mining, our comments are focused on the United States Forest Service (USFS) and its regulatory activity.

The USFS plays a critical role in the administration of the Mining Law of 1872. As such, the guaranteed access to public lands for mineral exploration is a right that must be preserved and left as unencumbered as possible. This right is recognized by the USFS Organic Act of 1897. Our comments also are widely focused on areas that can be achieved without congressional action and meeting the intent of Presidential Executive Order (E.O.) 13777.

Five (5) Acre or Less Disturbance Exemption
Currently those engaged in mineral exploration on Bureau of Land Management (BLM) administered lands are able to conduct exploration activity on 5 acres or less (only one project area totaling 5 acres or less of surface disturbance at a single time) by filing a Notice of Intent, calculating reclamation costs and posting a bond without "triggering" NEPA. This allows for a progression of activity that fits the iterative exploration model of locatable minerals when the mineral potential of an area is unknown.

Conversely, the USFS does not allow similar exploration without filing a Plan of Operation subject to NEPA. This results in an 18-24-month delay, and is the reason many companies decline to invest in exploration and development of mineral deposits on National Forest Lands. This is another example of how two agencies regulating the same activity diverge in their approach.

In 1999, the National Academy of Sciences National Research Council published a study on the effectiveness of environmental regulation of hardrock mining on federal land. Only two recommendation remain unfulfilled; Good Samaritan legislation and for the USFS to adopt BLM's 5 acre NOI process.

Update Categorical Exclusion Provisions
Update National Environmental Policy Act (NEPA) Categorical Exclusion (CATEX) provisions to include exploration or other mining operations fitting within the BLM NOI scope. In addition, remove the 1-year limit on exploration projects in order to qualify for a CATEX. For projects beyond the CATEX scope, well defined deadlines for NEPA benchmarks are necessary.

Environmental Analysis
Focused Analysis – Stop reinventing the wheel every time NEPA is done. If a past EIS has addressed the same resource issues for a similar project, use the previous analysis. Develop mandatory timeframes for each step in the NEPA process. Set maximum time-limits for all NEPA analyses. Right size the environmental analysis by only addressing legitimate resource issues. Vague needs do not override statutory rights. If time limits are exceeded, the project proponent should be compensated.

Financial Assurance
AEMA and its members have a positive history with the USFS and its system requiring financial assurance, or bonding, for reclamation of mines. Foremost, we encourage USFS to maintain its objection the Environmental Protection Agency's (EPA) attempt to create a duplicative and unnecessary CERCLA 108(b) rule for hardrock mining.

We also would encourage the USFS to uniformly adopt the BLM method and the standardized spreadsheet process to determine the bond amounts. Currently, in some states, the USFS is extremely slow in processing permit applications and have limited experience in determining bond amounts. The USFS should require the use of the Standardized Reclamation Cost Estimate (SRCE) to calculate reclamation costs for all mineral exploration, development and mining projects.

Adopting the use of the SRCE model has worked very well, particularly in Nevada. This process is in use by all BLM district offices in Nevada and has greatly improved the consistency in determining bond amounts statewide.

Finally, update financial assurance mechanisms to expressly allow them to track BLM regulations and allow trust agreements and other flexible mechanisms for long term post-closure maintenance/monitoring. One example is to accept third party bonds for projects of any scale.

Consolidation of Mineral Programs
Evaluate merging of the BLM and USFS mineral programs to eliminate duplication of efforts and excessive overhead. Currently, an exploration and mine project commonly will fall on public lands administered by multiple federal agencies. While the governing Mining Law applies to all public lands, the regulations are often very different. This leads to confusion, delay and loss of investment. A single agency administering mineral exploration development and production in

the US would save the mining company and the taxpayer significant money and bring desperately needed efficiency and certainty to the investors looking to create jobs.

Cooperation with States
AEMA recommends elevating the States' role in resource management. While the USFS does enter into management agreements with states specific to projects, they are overly bureaucratic and seldom adhered to. Robust agreements that allow states to lead projects, provide mutually acceptable data and share staff resources would prove to be more cost effective and efficient.

Employee Performance
We would encourage USFS leadership to adopt policies that mandate consistent and standard implementation of regulations. The wide discretion at the District Ranger position has created vastly different operating scenarios for exploration and mining projects from forest to forest. One District Ranger may accept 3rd party bonds, allow public, or proponent access to documents, while others (even in adjoining districts) may not. This effectively moves the standard from one based on regulations to one based on individual approach and personality. One immediate action would be to include mineral permit performance standards in the annual USFS employee review process. This would put mineral activity on par with other areas of work that are included in the employee review process.

Who We Are
AEMA is a 122-year old, 2,000 member national association representing the minerals industry with members residing in 42 U.S. states, six Canadian provinces or territories, and 10 other countries. AEMA is the recognized national voice for exploration, the junior mining sector, and maintaining access to public lands, and represents the entire mining life cycle, from exploration to reclamation and closure. More than 80% of our members are small businesses or work for small businesses. Most of our members are individual citizens.

Respectfully submitted,

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February 2, 2018

Submitted via email NEPA-procedures-revision@fs.fed.us

RE: National Environmental Policy Act Compliance 83 Fed. Reg. 302, January 3, 2018

The American Exploration & Mining Association (AEMA) submits the following unique comments in response to the United States Forest Service (USFS) proposal to revise its National Environmental Policy Act (NEPA) procedures with the goal of increasing efficiency of environmental analysis. We appreciate this opportunity to bring about significant and much needed change to the overly burdensome NEPA process. It should be noted that from fiscal years 2010 through 2014, BLM approved 66 mine plans, and the Forest Service approved 2 mine plans for hardrock mines that varied by mineral type, mine size, and location[1]. While other agencies are completing NEPA, the USFS are severely lagging. This is comes at a cost to local, mostly rural, economies and growth.

Specifically, the Forest Service seeks public comment on the following:

- **Processes and analysis requirements that can be modified, reduced or eliminated in order to reduce time and costs while maintaining science-based, high quality analysis; public involvement; and honoring agency stewardship responsibilities.**

AEMA recommends that the Forest Service adopt the page limitations and time limitations set forth in the Secretary of the Interior's Secretarial Order 3355 dated August 31, 2017 (attached and incorporated by reference). The Forest Service also should allow project proponents to prepare the initial draft NEPA documents. No one knows the project better than the project proponent. The project proponent knows what alternatives are economically and technically

[1] *HARDROCK MINING: BLM and Forest Service Have Taken Some Actions to Expedite the Mine Plan Review Process but Could Do More.* United States Government Accountability Office 2016 https://www.gao.gov/assets/680/674752.pdf.

feasible. If necessary, third-party contractors can be retained to review the Draft Environmental Impact Statements (DEIS) or Environmental Assessments (EA). At the very least, the Forest Service must allow the project proponent to communicate with the third-party contractor through all stages of the NEPA and project review process.

The Forest Service should eliminate specialist reports that duplicate EIS chapters in the NEPA analysis. Specialist reports increase costs, contribute to delays and add nothing of substance to the record that is not already covered by the NEPA analysis.

The Forest Service should revise its objection process to prevent the objection process from becoming a tool for obstruction. The Forest Service should streamline its process for "completeness determinations" to ensure they are more transparent and timely. The completeness determination process must not be used to delay the start of the NEPA clock. The Forest Service should allow its personnel to participate in pre-submission planning meetings if requested by the project proponent.

The Forest Service should remove collection agreements that have companies putting up monies, and the Forest Service then gets to charge employee time against that money. The Forest Service employees are required to do this work, and collection agreements have turned into a "pay-to-play" scenario. The Forest Service can and needs to do a better job of holding their employees accountable to do their work in a timely manner. One way to accomplish this is to include performance on mineral projects and permits in the Annual Review that determines raises and promotions.

The Forest Service should standardize Memorandums of Understanding (MOU) with project proponents and all cooperating agencies. Standardized MOUs will save significant time and make the process more transparent and efficient. These MOUs must contain enforceable timelines and procedures for participation.

The Forest Service should eliminate from NEPA analysis alternatives which are not technically or economically feasible.

The Forest Service should require all district rangers and forest supervisors in forests with mineral activity to undergo training in the Mining Law, geology and the logical sequence in developing a mine from exploration through closure and reclamation. The Forest Service should increase its budget to ensure these are sufficient, trained personnel on each forest to process mining plans of operation in a timely manner.

The Forest Service should revise its guidance documents to provide greater clarity regarding the content required in a plan of operation.

The Forest Service should provide categorical exclusions for small scale exploration projects, including the adoption of the Bureau of Land Management (BLM) Notice of Intent process for exploration disturbing 5-acres or less. Also, the Forest Service should adopt programmatic EAs

for exploration projects disturbing more than 5-acres that have common, well-known disturbances and for which there are established reclamation protocols.

The Forest Service should adopt BLM's 43 CFR 3809 regulations on transfer surface management and plan approval process to BLM to ensure consistency across all federal lands open to mineral entry.

- **Approaches to landscape-skill analysis and decision making under NEPA that facilitate restoration of National Forest System lands.**

Forest plans are "landscape scale" plans and should be reviewed, analyzed and justified, vis-à-vis the 2017 Congressional Review Act rejection of BLM Planning 2.0, which rejected the concept of landscape scale planning on BLM administered lands. As such, AEMA asserts there is no authority for USFS to consider landscape scale planning other than the standard Forest Plan land use planning process. Therefore the NEPA evaluation cannot consider landscape scale planning-except perhaps as an alternative eliminates from detailed consideration because it is unauthorized.

- **Classes of action that are unlikely, either individually or cumulatively, to have significant impacts and therefore should be categorically excluded from NEPA's Environmental Assessment (EA) and Environmental Impact Statement (EIS) requirements such as integrated restoration projects; special use authorization; and activities to maintain and manage agency sites (including recreation sites), facilities and associated infrastructure.**

The Forest Service must adopt the BLM 43 CFR 3809 Notice of Intent regulations for exploration causing service disturbance of 5-acres or less. *See* 43 CFR 3809.21. This remains one of only two recommendations from the 1999 National Academy of Sciences/National Research Council Report "Hardrock Mining on Federal Lands" that has not been implemented (the other is Good Samaritan legislation). It has been almost 20 years since that report. It is past time to adopt this recommendation.

Most mineral exploration disturbing more than 5-acres consists of known impacts, common disturbance and established reclamation processes. Decades of exploration on BLM lands under the 5 acre regulation has clearly demonstrated this activity can be done without harm nor environmental degradation. The USFS lands are no different. The Forest Service should provide categorical exclusions or programmatic EAs for this type of mineral exploration.

The Forest Service should consider transferring all responsibility for locatable mineral operations to the BLM so that all locatable mineral operations are subject to one consistent set of regulations and one consistent set of definitions and one consistent set of requirements.

- **Ways the Agency might expand and enhance coordination of environmental review and authorization decisions with other Federal agencies, as well as State, Tribal, or local environmental reviews.**

One of the best ways to expand and enhance coordination of environmental review and authorization decisions is to standardize MOU among all agencies, tribal authorities and states.

The Forest Service should ensure there is a lead agency on all projects on National Forest System lands and that all cooperating agencies are identified and required to participate at the beginning of the process. When the Forest Services is lead agency, it should insist that all reviews, regardless of the agency, be concurrent and not consecutive.

In addition to the above comments, AEMA attaches and incorporates by references as though fully set forth herein, the comments it filed on September 15, 2017 with respect to identifying regulatory reform initiatives, and Secretary of the Interior Secretarial Order 3355.

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Sincerely,

Matthew Ellsworth
Government Affairs