



## **NOTICE OF APPEAL**

Pursuant to 43 C.F.R. Part 4, the Center for Biological Diversity, Northeastern Minnesotans for Wilderness, and The Wilderness Society (collectively “Appellants”), hereby Appeal the May 1, 2020 Decision by BLM approving Twin Metals Minnesota, LCC (“Twin Metals”) prospect permit extensions on the Superior National Forest. The BLM’s May 1, 2020 Decision approved the extension of the following prospecting permits: MNES054387, MNES054050, MNES054194, MNES054195, MNES054196, MNES053731, MNES055301, MNES055302, MNES055305, MNES053868, MNES054037, MNES055203, and MNES055206. To the extent that the BLM’s May 1, 2020 Decision relies on the BLM’s March 13, 2015 Determination of NEPA Adequacy (“DNA”) Worksheet for Twin Metal’s Prospecting Permit Extension Request (NEPA No. DOI-BLM-ES-0030-2015-0004-DNA), Appellants’ also challenge the 2015 DNA for Twin Metal’s prospecting permit extension request. This appeal is timely filed, as it is filed within 30 days of the BLM’s May 1, 2020 Decision.

## **STATEMENT OF REASONS**

### **I. BACKGROUND**

In 2012, the Forest Service issued a Final Environmental Impact Statement (“FEIS”) for the proposed “Federal Hardrock Minerals Prospecting Permits Project” on the Superior National Forest. The Forest Service issued its Record of Decision for the project in May, 2012, choosing to implement Alternative 4 from the FEIS. The decision provided the Forest Service’s consent to the BLM issuing 29 prospecting permits, including 37,562 acres of National Forest System lands in the public domain, and 1,142 acres of National Forest Service lands acquired under the Weeks Act, for a total of 38,704 acres. The prospecting permits included five applications from Twin

Metals, and additional applications from Encampment Resources, Lehmann Exploration, DMC, and Prime Meridian.

Appellant Center for Biological Diversity and others submitted an administrative appeal of the Record of Decision on July 14, 2012. The appellants argued in part that the Forest Service had failed to properly consider the cumulative impacts of other mining related projects in the region. The Forest Service denied the appeal on August 29, 2012. In response to the cumulative impacts argument, the Forest Service stated that it was not aware of a submitted plan for the proposed Twin Metals mine, and that it would be speculative to guess the specifics at that time. According to the Forest Service, “If and when the Twin Metals project or any other mine proposals reach the stage of being considered ‘reasonably foreseeable,’ the Forest Service would consider cumulative impacts as needed for a project proposal undergoing NEPA analysis.”<sup>1</sup>

On March 22, 2012, the U.S. Fish and Wildlife Service completed a Biological Opinion for the Hardrock Minerals Prospecting Permits, pursuant to Section 7 of the Endangered Species Act. The Biological Opinion considered the impacts of the prospecting permits on the Canada lynx. The gray wolf and its critical habitat were not considered in the Biological Opinion because the gray wolf had been removed from the Endangered Species list at that time.

On March 13, 2015, the BLM issued a Determination of NEPA Adequacy (“DNA”) Worksheet for “Twin Metals Minnesota, LLC and Duluth Metals, Ltd., Prospecting Permit Extension Request.” The description of the proposed action was to extend 13 prospecting permits for a four year period. According to the BLM, the proposed action was “a request for extension to determine the workability of the mineral deposit on the prospecting permit lands for an existing approved action analyzed within the 2012 [Federal Hardrock Minerals Prospecting

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<sup>1</sup> See Attachment E.

Permit] FEIS.” The BLM determined that “[n]o new issues or concerns have arisen,” and that “no new information has been brought to the attention of BLM from the Superior National Forest in regards to the prospecting permit extension request.”

Five years later, on May 1, 2020, the BLM issued its decision, extending 13 prospecting permits held by Twin Metals for 4 years. The 13 permits collectively cover over 15,000 acres of the Superior National Forest. According to the May 1, 2020 Decision, the Forest Service raised no objection to these permit extensions in letters dated December 22, 2014 and March 13, 2015. According to the Decision, “the prospecting permits are hereby extended to be effective May 1, 2020. The permits, which now contain approved exploration plans, are extended for a period of four years and will expire on April 30, 2024.”

## **II. STATEMENT OF STANDING**

Appellants Center for Biological Diversity, Northeastern Minnesotans for Wilderness, and The Wilderness Society can properly pursue this administrative appeal. 43 C.F.R. § 4.410. The BLM provided no opportunity for public comment or involvement prior to issuing its May 1, 2020 Decision, or prior to issuing its March 13, 2015 DNA. As stated by BLM in the 2015 DNA: “Nothing has been proposed that would change the plan to require additional public comment for the proposed prospecting permit extension.” The Appellants have been extensively involved in other federal agency administrative processes and decisions involving Twin Metals and copper-sulfide related proposals in this region, and would have been involved in the administrative process for these prospecting permit extensions had BLM provided an opportunity for public input. *See e.g.*, Rom Declaration, ¶ 9.

Appellants and their members are adversely affected by the May 1, 2020 Decision to extend these 13 prospecting permits. 43 C.F.R. § 4.410. An organization is “adversely affected”

by the decision appealed if one or more of its members have “a legally cognizable interest in the subject matter of the appeal, coinciding with the organization’s purposes, that is or may be negatively affected by the decision.” *Wildlands Defense and Deep Green Resistance*, 187 IBLA 233, 236 (2016) (citing 43 C.F.R. § 4.410(d)). A legally cognizable interest can include “cultural, recreational, and aesthetic use and enjoyment of the affected public lands.” *Cascadia Wildlands & Or. Wild*, 188 IBLA 7, 9-10 (2016); *see also Wyo. Outdoor Council*, 153 IBLA 379, 383 (2000) (legally cognizable interest in the land “need not be an economic or a property interest” and “[u]se of the land will suffice”); *S. Utah Wilderness Alliance*, 127 IBLA 325, 327 (1993); *Animal Prot. Inst. of Am.*, 117 IBLA 208, 210 (1990). The IBLA does not require a showing that an injury has actually occurred. Rather, a colorable allegation of injury suffices. *Powder River Basin Res. Council*, 124 IBLA 83, 89 (1992).

Appellant Center for Biological Diversity (“the Center”) is a non-profit organization with over 74,000 members. The Center is headquartered in Tucson, Arizona, and has offices across the United States, including in Duluth and Minneapolis, Minnesota. The Center works to ensure the long-term health and viability of animal and plant species across the United States and elsewhere, and to protect the habitat these species need to survive. The Center believes that the health and vigor of human societies and the integrity and wildness of the natural environment are closely linked. The Center has long advocated for northeastern Minnesota’s animal and plant species in administrative processes and in court, including by commenting on mining-related proposals, petitioning for Endangered Species Act protections for the Minnesota moose population, and joining litigation over proposed mining that would destroy habitat for Canada lynx and gray wolves in the Superior National Forest.

Appellant Northeastern Minnesotans for Wilderness (“NMW”) is a non-profit, charitable corporation organized under the laws of Minnesota. Formed in 1996 and based in Ely, Minnesota. NMW’s mission is to protect and preserve wilderness and wild places in Minnesota’s Arrowhead region, to advocate for the protection of the Boundary Waters and Voyageurs National Park and the enhancement of their wilderness aspect, and to foster education about the value of wilderness and wild places. NMW was formed to continue the local tradition of working to protect wild places, particularly the Boundary Waters, against increasing commercial pressures, so that the area’s natural features and processes remain intact for future generations. NMW has approximately 23,500 members, and more than 185,000 additional supporters across all 50 states. NMW’s members rely on, appreciate, and benefit from the natural resources in the Superior National Forest, especially the waters, lands, plant communities, and wildlife in the Boundary Waters, as well as in Voyageurs National Park. They have a long-standing interest in lynx, moose, wolf, and forest conservation, both in the Boundary Waters and across the Superior National Forest. NMW members and staff regularly visit the Boundary Waters, Voyageurs National Park, the Superior National Forest, and surrounding areas for recreation, wildlife observation, and other uses. Many NMW members plan to visit the Boundary Waters over the coming days, weeks, months, and years.

Appellant The Wilderness Society, founded in 1935, is a national, non-profit membership organization devoted to protecting wilderness and inspiring Americans to care for wild places. It has led the effort to permanently protect 111 million acres of wilderness and ensure sound management of our shared national lands. The Wilderness Society has more than 1 million members and supporters, including over 2,600 members and 7,200 supporters in Minnesota, and has long worked to protect the Boundary Waters. A member of the Campaign to Save the

Boundary Waters, The Wilderness Society has advocated for permanent protection of the Boundary Waters watershed from the threat of sulfide-ore copper mining, and has worked to inform the public about threats to the Boundary Waters, including with its 2017 report “Too Wild to Drill.” Members and staff of The Wilderness Society regularly visit the Boundary Waters and surrounding Superior National Forest lands to paddle, hunt, fish, harvest wild rice, and enjoy the splendor of the areas’ pristine lakes, rivers, and forests.

Members of the Appellant organizations regularly use and enjoy the Superior National Forest and the Boundary Waters Canoe Area Wilderness, including lakes, rivers, and areas that would be adversely affected if Twin Metals proceeds with mineral exploration on its prospecting permits that the BLM extended on May 1, 2020. *See* Koschak Declaration, ¶ 3 (owns property on the peninsula where the South Kawishiwi River flows into the northern end of Birch Lake); Rom Declaration, ¶¶ 1-2 (resides in Ely and has regularly visited since childhood the Boundary Waters, Birch Lake, and the South Kawishiwi and Kawishiwi Rivers); Adkins Declaration, ¶ 4 (has regularly taken trips to the Boundary Waters since grade school, frequently entering near the Kawishiwi River); Ipsen Declaration, ¶¶ 1, 5-6, 13 (owns a cabin near the edge of the Boundary Waters, and has been regularly visiting the Boundary Waters since the late 1970s). As explained in further detail by NMW member Rebecca Rom,

I hike and birdwatch in and around Nickel Lake and Omaday Lake, located in the heart of five of the prospecting permits. I hike, birdwatch, canoe, and camp in the South Kawishiwi, Little Gabbro, Gabbro, and Bald Eagle Lakes area, which is located within the Boundary Waters. The thirteen prospecting permits are adjacent to or near the Gabbro-Bald Eagle Lakes area. I also hike and birdwatch on Superior National Forest lands along Highway 1 in the area of eight of the prospecting permits that are located on the east and west sides of Highway 1.

Rom Declaration, ¶ 13. These members intend to continue to regularly use and enjoy the Superior National Forest and the Boundary Waters Canoe Area Wilderness, including areas that

would be adversely affected by the 13 prospecting permits. *See e.g.*, Adkins Declaration, ¶ 6 (“I will return to the Boundary Waters again this summer. I have secured two permits – one on June 6 and another on July 4 – to enter the Boundary Waters through the Lake One entry point.”).

The BLM’s May 1, 2020 Decision to extend Twin Metal’s prospecting permits directly and imminently injures Appellants’ members’ interests. The drilling and other activities allowed by the prospecting permits interfere with Appellants’ members’ use and enjoyment of these public lands by causing substantial noise, increasing traffic, disturbing wildlife, and threatening groundwater and water quality. Koschak Declaration, ¶¶ 21, 32-33; Rom Declaration, ¶ 13; Adkins Declaration, ¶¶ 7-12; Ipsen Declaration, ¶¶ 13-15. These circumstances dissuade Appellants’ groups’ members from visiting the public lands in this area and surrounding lands, including the nearby Boundary Waters entry points, and reduce the value of their experiences when they do visit. Koschak Declaration, ¶ 33; Rom Declaration, ¶ 13; Adkins Declaration, ¶¶ 7-12; Ipsen Declaration, ¶¶ 14-18. As explained by Rebecca Rom,

Noise from prospecting activities on the thirteen prospecting permit areas would adversely impact my enjoyment of the Wilderness and the Superior National Forest. Noise from prospecting drilling is particularly disturbing because it travels farther in an area populated with lakes and rivers – well into the Boundary Waters where only natural sounds are supposed to be heard. Drilling on nearby lands has, in the past, occurred nonstop, 24-hours a day, for two-week stretches, with a sound best described as a jet engine. I would be much less likely to recreate in the Boundary Waters Canoe, on Superior National Forest lands, or on nearby Birch Lake and other smaller lakes in this area if I am able to hear, see, or experience drilling activities nearby.

Rom Declaration, ¶ 13.

### **III. STATEMENT OF REASONS**

Pursuant to 43 C.F.R. § 4.412(a), Appellants provide the following statement of reasons for their appeal.



## A. The BLM Failed to Comply with NEPA

“The National Environmental Policy Act (NEPA) is our national charter for protection of the environment.” 40 C.F.R. § 1500.1(a). NEPA requires agencies to evaluate and publicly disclose the potential environmental impacts of proposed actions. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989). NEPA ensures “that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the [public] that may also play a role in both the decisionmaking process and the implementation of that decision.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

NEPA requires that federal agencies consider "any adverse environmental effects" of their "major ... actions." *Mid States Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520, 549 (8th Cir. 2003), citing 42 U.S.C. § 4332(C). The CEQ's NEPA regulations explain that "effects" include both "direct effects" and "indirect effects." *Id.*, citing 40 C.F.R. § 1508.8. Indirect effects are defined as those that "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8. NEPA further requires the consideration of cumulative actions and cumulative impacts. 40 C.F.R. §§ 1508.25(a)(2), 1508.7, 1508.27(b)(7).

NEPA requires agencies to prepare a detailed “environmental impact statement” (“EIS”) for major federal actions that may significantly impact the environment. 42 U.S.C. § 4332(2)(C). To determine whether an EIS should have been prepared, courts consider the criteria defining “significance” in the NEPA regulations, which include the unique characteristics of the geographic area, the degree to which effects may be highly controversial or uncertain, and the degree to which the action may establish a precedent for future actions. 40 C.F.R. §

1508.27(b); *Anderson v. Evans*, 371 F.3d 475, 488 (9th Cir. 2004). If an agency’s “action is environmentally ‘significant’ according to *any* of these criteria,” an EIS is required. *Public Citizen v. Dept. of Transp.*, 316 F.3d 1002, 1023 (9th Cir. 2003) (emphasis in original).

“If an agency decides not to prepare an EIS, it must supply a ‘convincing statement of reasons’ to explain why a project’s impacts are insignificant.” *Blue Mts. Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998). “The statement of reasons is crucial to determining whether the agency took a ‘hard look’ at the potential environmental impact of a project.” *Id.* The court may defer to the agency’s decision not to prepare an EIS only when that decision is “well informed and well considered.” *Save the Yaak Comm. v. Block*, 840 F.2d 714, 717 (9th Cir. 1988).

Agencies may prepare an “Environmental Assessment” (“EA”) when necessary to determine whether a proposed action may have a significant impact on the environment. 40 C.F.R. § 1501.3; 40 C.F.R. § 1508.9. Based on the EA, the agency must determine whether an EIS is required. 40 C.F.R. § 1501.4(c). Agencies must involve the public, to the extent practicable, in preparing EAs. 40 C.F.R. § 1501.4(b). If the agency decides based on the EA that it does not need to prepare an EIS, it must prepare a “Finding of No Significant Impact,” and make this finding available to the public. 40 C.F.R. § 1501.4(e).

1. The BLM Failed to Consider the Cumulative Impacts of the Prospecting Permit Extensions Along With All Past, Present, and Reasonably Foreseeable Future Actions Prior to Issuing the May 1, 2020 Decision.

“In accord with NEPA, [Federal agencies] must ‘consider’ cumulative impacts.” *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1379 (9th Cir. 1998), citing 40 C.F.R. § 1508.25(c). The obligation to consider cumulative impacts applies to both EISs and EAs. *Sierra Club v. U.S. Army Corps of Engineers*, 645 F.3d 978, 991 (8th Cir. 2011) (stating

that each EA shall include a discussion of the environmental impacts of the proposed action, including cumulative impacts). To "consider" cumulative effects, some quantified or detailed information is required. *Neighbors of Cuddy Mountain*, 137 F.3d at 1379. 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. *Id.* at 1380.

“Cumulative impact is the 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.” 40 C.F.R. § 1508.7. “Reasonably foreseeable” means it is “sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.” *Mid States Coalition for Progress*, 345 F.3d at 549. Moreover, when the *nature* of the effect is reasonably foreseeable but its *extent* is not, the agency still must consider the effect. *Id.* “Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” 40 C.F.R. § 1508.7. An agency cannot break an action down into small component parts to avoid a significance determination. 40 C.F.R. § 1508.27(b)(7).

Prior to issuing the May 1, 2020 Decision, the BLM wholly failed to consider and disclose the overall cumulative impacts of the proposed action along with all past, present, and reasonably foreseeable future actions within the same region of the Superior National Forest, in violation of NEPA. *Neighbors of Cuddy Mountain*, 137 F.3d at 1379; 40 C.F.R. § 1508.25(c); 40 C.F.R. § 1508.7; 40 C.F.R. § 1508.27(b)(7). For instance, prior to issuing the May 1, 2020 Decision, BLM entirely failed to consider or address that Twin Metals had submitted to BLM and other agencies in December, 2019, a Mine Plan of Operations for a large-scale copper-nickel mine in this same area, along with an application for a new preference right lease. Attachment A

(Twin Metals stating that it submitted the Mine Plan of Operations to the BLM, and that the proposed mine would process 20,000 tons of ore per day); *see also* [https://eplanning.blm.gov/epl-front-office/projects/nepa/1503233/20010575/250013586/TMM-ES-115-0001\\_0A\\_Mine\\_Plan\\_of\\_Operations\\_2019-12-18.pdf](https://eplanning.blm.gov/epl-front-office/projects/nepa/1503233/20010575/250013586/TMM-ES-115-0001_0A_Mine_Plan_of_Operations_2019-12-18.pdf).<sup>2</sup> According to the BLM, Twin Metals submitted the preference right lease application “for lands on which it has prospecting permits.”<sup>3</sup> The BLM also failed to consider prior to issuing its May 1, 2020 Decision that in 2018, it had reinstated Twin Metals two mineral leases, and that in 2019, it had renewed these mineral leases.<sup>4</sup>

As seen in the enclosed maps (Attachment B), Twin Metal’s Mine Plan of Operations, Preference Rights Lease Application, mineral leases, and the 13 prospecting permits are all in the same vicinity, and will undoubtedly have overlapping and cumulative impacts on numerous resources, including wildlife, recreation, water, wildlife, and the downstream Boundary Waters Canoe Area Wilderness from noise, roads, clearing of trees, fragmentation, increased human presence, and other factors. The BLM violated NEPA by failing to consider and disclose these cumulative impacts prior to issuing the May 1, 2020 Decision. 40 C.F.R. § 1508.25(c); 40 C.F.R. § 1508.7; 40 C.F.R. § 1508.27(b)(7).

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<sup>2</sup> Twin Metal’s December 18, 2019 Mine Plan of Operations can also be found on the company’s website at: [http://www.twin-metals.com/wp-content/uploads/2019/12/TMM-Mine-Plan-of-Operations\\_2019-1218-R.pdf](http://www.twin-metals.com/wp-content/uploads/2019/12/TMM-Mine-Plan-of-Operations_2019-1218-R.pdf) and [http://www.twin-metals.com/wp-content/uploads/2019/12/TMM-Mine-Plan-of-Operations-Appendices\\_R.pdf](http://www.twin-metals.com/wp-content/uploads/2019/12/TMM-Mine-Plan-of-Operations-Appendices_R.pdf).

<sup>3</sup> <https://eplanning.blm.gov/epl-front-office/eplanning/planAndProjectSite.do?methodName=dispatchToPatternPage&currentPageId=200010289>; *see also* Attachment F (map).

<sup>4</sup> *See* [https://eplanning.blm.gov/epl-front-office/projects/nepa/98730/172782/209927/DR-FONSI\\_LeaseRenewal\\_MNES01352-01353\\_signed.pdf](https://eplanning.blm.gov/epl-front-office/projects/nepa/98730/172782/209927/DR-FONSI_LeaseRenewal_MNES01352-01353_signed.pdf).

2. The BLM Failed to Consider the Proper Scope of the Project, along with Connected, Cumulative, and Similar Actions.

Pursuant to the NEPA regulations, the “scope” of an EIS consists of the range of actions, alternatives, and environmental impacts that must be considered collectively within an EIS. 40 C.F.R. 1508.25. In order to determine the proper scope of an EIS, agencies must consider three types of actions. *Id.* Connected, cumulative, and similar actions must be considered together, in a single EIS. *Id.*

The NEPA regulations further define connected, cumulative, and similar actions. Actions are connected if they are interdependent parts of a larger action and depend on the larger action for their justification. 40 C.F.R. § 1508.25(a)(1). Actions are cumulative when, viewed with other proposed actions, they have cumulatively significant impacts and should therefore be addressed in the same EIS. 40 C.F.R. § 1508.25(a)(2). And actions are similar when they have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. 40 C.F.R. § 1508.25(a)(3).

During the same time that BLM was considering whether to issue the May 1, 2020 Decision extending Twin Metal’s prospecting permits, the BLM received from Twin Metals a Mine Plan of Operations, proposing a large-scale copper-nickel mine for this same region. Attachment A. Twin Metals also submitted a preference right lease application to BLM for this same region,<sup>5</sup> and the BLM had reinstated and then renewed Twin Metal’s mineral leases. However, this is no indication in the May 1, 2020 Decision that BLM even considered whether

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<sup>5</sup> <https://eplanning.blm.gov/epl-front-office/eplanning/planAndProjectSite.do?methodName=dispatchToPatternPage&currentPageId=200010289>; Attachment F.

or not the prospecting permits, Mine Plan of Operations, preference right lease application, and mineral leases, all from Twin Metals, were connected, cumulative, or similar projects that should be considered together in a single NEPA analysis.

Based on the available evidence, the prospecting permits are connected to one or more of the Mine Plan of Operations, preference right lease application, and mineral leases. There is no indication that Twin Metals would be pursuing the extension of the prospecting permits if it was not also proposing additional, substantial mining activity in the same region. The prospecting permits are part of a larger mining action being proposed and undertaken by Twin Metals, and all must be considered together under NEPA as connected actions. 40 C.F.R. § 1508.25(a)(1).

The extension of the prospecting permits, proposed Mine Plan of Operations, preference right lease application, and mineral leases would clearly result in cumulatively significant impacts on the environment if all are approved. These actions must therefore be considered collectively as cumulative actions, in a single NEPA analysis. 40 C.F.R. § 1508.25(a)(2).

The extension of the prospecting permits, proposed Mine Plan of Operations, preference right lease application, and mineral leases have similarities that provide a basis for evaluating their environmental consequences together, including common timing, common geography, and all being proposed by the same mining company. The BLM was therefore again required to consider these proposed actions together, in a single NEPA analysis, as similar actions. 40 C.F.R. § 1508.25(a)(3).

In failing to even consider whether the extension of the prospecting permits may be related to, connected to, and cumulative to the other mine related proposals of Twin Metals in this same region, prior to issuing the May 1, 2020 Decision, the BLM failed to take a hard look at the environmental impacts of the extension of the permits, and failed to consider all relevant

factors. The May 1, 2020 Decision is arbitrary, capricious, contrary to law, and contrary to the procedures required by law, and must be set aside. 5 U.S.C. § 706.

3. The BLM Failed to Consider and Address Relevant New Science and Information, Subsequent to the 2012 FEIS.

The BLM relied on the Forest Service's 2012 Federal Hardrock Mineral Prospecting Permits FEIS in its March 13, 2015 Determination of NEPA Adequacy (DNA) for the proposed extension of the thirteen prospecting permits. The BLM, however, cannot simply rely on a DNA, which itself relies on an old EIS, where that EIS has become stale because it did not consider relevant new science and information. *Pennaco Energy, Inc. v. U.S. Dept. of Interior*, 377 F.3d 1147 (10th Cir. 2004); *see also S. Utah Wilderness Alliance v. Norton*, 457 F.Supp. 2d 1253, 1265-66 (D. Utah 2006) (rejecting BLM's use of a DNA that relied on stale NEPA and failed to consider new information); BLM NEPA Handbook H-1790-1, § 5.1. Here, there is no indication that the BLM considered the new information and science concerning the proposed action and related mining activities within this region of the Superior National Forest prior to issuing its May 1, 2020 Decision.

For instance, there is no indication in the May 1, 2020 Decision that the BLM considered that in 2016, the Forest Service determined that a copper-nickel mine in this same watershed would pose an inherent, unacceptable risk to the Boundary Waters Canoe Area Wilderness. In a December 14, 2016 letter to the BLM, the Forest Service informed the BLM that it would therefore not consent to the renewal of Twin Metals leases MNES-01352 and MNES-01353. Attachment C. The Forest Service has not recanted or withdrawn its December 14, 2016 letter to the BLM, which sets forth in considerable detail why a copper-nickel mine in this watershed, such as the one proposed by Twin Metals, would be unacceptable and cannot be permitted. This letter is directly relevant to the proposed extension of Twin Metals prospecting permits that the

BLM approved on May 1, 2020, as there is no reason to extend these prospecting permits if a copper-nickel mine in this watershed cannot be approved or proceed. The BLM's failure to consider this December 14, 2016 letter, including the significant and directly relevant scientific information provided within the letter, demonstrates that the BLM failed to take a hard look at the potential environmental impacts, and failed to consider all relevant factors, prior to issuing its May 1, 2020 Decision. The May 1, 2020 Decision is arbitrary, capricious, contrary to law, and contrary to the procedures required by law, and must be set aside. 5 U.S.C. § 706.

The BLM also failed to consider that the Forest Service subsequently requested a twenty-year mineral withdrawal of National Forest System lands within the Rainy River Watershed, and prepared an EA to inform the Secretary of Interior's decision. 82 Fed. Reg. 4828 (Jan. 13, 2017); <https://www.fs.usda.gov/project/?project=50938>. As explained by the Forest Service,

The purpose of the withdrawal request is protection of the natural resources and waters located on NFS lands from the potential adverse environmental impacts arising from exploration and development of fully Federally-owned minerals conducted pursuant to the mineral leasing laws within the Rainy River Watershed that flow into the Boundary Waters Canoe Area Wilderness (BWCAW) and the Boundary Waters Canoe Area Wilderness Mining Protection Area (MPA) in northeastern Minnesota.

82 Fed. Reg. at 4283. Pursuant to this withdrawal, the BLM's extension of Twin Metal's prospecting permits would have been prohibited. The Forest Service's EA and supporting information prepared for the withdrawal are directly relevant, and BLM's failure to consider this information prior to issuing the May 1, 2020 Decision is again arbitrary and capricious.

Additionally, prior to issuing its May 1, 2020 Decision, the BLM failed to consider that when the Forest Service prepared the 2012 EIS, neither gray wolves nor the northern long-eared bat were listed by the U.S. Fish and Wildlife Service ("FWS") as a threatened species under the Endangered Species Act ("ESA"). As FWS states in the 2012 Biological Opinion for the Hardrock Minerals Prospecting Permits, the gray wolf and gray wolf critical habitat "were



removed from the Endangered Species list effective January 27, 2012.” However, on February 20, 2015, FWS issued a new final rule that reinstated the March 9, 1978 final rule for gray wolves in the western Great Lakes including threatened status for gray wolves in Minnesota. 80 Fed. Reg. 9218 (Feb. 20, 2015). Additionally, on April 2, 2015, FWS designated the northern long-eared bat as a threatened species under the ESA, including within Minnesota. 80 Fed. Reg. 17974 (April 2, 2015). There is no evidence that the BLM considered that the extension of the prospecting permits may adversely affect these listed species prior to issuing the May 1, 2020 Decision. The BLM has therefore failed to take a hard look at the environmental impacts of the extension of the permits, and failed to consider all relevant factors. The May 1, 2020 Decision is arbitrary, capricious, contrary to law, and contrary to the procedures required by law, and must be set aside. 5 U.S.C. § 706.

Further, the BLM failed to consider, prior to issuing its May 1, 2020 Decision, that the noise impacts from the prospecting permits have been more substantial and controversial than the Forest Service had anticipated in the 2012 FEIS for the Federal Hardrock Mineral Prospecting Permits. The Forest Service had downplayed the potential significance of noise impacts from the prospecting permits in the 2012 FEIS. FEIS, p. 102 (“There could be minor to moderate impacts in areas outside the wilderness.”); *id.*, p. 103 (“There could be minor impacts to opportunities for solitude . . .”); *id.*, p. 121 (“The degree of impacts under the action alternatives is limited by the fact that project activities are temporary, . . . . Alternative 4 would reduce impacts to the greatest degree of the action alternatives for the BWCAW for drill sites located near the wilderness by requiring maximum limits for sound levels reaching the wilderness.”). The noise of drilling activities in the region, however, has proven to be significant both within and outside the BWCAW. Koshak Declaration, ¶¶ 12-23; Ipsen Declaration, ¶¶ 13-

15. The BLM failed to take into account the significance of these noise impacts prior to approving the extension of the prospecting permits on May 1, 2020.

4. The BLM Failed to Assess and Disclose Baseline Conditions in the Project Areas Impacted by the Extended Prospecting Permits.

In order to evaluate and consider the potential environmental impacts of a proposed action under NEPA, the agency must first establish the baseline conditions of the potentially affected resources in the vicinity of the proposed action, such as surface and groundwater, wildlife habitat, and wetlands. *Half Moon Bay Fisherman's Mktg. Ass'n. v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988). Here, the BLM's failure to conduct an assessment of the baseline of the affected area, prior to considering the potential environmental impacts of extending the thirteen prospecting permits, violated NEPA because "[w]ithout 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." *Gifford Pinchot Task Force v. Perez*, 2014 U.S. Dist. LEXIS 90631, \*78 (D. Or., July 3, 2014), quoting *Half Moon Bay Fisherman's Mktg. Ass'n.*, 857 F.2d at 510.

For instance, prior to determining that the proposed action would not result in any significant impacts to groundwater, the BLM "needed to have first conducted a baseline study and actual analysis of the groundwater in the area before reaching its conclusion." *Gifford Pinchot Task Force v. Perez*, 2014 U.S. Dist. LEXIS 90631, \*83-84, citing *Idaho Conservation League v. U.S. Forest Serv.*, 2012 U.S. Dist. LEXIS 124659 (D. Idaho, Aug. 29, 2012). And the BLM cannot evade this requirement by simply claiming that the effects to groundwater would be negligible by relying on data from similar sites. *Gifford Pinchot Task Force*, 2014 U.S. Dist. LEXIS 90631, at \*85. Similarly, the BLM cannot rely solely on the 2012 FEIS prepared by the Forest Service, and its discussion of groundwater impacts, as "it fails to comply with NEPA's

‘hard look’ requirement absent baseline groundwater information upon which the conclusion of negligible impact can be made.” *Id.* at \*113. “[T]he absence of baseline data means that the 2012 [FEIS] cannot have discussed the environmental effects of the Project on groundwater and cannot have reached a conclusion about those effects based on all relevant information.” *Id.* at \*92.

5. The BLM Failed to Consider the NEPA Significance Factors Prior to Issuing the May 1, 2020 Decision.

As explained, it was improper for the BLM to simply rely on its 2015 DNA, which in turn relied on a 2012 EIS prepared by the Forest Service, to satisfy the agency’s NEPA requirements prior to issuing its May 1, 2020 Decision. Therefore, to satisfy NEPA, the BLM was required to prepare and circulate an EIS, in which it evaluated and disclosed the potential impacts of a proposed action, considered alternatives, and identified all irreversible and irretrievable commitments of resources associated with the proposed action. 42 U.S.C. § 4332(2). Or, the BLM could have prepared an EA to determine whether the proposed project was likely to result in significant impacts and, therefore, require an EIS. 40 C.F.R. § 1508.9. If the EA concluded that the project may have a significant impact on the environment, then an EIS would have been required. *Id.*; *National Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001). If not, the BLM would have been required to provide a detailed statement of reasons why the project's impacts are insignificant and issue a "finding of no significant impacts" (“FONSI”). 40 C.F.R. § 1508.13. In considering whether a proposed project may have a significant impact on the environment, the NEPA regulations require the BLM to consider ten “significance” factors, including the unique characteristics of the geographic area; the degree to which effects on the environment are likely to be controversial, uncertain, or involved unknown risks; whether the action is related to other actions with individually insignificant but

cumulatively significant impacts; and the degree to which the action may adversely affect threatened or endangered species. 40 C.F.R. § 1508.27(b).

Certain agency actions may be categorically excluded from full NEPA review. NEPA regulations define categorical exclusions as actions which do not individually or cumulatively have a significant effect on the human environment. 40 C.F.R. § 1508.4. CEQ directed each federal agency to develop a list of activities that meet this definition. *Id.* § 1507.3(b)(2)(ii). A categorically excluded activity may nonetheless require full NEPA analysis if there are "extraordinary circumstances," such as when the action causes significant impacts. *Id.* § 1508.4.

Prior to issuing the May 1, 2020 Decision, the BLM did not prepare an EIS, or a less detailed EA, or even attempt to rely on a categorical exclusion. The agency instead approved the proposed action with no NEPA review. In doing so, the BLM failed to consider the NEPA significance factors, and failed to consider whether or not there may be extraordinary circumstances that would require at least an EA for the proposed extension of the prospecting permits. Had the agency considered these relevant factors, as required by NEPA, the BLM would have found that the proposed action is located in a unique geographic area, just upstream from the irreplaceable Boundary Waters Wilderness. 40 C.F.R. § 1508.27(b)(3). The BLM would have further found that the potential impacts are controversial and uncertain, and that the proposed action is related to other actions with cumulatively significant impacts including Twin Metal's Mine Plan of Operations and other mineral leases in the same region. 40 C.F.R. § 1508.27(b)(3-5). And the BLM would have found that the action may adversely affect Canada lynx, gray wolves, and the northern long-eared bat. 40 C.F.R. § 1508.27(b)(9). Similarly, the BLM would have discovered the presence of extraordinary circumstances, including the Mine

Plan of Operations already under consideration, and the potential for cumulatively severe and irreparable impacts on the downstream Boundary Waters Wilderness, as determined by the Forest Service in its December 14, 2016 letter to BLM. By failing to consider these relevant factors prior to issuing its May 1, 2020 Decision, the BLM violated NEPA. 40 C.F.R. § 1508.4; 40 C.F.R. §1508.27(b). As a result, the May 1, 2020 Decision is arbitrary, capricious, not in accordance with law, and not in accordance with procedures required by law. 5 U.S.C. § 706.

**B. The BLM Failed to Comply with the Endangered Species Act**

As set forth in Appellants' May 20 sixty-day notice letter to the BLM, Forest Service, FWS, and Secretary of the Interior, the BLM violated the ESA by issuing the May 1, 2020 Decision without any consultation with FWS under Section 7 of the ESA. 16 U.S.C. § 1536(a)(2).<sup>6</sup> The BLM's May 1, 2020 Decision constitutes an agency action under the ESA which may affect listed species, including the Canada lynx and its critical habitat, the gray wolf and its critical habitat, and the northern-long eared bat. Prior to issuing the Decision, however, the BLM failed to request from FWS whether any listed or proposed species may be present in the area of the proposed action, in violation of the ESA. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12. Listed or proposed species may be present in the area of the prospecting permits, and therefore the BLM's failure to prepare a "biological assessment" to determine whether the listed species may be affected by the permits further violates the ESA. *Id.* Moreover, the prospecting permits may affect listed species or critical habitat, and thus the BLM's failure to engage in consultation with FWS further violated the ESA. 50 C.F.R. § 402.14. The BLM's failure to insure, in consultation with FWS, that the May 1, 2020 Decision is not likely to jeopardize the continued existence of any threatened or endangered species, or result in the destruction or

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<sup>6</sup> See Attachment D.

adverse modification of the critical habitat of such species, violates Section 7 of the ESA. 16 U.S.C. § 1536(a)(2).

As further set forth in the Appellants' sixty-day notice letter under the ESA, the Forest Service, BLM and FWS also have violated and remain in violation of the ESA by failing to reinitiate consultation on the 2012 Federal Hardrock Mineral Prospecting Permits project, despite the wolves being back on the list of threatened species, and the listing of the northern long-eared bat, and new information revealing effects of the project that may affect listed species and critical habitat in a manner and to an extent not previously considered. 50 C.F.R. § 402.16(a).

### **C. The BLM Failed to Comply with the Agency's Regulations**

Pursuant to the BLM's regulations, in order to extend a prospecting permit, the agency must prove that the mining company "explored with reasonable diligence," and was unable to determine the existence and workability of a valuable deposit covered by their permit. 43 C.F.R. § 3505.62(a). "Reasonable diligence means that, in BLM's opinion, you drilled a sufficient number of holes or performed other comparable prospecting to explore the permit area within the time allowed," or "Your failure to perform diligent prospecting activities was due to conditions beyond your control." 43 C.F.R. § 3505.62(a), (b). There is no evidence in the May 1, 2020 Decision that BLM required Twin Metals to prove that it had explored with reasonable diligence on each of the 13 prospecting permits prior to BLM approving the expansion on the permits. BLM's approval of the expansions therefore violates this regulation. 43 C.F.R. § 3505.62.

### **CONCLUSION**

For the above stated reasons, Appellants provide this notice of appeal of the BLM's May 1, 2020 Decision approving Twin Metal's prospecting permit extensions on the Superior National Forest.

Dated May 27, 2020.

/s/ Marc D. Fink  
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*Attorney for Appellants*

Attachments, submitted herewith:

- A: Excerpt of Twin Metals Mine Plan of Operations.
- B: Maps of Twin Metal's proposed Mine Plan, Leases, and Permits.
- C: Forest Service's Dec. 14, 2016 letter to the BLM.
- D: Appellants' May 20, 2020, Endangered Species Act Notice Letter.
- E: Excerpt of Forest Service's Aug. 29, 2012 Response to Administrative Appeal.
- F: Map of Twin Metals Preference Right Lease Application.

Declarations of Appellants' Members, submitted herewith:

Steven Koschak

Rebecca Rom

Collette Adkins

John Ipsen

**CERTIFICATE OF SERVICE**

I certify that on May 27, 2020, in accordance with all applicable rules, I served this

Notice of Appeal and Statement of Reasons by federal express delivery, upon:

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