

Community Involvement in Mine Permitting and Compliance

The requirements for permitting large mines are extensive and complicated. Mine permitting is a complicated multi-year process, involving dozens of individual permits and about 11 different agencies, both state and federal.¹ Despite this mine permitting procedures are often not protective of the environment and community health. This summary provides an overview of the mine permitting process and how communities can get involved, but it is not meant to be an exhaustive review of mine permitting laws.

State of Alaska

The State of Alaska requires many permits in order for a mine to become operational. Some of the permits are required by Alaska and some permits are required by the federal government. Examples of these permits include the following:

- Plans for monitoring waters, ground waters, fisheries and wildlife
- Solid waste disposal and air quality permits
- Approval that cultural resources are adequately protected
- A reclamation plan

All of these permits require mining companies to meet certain criteria to be approved by the regulating agencies. Information provided by local people, and especially subsistence users, can affect the final decisions about environmental permits. For example, Tribal involvement is vitally important in designating cultural resources. Public participation is important at both the federal and state levels.

Federal

Mines requiring a permit from the federal government must meet the requirements of the National Environmental Protection Act (NEPA). Congress enacted NEPA in 1969, in response to the public's concerns about the environmental and social impacts of unrestricted industrial development.² The NEPA process is important because it requires significantly more research and public discussion than State permits do. Examples of Federal permits that trigger an evaluation under NEPA include the following:

- U.S. Environmental Protection Agency (EPA): Clean Water Act Section 401

National Pollution Discharge and Elimination System (NPDES) Permit for mine discharges

-U.S. Army Corps of Engineers: Clean Water Act Section 404 Wetlands Dredge and Fill Permit for mining activities near wetlands

National Environmental Protection Act (NEPA) Process:

The purpose of this act is to require federal agencies to consider all of the environmental impacts of proposals before taking action. The initial step of this process is completing an Environmental Assessment (EA), a preliminary document that determines whether the environment will be significantly impacted by the project. After completing an environmental assessment, if the agencies determine the effects of a proposed action will not have a significant impact on the environment then a "Finding of No Significant Impact" (FONSI) statement will then be available for public comment review, and challenge.

If the effects of a proposed action may potentially have a significant impact on the environment, an Environmental Impact Statement (EIS) will be written. The EIS is a comprehensive document produced to record the present state of the environment and discuss likely impacts of proposed mining activities. The public is included in the process at multiple levels, from scoping out likely impacts to commenting on draft statements. The EIS process is one of the areas where local people can influence decisions about mines. However, areas of concern identified by local people will not necessarily be fully discussed in the Environmental Impact Statement.

The Environmental Impact Statement is required to discuss any direct or indirect impacts to the environment or communities. Such impacts could include *"ecological, aesthetic, historic, cultural, economic, social, or health [impacts], whether direct, indirect, or cumulative."* It is important to understand that the EIS will only investigate areas that are assumed to have impacts or that were identified as public concerns in the scoping process. For example, the EIS will probably not investigate culturally important landmarks or areas, unless those are identified by local people during the scoping process. Early involvement can help to identify areas of concern for the EIS to review. Identification of negative impacts in the EIS does not necessarily mean the mine will fail to be permitted. Federal agencies are required to discuss environmental impacts and reasonable alternatives publically, but are not required to select the most environmentally sound option.

Despite its clear intention to protect the health of people and the environment, NEPA and EIS have numerous failings. One of which is that human health is discussed narrowly and often without consideration of the broad influence of the environment.

Health Impact Assessment

Health Impact Assessments (HIAs), which cover potential impacts to human health in more depth and breadth, are becoming increasingly popular. Unlike Environmental Impact Statements, HIAs focus on how a proposed policy or project will affect human health, including indirect effects. Health impact assessments are designed to judge *“the potential, and sometimes unintended, effects of a policy, plan, programme or project on the health of a population and the distribution of those effects within the population. HIA identifies appropriate actions to manage those effects.”*³ Federal and state agencies are not required to do a HIA, but the incorporation on a HIA into the assessment of a mining project provides the framework for an in depth discussion of potential impacts on tribal and community health. Tribes may make an HIA a condition of their contract with mining companies, or contact the EPA and assert their right to an HIA through self determination of policies that affect Tribal welfare.

Indigenous Rights

Alaska Natives have greater rights than other citizens of the State of Alaska with respect to their influence on mining activities on Native lands.

ANCSA

Alaska is unique when compared to tribal interests in the lower 48 United States in that, with few exceptions, there are not reservations or lands set aside by the federal government for Alaska Native peoples.⁴ Before the 1950s, Congress made no effort to determine the legal status of Native land claims in the territory of Alaska.⁵ After significant litigation, Congress passed a comprehensive law regarding the land rights of Alaska Natives. In 1971, Congress agreed to compensate Alaska Natives for taking their land through the Alaska Native Claims Settlement Act (ANCSA). The monetary compensation of \$962.5 million was given to 13 regional Native corporations which were developed as part of the act. In addition, 40 million acres of federal land were conveyed to Alaska Natives through village and regional corporations. Village corporations were given 22 million of the 40 million surface acres (the rights to resources above ground). Regional corporations were given all 40 million of the subsurface acres (the rights to resources underground) and 18 million of the remaining surface acres.

Following the passage of ANCSA, in order for mining to take place on Tribal lands, mining companies must have the permission of the corporations that control the surface and subsurface rights to the lands. However, the permission of local tribes is not necessarily required, so disagreement between tribal governments and Native Corporations may arise.

While some federal laws governing Alaska Natives are unique to Alaska, tribes in Alaska have the same status as tribes in the contiguous 48 states. In 1993, the Department of the Interior ruled that Alaska Native villages and corporations are

“entitled to the same protection, immunities, and privileges as other acknowledged tribes.”⁶ This means that Alaskan Native peoples retain their rights as sovereign governments, and the federal government must interact with them as such.

ANILCA

Another federal law which has important implications for Alaska Natives is the Alaska National Interest Lands Conservation Act of 1980 (ANILCA).⁷ It gives all people living in rural areas of the state a priority right to hunt and fish on public lands for subsistence purposes. It requires both the U.S. Department of the Interior and the State of Alaska to protect certain Native subsistence rights which may be impacted by industrial and mining operations.

Executive Order 13175⁸ and The Presidential Memorandum on Tribal Consultation⁹

The unique rights of Alaska Natives and Native Americans have been further supported by a series of executive orders and memorandums. These executive actions reaffirm tribal governments are sovereign entities, and state that whenever possible agencies should defer to tribes to establish standards and policies. These executive actions reaffirm the need for extensive consultation with tribal governments on any actions that may affect tribal welfare. These the executive actions are not laws, but they do direct the policy of the executive branch and Federal agencies.

UN declaration on the Right of Indigenous People¹⁰

The protection of Indigenous Peoples from actions that affect their health and livelihood are supported internationally as well. The U.N. declaration on the Rights of Indigenous People clearly outlines the inherent rights of Indigenous Peoples to maintain their lifestyle and culture. The declaration clearly states that that States should prevent “any action which has the aim or effect of dispossessing them of their lands, territories or resources” and additionally that Indigenous Peoples have the right “to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.”

Strategies for Tribal Involvement in Mine Permitting and Compliance

1. Participate in the scoping process

The scoping process is the first opportunity to participate in the NEPA process. Tribes can identify significant issues that should be analyzed in the EA or EIS, identify sources of information (especially those in the possession of indigenous interests, identify data gaps and informational needs, and also identify alternatives to a proposed action. This is good time to assert the need for a Health Impact Assessment in addition to the EIS.

2. Protect subsistence resources by using the federal trust responsibility under ANILCA¹¹

In section 810 of ANILCA, federal agencies that issue permits, leases, and take other actions with regard to federal land must consider the impact of these actions on subsistence and consider available alternatives to reduce the impact on subsistence. When an EA or EIS is drafted, tribes and local people should ensure that subsistence impacts have been thoroughly considered by the agency. ANILCA is coordinated by the Office of Project Management and Permitting in the Alaska Department of Natural Resources.

3. Assert tribal right to government-to-government consultations¹²

This is a way for tribal governments to ensure that they are consulted about the environmental impact of a proposed project. An official representative for the tribal government should be designated to establish a tribal consultation plan with the appropriate agency. Such consultation should start via written documents requesting such consultation.

4. Assert tribal right to be a cooperating agency

Cooperating agencies work in conjunction with the lead agency to provide perspectives, opinions, and expertise in the development of an EIS and HIA. The advantage of becoming a cooperating agency is that tribes can have direct and early involvement in key decisions. These include the scope of the EIS or HIA, the nature of the alternatives considered, and the degree of public involvement. As a cooperating agency, tribes have the opportunity to both shape the process and educate the agency on the impact of a proposed project.

5. Request training and educational opportunities

These are ways to learn more about the environmental implications of a project. For example, tribes can request technical training on NEPA through the Bureau of Indian Affairs. Tribes may request site visits to mines or proposed mine sites. It may be appropriate for tribal interests to request assistance with securing funding for tribal consultants to review the mine proposal and its related analysis documents.

6. Ensure that Traditional Ecological Knowledge is incorporated into NEPA documents when it is deemed desirable by a tribe

Traditional Ecological Knowledge can be used to evaluate the environmental impacts of a proposal or to develop alternatives. Some examples of Traditional Ecological Knowledge that may be included in an EA or EIS are observations of the environment, climate, habitat, and migratory patterns of fish and wildlife. Subsistence harvest practices, subsistence resources and subsistence areas also may be important to include in NEPA documents.

Keep in mind that sensitive information may not be kept private in the NEPA process.

Where Traditional information may be sensitive or where divulging traditional uses or locations is a problem, there are mechanisms to ensure that the information remains confidential. This information can still be used to benefit the analysis and thereby potentially protect tribal interests. The nature of and protection of sensitive or confidential information should be discussed and a plan established to protect it before it is divulged.

7. Use provisions of the Federal Coastal Zone Management Act

Under the Coastal Zone Management Act of 1972, "any Federal agency which shall undertake a development project in the coastal zone of a state shall insure that the project is, to the maximum extent practicable consistent with the enforceable policies of approved state management programs."¹³ Therefore, NEPA requires that proposed actions are evaluated to see if they are "consistent" with the State coastal zone management program. In some areas of Alaska, tribal governments have worked with boroughs to develop regional coastal zone management programs that protect subsistence areas vital to their community.

8. Ensure that consultation requirements are being met under state and federal cultural resource protection statutes.

Tribes have a right to be involved in the federal decision making process about actions which may impact cultural properties and cultural resources. The National Historic Preservation Act of 1966 (NHPA), the Archaeological Resources Protection Act (ARPA), and the Native American Graves Protection and Repatriation Act (NAGPRA) are among the statutes that protect historically and culturally significant places from being destroyed by development. According to the Alaska State Preservation Act before a "permit for the investigation, excavation, gathering, or removal from the natural state, of any historic, prehistoric, or archeological resources" is issued for a site with "significance to a cultural group, the consent of that cultural group must be obtained before a permit may be issued under this section."

9. Participate in public hearings and meetings

Hearings provide an opportunity to present information to improve the NEPA process and decision. Tribal members can educate agencies on the tribal perspective and also provide site specific information that has been passed down for generations. To provide an effective public hearing, the agency should provide reasonable accommodation so that many members of the tribe can participate. Printed materials may need to be translated into Native languages and interpreters may be needed. Also, hearings should be scheduled at times that do not conflict with important subsistence and

cultural activities.

10. Take agencies/project proponents on a site visit

This provides another way for tribes to educate agencies and project proponents about the cultural and natural significance of tribal lands as well as impacts that the project may have on the tribe's way of life.

11. Develop a tribal community environmental plan

This is a community resource plan that documents the traditional territory of a tribe and important cultural and natural resources. Specifically, a tribe may develop a tribal comprehensive plan, a watershed plan, or a subsistence use plan. The plan could document sensitive habitat in the area, traditional uses of the area, and future tribal goals for the area. A tribal community environmental plan can be helpful because it streamlines the tribe's role in contributing to NEPA, establishes the tribe as having expertise about the area, and demonstrates legal standing if the tribe appeals NEPA actions.

12. Take a proactive role in project monitoring and oversight

NEPA does not dictate specific outcomes or ways to manage environmental damage; it only provides the framework to consider and document potential effects to the environment and people. By monitoring the projects, tribes have the ability to ensure that adverse impacts are brought to the public attention and considered by the action agencies. Mitigation measures detailed in the EIS may then be used to avoid or decrease these impacts.

13. Use provisions of the Executive Memorandum 12898, Environmental Justice

In 1994, President Clinton issued Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" to focus the attention of federal agencies on human health and environmental conditions in minority and low income communities. Under this order, all federal agencies are required to adopt strategies that will address environmental justice concerns within NEPA and other agency procedures. The provisions of this Memorandum can be used to make the NEPA process more culturally appropriate and accessible to Alaska Native communities.

Citizen Suits

If mines fail to comply with their permit, citizen suits present a means to force compliance with environmental permits and applicable laws. Citizen suits are direct legal action by citizens of the U.S. against violators of Federal laws. Citizen suits often cost the violator far more than fines imposed by federal agencies, and therefore are an extremely effective means of forcing compliance.

Equally importantly and perhaps more frequently used, citizens may sue a state or federal agency for failure to enforce regulations. An attorney is typically required to successfully carry out a citizen suit, but the laws allow for the collection of attorneys fees from the violator.

The first step in undertaking a citizen suit is to document that there has been a violation of a regulation (or law) or permit. Typically, citizens must notify the violator, the EPA and the State of intent to sue for compliance with permit or regulation. The violator is then given 60 days to voluntarily comply before legal action takes place. Citizens may not sue a violator of these acts if a federal agency or state is already diligently prosecuting to enforce compliance. Not all laws allow for citizen suits, but several important environmental laws can be enforced by citizens.

Clean Water Act¹⁴ and Clean Air Act¹⁵

These acts regulate the release of pollutants into waters and air. This includes the enforcement of permits issued for releases of pollution.

Endangered Species Act¹⁶

This act provides endangered species protection from extinction "*as a consequence of economic growth untempered by adequate concern and conservation.*"

Safe Drinking Water Act¹⁷

This act is designed to monitor contamination of drinking water to ensure it meets EPA standards; it includes ground water and surface waters that contribute to drinking water.

Solid Waste Disposal Act¹⁸ (as amended by Resource Conservation and Recovery Act)

This act provides the authority for the EPA to regulate the generation, transportation, treatment, and storage of hazardous wastes.

Surface Mining Control and Reclamation Act¹⁹ (specific to surface coal mining)

This act is the primary regulatory law on surface coal mining. It provides for the permitting, inspection and enforcement of surface coal mines.

Conclusions

There are numerous permitting and legal obstacles that must be met before a mine can become operational. More often than not, agencies require mining companies to alter their procedures to qualify for permits. Many permits require public *notification*, but rarely is public *participation* required. Overall tribes have greater rights than citizens in regards to mining, but concerned people and communities must take an active approach if they wish their opinions and questions to be heard and addressed. Even when the public is proactive, government agencies may still permit unpopular mining projects.

If mines fail to comply with regulations once they are permitted, they are typically subject to fines by state and federal agencies. If these agencies are not adequately enforcing compliance, citizens can enforce compliance with applicable regulations by directly suing the regulatory agencies and through citizen suits.

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¹ Alaska Resource Development Council. Alaska's Mining Industry. Available: <http://www.akrdc.org/issues/mining/overview.html>

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⁵ Prevar, SL. 2004. *The Rights of Indians and Tribes*, (3rd ed.). New York: New York University Press.

⁶ Fed. Reg. Oct. 21, 1993, 58 Fed Reg. 54, 364-65.

⁷ 16 U.S.C. § 3120.

⁸ Executive Order 13175. 2000. Federal Register 65(218)

⁹ Presidential Memorandum on Tribal Consultation. 2009. Federal Register 74(215)

¹⁰ United Nations. 2007. United Nations Declaration on the Rights on Indigenous Peoples, General Assembly Resolution 61/295. Available: <http://www.un.org/esa/socdev/unpfii/en/drip.html>

¹¹ Mittelstaedt G, Suagee D, Nelson LH. 2000. NEPA/TEPA Guide for American Indian and Alaska Native Communities. Available: http://www.tulalip.nsn.us/pdf.docs/Tribal_EA_Handbook.pdf

¹² Indian Law Resource Center. 2005. Federal statutory opportunities for the protection of the Yukon River watershed in Alaska and the Yukon Territory. Available:

http://www.indianlaw.org/sites/indianlaw.org/files/resources/federal_strategies_handbook.pdf

¹³ 16 U.S.C. § 1451 *et seq.*

¹⁴ 33 U.S.C § 1251 *et seq.*

¹⁵ 42 U.S.C § 7401 *et seq.*

¹⁶ 16 U.S.C § 1531.

¹⁷ 42 U.S.C. § 300f *et seq.*

¹⁸ 42 U.S.C. § 6901 *et seq.*

¹⁹ 30 U.S.C. § 1201 *et seq.*