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RESEARCH

CONSERVATION AND FORESTRY

January 27, 2020

Ms. Victoria Christiansen
Chief
U.S. Forest Service
U.S. Department of Agriculture
1400 Independence Ave, SW
Washington, DC 20250

Dear Chief Christiansen:

We write to express our deep concern with the U.S. Forest Service's (USFS) March 14, 2018, decision to approve non-federal representative (NFR) status to Midas Gold (Midas) for the proposed Stibnite Mine in Idaho.¹ This NFR status, and the associated memo that outlines the implementation plan for the Biological Assessment (BA),² gives Midas authority to write the BA required by the Endangered Species Act (ESA).³ Allowing a mining company to author its own BA on its project's potential impacts to ESA-listed species creates potential conflicts of interest and undermines public confidence in the permitting process. It also fails the spirit of the ESA and potentially violates related National Environmental Policy Act (NEPA) regulations.

We request:

- 1) USFS provide to Congress all records relating to USFS's granting Midas NFR status for the proposed Stibnite Mine.
- 2) USFS provide to Congress a list of all proposed major hardrock mines where the permit applicant sought or received NFR status.
- 3) USFS revoke its decision granting NFR status to Midas for the Stibnite project.

Background

Midas has proposed the Stibnite Mine, a large open pit, cyanide leach gold mine on approximately 1,500 acres of unpatented National Forest system lands in the Payette National

¹ USDA Forest Service, Letter to Laura Sayer, Midas Gold, from Keith Lannom, Forest Supervisor, December 12, 2018. Available at: https://www.dropbox.com/s/bppas0mcqz42rg6/20181212_SGP_BA_Sideboards-signed.pdf?dl=0

² USDA, U.S. Forest Service, Letter to Laura Sayer, Midas Gold, from Keith Lannom, Forest Supervisor, December 12, 2018. Available at: https://www.dropbox.com/s/bppas0mcqz42rg6/20181212_SGP_BA_Sideboards-signed.pdf?dl=0

³ 50 CFR § 402.12(b)(1)

Forest. This area resides at the headwaters of the East Fork of the South Fork of the Salmon River, providing habitat for three threatened ESA species: Snake River Steelhead trout, Chinook salmon and Bull trout.⁴ The mine plan involves developing three open pits and permanently storing 450 million tons of toxic mine waste. Midas further proposes to permanently store their waste in the Meadow Creek Valley, critical habitat for Chinook salmon and Bull trout.

The salmon and steelhead runs at risk from these mining activities provide valuable public resources, with recreational, subsistence, cultural, and economic importance to the region. The Nez Perce Tribe has invested considerable resources restoring salmon and salmon habitat in the area harmed by previous mining operations.

Granting NFR designation for a major cyanide leach gold mine to a Canadian mining company is unnecessary, inappropriate, and conflicts with the public's interest in unbiased science-led decision making.

Granting Midas NFR Status Creates a Potential Conflict of Interest and is Unnecessary

Emails obtained by Earthworks through a Freedom of Information Act request show Midas applied for NFR status on January 12, 2018, and the Payette Forest Supervisor initially intended to deny the request. Yet, by December 12, 2018, the USFS had reversed that position and given Midas Gold NFR status and the authority to draft the Biological Assessment.⁵

Despite the Forest Supervisor's opposition, records indicate Midas did receive NFR status only after further "conversations with Midas, legal counsel, and the Region, and Washington Office."⁶ The Forest Supervisor had based his initial denial, in part, on an anticipated "may affect, likely to adversely affect" determination under Section 7 of the ESA,⁷ meaning the Stibnite Mine project is likely to adversely affect the salmon and trout or their habitat.

A "may affect, likely to adversely affect" determination may also require Midas to perform mitigation measures or alterations to the proposed mine plan that could increase their construction, operation, reclamation, or other costs. Midas therefore has a compelling financial interest in avoiding this determination or underestimating the magnitude of the potential adverse impacts of a "may effect" determination. To avoid this conflict, USFS should require an independent, unbiased expert to write the BA.

⁴ USDA, U.S. Forest Service, Stibnite Gold Project Briefing Paper, Payette and Boise National Forests Intermountain Region, August 22, 2018. Available at: https://www.dropbox.com/s/i539v8osffo8gfc/FW%20%20Stibnite%20Briefing%20Paper.msg.eml.pdf.MGM2018_StibniteGold_EIS_02_26.docx?dl=0

⁵ USDA, U.S. Forest Service, Payette National Forest, Letter from Keith Lannom, Forest Supervisor to Laurel Sayer, President Midas Gold, December 12, 2018. https://www.dropbox.com/s/bppas0mcqz42rg6/20181212_SGP_BA_Sideboards-signed.pdf?dl=0

⁶ Ibid.

⁷ USDA, U.S. Forest Service, Stibnite Gold Project Briefing Paper, Payette and Boise National Forests Intermountain Region, August 22, 2018. Available at: https://www.dropbox.com/s/i539v8osffo8gfc/FW%20%20Stibnite%20Briefing%20Paper.msg.eml.pdf.MGM2018_StibniteGold_EIS_02_26.docx?dl=0

An October 5, 2018 memo from the NEPA Review Team Lead with the USFS Intermountain Region Office highlighted the irregularities with this NFR. The memo noted “the Forest Service does not routinely designate a non-federal representative,” and the Forest Supervisor’s initial NFR denial came from an apparent obligation to carry out his duties and responsibilities under the ESA while respecting “accepted practices for dealing with permit applicants.”⁸ It further expressed a potential concern that granting NFR to a large mine to write its own BA may be perceived as leading to a predetermined outcome.

Furthermore, the NEPA Review Team Lead shared the Forest Supervisor’s concern that Midas could exert undue influence on the BA, stating:

“It is unclear if the consultation process has benefited from the non-Federal representative status. What is clear is Midas Gold’s perception that non-Federal representative status will allow greater access and influence to the Endangered Species Act consultation process.”⁹

Granting NFR status to Midas for the Stibnite project was also unnecessary since the Payette Forest Supervisor had already developed a thorough NEPA review and ESA consultation plan and secured an independent third-party contractor to assist. In fact, the NEPA Review Team Lead confirmed the Forest Supervisor had “sufficient personnel with experience and expertise in the consultation process.”¹⁰ If USFS knows NFR status is unnecessary, and believes Midas will use their NFR to exert greater influence, then USFS should revoke NFR from Midas.

USFS Reliance on an NFR with a Financial Interest in the Outcome May Violate NEPA Regulations Prohibiting Bias or Conflicts of Interest

Later this month, USFS is scheduled to release their Draft Environmental Impact Statement (DEIS) on the Stibnite project pursuant to their legal obligations under NEPA and the final Record of Decision by February 2021. NEPA regulations require that any entities preparing portions of an Environmental Impact Statement (EIS) not have any “financial interest in the outcome of the project.”¹¹ The Midas BA is a critical portion of the EIS process analyzing the mine’s impacts and consideration of alternatives.

Any person, including a mining company, may submit information to an agency or EIS contractor. However, the project applicant may not unduly influence the language of the document or be, in effect, the de facto preparer of portions of the EIS. See Colorado Wild, Inc. v. U.S. Forest Service, 523 F.Supp.2d 1213, 1229-1230 (D. Colo. 2007).

⁸ U.S. Forest Service, Intermountain Region, Letter to Forest Supervisor, Payette National Forest re: Stibnite EIS process, October 5, 2018. Available at:

<https://www.dropbox.com/s/jqv44m5a2fwjyb/October%205%20letter.pdf?dl=0>

⁹ Ibid.

¹⁰ Ibid.

¹¹ 40 CFR § 1506.5(c)

According to USFS, Midas intends to prepare the BA concurrently with the development of the EIS.¹² By allowing Midas to prepare the BA, a significant portion of the wildlife section of the upcoming EIS, USFS fails to meet this fundamental requirement for an unbiased NEPA process.

Conclusion

The American people must have confidence that science, and not politics, drives the environmental review process and vital Chinook salmon and Steelhead trout populations receive the necessary protection required under the ESA and NEPA. We therefore urge the USFS to reinstate public confidence in the Stibnite Mine ESA review process by revoking NFR status and reinstating an independent third-party consultant to author and lead the Biological Assessment.

Sincerely,



Chellie Pingree
Member of Congress



Betty McCollum
Member of Congress



Alan Lowenthal
Member of Congress



Raúl M. Grijalva
Member of Congress



Nanette Diaz Barragán
Member of Congress



Debra Haaland
Member of Congress

¹² U.S. Forest Service, Intermountain Region, Letter to Forest Supervisor, Payette National Forest re: Stibnite EIS process, October 5, 2018. Available at: <https://www.dropbox.com/s/jqv44m5a2fwjyjb/October%205%20letter.pdf?dl=0>