

July 9, 2009

Mr. Jim Sanders  
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Superior National Forest Supervisor  
8901 Grand Avenue Place  
Duluth, Minnesota 55808

Mr. Michael Jiménez  
United States Forest Service  
Superior National Forest Planner  
8901 Grand Avenue Place  
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RE: Federal Hardrock Minerals Prospecting Permits Project on the Superior National Forest Environmental Impact Statement Scope

Dear Mr. Sanders, Mr. Jiménez:

This letter is submitted on behalf of WaterLegacy, a non-profit organization founded to protect Minnesota water resources and the communities who depend on them. WaterLegacy appreciates Mr. Jiménez' recent email communicating the continuing openness of Superior National Forest (SNF) to public comment on the scope of the Environmental Impact Statement pertaining to Federal Hardrock Minerals Prospecting Permits on the Superior National Forest ("SNF Prospecting Permits EIS").

WaterLegacy has reviewed the April 1, 2009 letter and Attachments on the SNF website and the Memorandum of Understanding pertaining to the proposed EIS. We have also reviewed comments by the Friends of the Boundary Waters Canoe Area Wilderness and Minnesota Center for Environmental Advocacy ("MCEA") and support their comments regarding adverse impacts of prospecting and the potential that issuance of permits may be contrary to the public interest. WaterLegacy shares concerns raised by the MCEA that the SNF Prospecting Permits EIS may itself be an inappropriate abnegation of the mission of the Forest Service to protect the Superior National Forest.

Without waiving our objection to the NEPA process itself, we address our comments to the possibility that the SNF Prospecting Permits EIS will move forward. First, WaterLegacy emphasizes the need to ensure that this EIS will not be used to weaken the environmental review process. Our comments then propose that the SNF Prospecting Permits EIS clearly define the scope of potential permit applications that are excluded from the scope of the proposed prospecting project and should be denied. The SNF Prospecting Permits EIS should also define which prospecting permits may be presumed, absent clear and convincing evidence to the contrary, to be antithetical to the public interest. WaterLegacy also proposes that, in addition to researching adverse impacts of prospecting activities, the SNF Prospecting Permits EIS set minimum

mitigative conditions that would apply to any prospecting permits granted within the Superior National Forest. Finally, WaterLegacy expresses our concerns that the EIS process include tribal participation and a more transparent process to involve members of the public.

### **1. WaterLegacy Opposes any Use of the SNF Prospecting Permits EIS to Weaken the Environmental Review Process.**

It is not entirely clear from the documentation on the SNF web site how the SNF Prospecting Permit would be used. Mr. Sanders' April 1, 2009 letter to Forest Users stated that the EIS will address federal hardrock mineral exploration for: "1) 32 current permit applications; 2) future permit applications, current and future operating plans; and 3) future use and occupancy authorizations (Special Use Permits) on the SNF over the next 20 years." The letter further stated that the Bureau of Land Management ("BLM") would adopt the EIS to support their own Record of Decision.

#### Delay SNF Prospecting Permits EIS Pending Complete Information

WaterLegacy joins with MCEA in expressing concern that the information required to begin the National Environmental Policy Act ("NEPA") review process of permit applications is inadequate. WaterLegacy believes that, in order to conduct a NEPA review, at least the following information would need to be available for each of the permit applications to which the EIS would apply: maps of the proposed prospecting locations; specific descriptions of the proposed prospecting project, including but not limited to method of access, areas where vegetation will be removed or impaired, depth of drilling, likely quantity and chemical constituents of waste rock, likely quantities, locations and types of potentially polluting materials and substances to be used, plan and site map for sump construction, waste rock storage, temporary and permanent reclamation, description of hydrology and water quality, including potential for impairment of adjacent or receiving waters, identification of rare and endangered plant and animal species, habitat and ecosystems in proximity to proposed access and drilling sites, and other information sufficient to identify the prospecting project and the nature and scope of environmental impacts.

WaterLegacy first requests that the NEPA process should not begin until such information is received for any permits to which it would apply. WaterLegacy also suggests that the SNF provide on its website current and updated information as the applicants comply with this preliminary requirement pursuant to 43 C.F.R. §3505.45.

#### Limit EIS Scope – Mining or Leasing Require Separate EIS

Next, WaterLegacy believes it is critical for the SNF Prospecting Permits EIS to state unequivocally that this EIS **will not** serve as environmental review for any of the following: 1) granting of future mineral leases; 2) permitting of future mining operations; 3) allowing any other use, occupancy or operation that is not identified in the applications for permits which are explicitly included in the SNF Prospecting Permits EIS.

The SNF Prospecting Permits EIS should be identified to apply only to prospecting permits and not to any other activities that may be later identified. This EIS should clearly state that any future mining or leasing activities or operations will be presumed to require an additional individual environmental review specific to that mining or leasing project

#### Comprehensive Review of Individual Permits and Alternatives

Third, WaterLegacy requests, for any prospecting permit to which the EIS applies, that a comprehensive environmental review be conducted, including consideration of whether the proposal is in an area or category where permitting is prohibited or presumed to be contrary to the public interest. In all cases, the SNF Prospecting Permits EIS should also evaluate alternatives, including the “no-build” alternative for the proposed permit.

If the SNF Prospecting Permits EIS does not provide detailed review of each individual permit, the EIS should state that the EIS only serves to define exclusion areas, locations and types of prospecting that are presumed to be contrary to the public interest and minimum conditions for prospecting. The EIS should then explicitly state that every individual permit must also be individually reviewed to determine, among other issues, whether a proposed drilling permit would impact federally listed threatened or endangered species, critical habitat, wetlands, existing or potential wilderness or wilderness protection areas, tribal usufructuary rights or religious or cultural values, or water quality impacts on watersheds and impaired waters under the Clean Water Act.

#### Limit Scope to Documented Permit Applications

As a corollary to our concern about the lack of information regarding the 32 existing permit applications, WaterLegacy opposes the application of the SNF Prospecting Permits EIS to any future permit applications in addition to the existing applications. The potential for cumulative environmental harm to the SNF and adjacent lands and watersheds over a period of 20 years with a theoretically unlimited number of permits is overwhelming. Future permit applications, by their nature, location or by their sheer number, might require different analysis, conditions and limitations than that developed at this time at the onset of accelerating hardrock prospecting in the SNF.

Although the exclusionary areas and categories where a permit is presumed to be against the public interest should be carried forward to future environmental review of prospecting permits, future permits may raise new issues requiring additional exclusions or conditions to strengthen and protect the environment and the purposes of the Superior National Forest.

## **2. WaterLegacy Requests that the EIS Clearly Prohibit Issuance of Prospecting Permits in Areas Where Mining Would be Excluded.**

Mr. Sanders’ April 1, 2009 letter proposed that the area of potential permitting and drilling under the SNF Prospecting Permits EIS would exclude the following areas:

- Lands within the Boundary Waters Canoe Area Wilderness (“BWCAW”);
- Lands within the Mining Protection Area (“MPA”);
- Eligible Wild River Segments (identified in Figure 1); and
- Lands that do not have both Forest Service surface ownership and federal mineral ownership.

WaterLegacy appreciates that these exclusions are protective of natural resources and supports the limitations on the scope of potential permitting and drilling that they reflect.

However, WaterLegacy believes that the SNF Prospecting Permits EIS should define a broader scope of exclusion in order to prevent potential permitting and drilling adjacent to or hydrologically proximate to the BWCAW or MPA from adversely impacting these areas. Water Legacy notes that subsection (a)(3) of Section 11 of the Boundary Waters Canoe Area Wilderness Act requires this additional protection:

SEC. 11. (a) In addition to any other applicable prohibition or withdrawal from entry or appropriation under any provision of the Wilderness Act or under any other provision of law, no permit, lease, or other authorization may be issued by any agency or authority of the United States for --  
. . . (3) the use of property owned by the United States in relation to any mining of or exploration for minerals *in such areas which may materially impair the wilderness qualities of the wilderness area or which may materially impair the natural values and environmental quality of the mining protection area.* (Public Law 95-495, emphasis added)

WaterLegacy requests that the SNF Prospecting Permits EIS state that prospecting permits should be denied in any location where prospecting or future mining for which prospecting is sought may materially impair the wilderness qualities of the BWCAW or the natural values and environmental quality of the MPA. The EIS should then set forth criteria by which the BLM should deny drilling permits to prevent impairment of qualities of the BWCAW and MPA, including but not limited to quietude, visual qualities of vegetation and scenery, surface water and groundwater quality, air quality, habitat and protection of rare and endangered species.

In addition, WaterLegacy believes that the SNF Prospecting Permits EIS should explicitly state that prospecting permits should be denied in any area where surface, strip or open-pit mining (as opposed to underground mining with minimal surface disruption) may be required to exploit any minerals identified. Destruction or removal of the surface of the Superior National Forest is incompatible with the purposes for which the SNF was created. Disruption of the forest to prospect for minerals that cannot be mined consistent with SNF management creates certain harm and unlikely benefits, and should not be permitted. To Mr. Sanders’ exclusion categories, we would suggest adding the following:

- Lands on which prospecting or future mining for which the prospecting permit is sought may materially impair the wilderness qualities of the BWCAW;
- Lands on which prospecting or future mining for which the prospecting permit is sought may materially impair the natural values and environmental quality of the MPA;
- Lands on which surface, strip or open pit mining, (as contrasted with underground mining with minimal surface disruption) would be required to exploit the minerals for which prospecting is proposed.

### **3. WaterLegacy Requests that the SNF Prospecting Permits EIS Establish Presumptions that Certain Permits are Contrary to the Public Interest.**

WaterLegacy is concerned about both the local and cumulative impacts of prospecting activities contemplated in the Superior National Forest. The Attachments pertaining to the SNF Prospecting Permits EIS suggest that prospecting permits may include “bulk sampling,” disturbing as much as two acres of land with a single permit; that a driving shaft could generate up to 225,000 cubic feet of waste rock, which might remain exposed on a site for 10 years or more. The Attachments also note that prospecting activities might result in construction of new roads, as well clearance of vegetation in the area needed for drilling, thus fragmenting habitat and allowing unauthorized motorized access through the Superior National Forest.

Although not specifically discussed in the materials on the SNF web site pertaining to the SNF Prospecting Permits EIS, WaterLegacy members have been made aware of existing and potential future drilling sites underneath waters of the state, including lakes, rivers and streams. The potential for contamination of waters, the difficulty in monitoring or detecting spills and the challenges of reclamation of aquatic habitat raise significant environmental concerns.

WaterLegacy proposes that the EIS discuss in detail the adverse environmental impacts of bulk sampling, construction of new roads and prospecting through or beneath state water bodies. The EIS should also evaluate other types of prospecting likely to conflict with the SNF forest management plan and materially impair environmental resources. In addition to describing impacts, WaterLegacy would request that the SNF Prospecting Permits EIS specifically state that certain prospecting activities should be presumed to be contrary to the public interest and should not be permitted in the SNF unless compelling evidence is presented by applicants to justify such exploration. Subject to additions and modifications as the EIS develops, WaterLegacy suggests that the following types of prospecting activities be presumed contrary to the public interest:

- Prospecting activities requiring new road construction through the SNF;
- Bulk sampling prospecting activities;
- Prospecting activities through or beneath waters of the state, including lakes, rivers and streams;

**4. WaterLegacy Requests that the EIS Analyze Impacts and Specify Minimum Mitigating Conditions Applicable to any Prospecting within the SNF.**

The Attachments pertaining to the SNF Prospecting Permits EIS raise a number of concerns regarding potential adverse impacts of prospecting activities on water quality and other natural resources as a result of road construction, clearance of vegetation, disruption of wetlands, creation of waste rock piles with the potential for acid rock drainage and heavy metals discharge, creation of sumps, usage of culverts and water diversions, chlorination of water, noise, and usage of petroleum products and other hazardous materials which may contaminate sumps and other site areas. To the extent that diesel-operated and gasoline-operated vehicles and machinery are used, local air emissions may also be a significant adverse impact of prospecting activities.

The Attachments also note that the state of Minnesota requires water use permits for use equal to 10,000 gallons per day, while approximately 1,000 to 2,000 gallons of water are used per day for each hole for a drill site, depending on subsurface conditions. It is clear from this discussion that cumulative impacts of multiple independent drill sites could impact hydrology without even triggering water use permit requirements.

WaterLegacy believes that the SNF Prospecting Permits EIS should include a detailed analysis of each of the issues identified above along with the concerns raised in the comments of the Friends of the BWCAW and MCEA and should, specifically, include analysis of impacts of prospecting activities on air quality, global warming, wetlands, hydrological changes, acid rock drainage, toxic metal discharge and methylation of mercury from sulfate emissions. WaterLegacy also specifically requests that EIS analysis address both direct harm and habitat fragmentation for rare and endangered species, species of concern and species of significance to tribes due to any of activity related to prospecting, including clearing of vegetation.

In addition to conducting appropriate research and analysis, WaterLegacy requests that the SNF Prospecting Permits EIS specify baseline mitigative measures to protect natural resources within the SNF. These conditions would be a minimum to which additional mitigation might be added on a case-by-case basis. As a preliminary suggestion, subject to review and addition as more information is developed, WaterLegacy would request that the following baseline conditions be considered as minimum requirements for any drilling permitted within the SNF:

- Require posting of a bond for reclamation and reevaluation every 2 years of the sufficiency of the bond;
- Require monitoring and reporting to assess if drill site cuttings or down hole additives will impact potable water, surface waters, groundwater and groundwater recharge to surface waters;

- Require monitoring to determine level and nature of discharge to surface and ground waters;
- Strictly prohibit any discharge or seep, whether through surface or groundwater, point or nonpoint sources that may affect the BWCAW or other waters designated as Outstanding Resource Value Waters under state or federal law;
- Prevent location of sump pits near water bodies;
- Preclude drilling in wetlands areas when ground is not frozen;
- Require replacement of wetlands disrupted or impaired by prospecting activities;
- Require aggregation of drilling permits affecting the same or related surface or groundwater resources for purposes of water use permit requirements;
- Require specific technologies, such as liners, and specific operational procedures, such as off-site vehicle maintenance, to prevent petroleum products from contaminating the site;
- Require testing of drill cuttings and ground up subsurface rock for sulfur content, and require off-site disposal of drill cuttings if sulfur content is above a specified level;
- Establish limits on the size and sulfur concentration of waste rock piles and require covering of waste rock piles, use of liners, seepage collection systems and early reclamation to prevent acid rock drainage and metal leaching from waste rock piles;
- Require prompt (within 6 months) plugging of drill holes, along with inspection to verify quality of seal wherever mixing of aquifers or of groundwater and surface water could result.
- Establish decibel limits and limits on hours of operation of equipment and surveillance flights;
- Establish emissions limits for vehicles with diesel, 2-cycle and 4-cycle engines used in connection with prospecting activities;
- Require specific temporary and permanent reclamation procedures to prevent continued access through roads and cleared vegetation sites.

**5. WaterLegacy Requests that Impacts of Prospecting Permits on Tribal Rights, Cultural Resources and Environmental Justice be Addressed before this EIS Process Proceeds.**

WaterLegacy is troubled by the lack of reference to tribal governance, treaty rights or tribal resources in the documents summarizing the proposed SNF Prospecting Permits EIS. It is unclear to WaterLegacy whether tribes have been consulted regarding the scope of the proposed EIS or whether they have played any role in its development.

WaterLegacy does not presume to speak for tribal interests, but we are concerned that proposed prospecting permits may affect treaty rights and obligations, to which we are all bound. The proposed prospecting permits may also impact historical or biological resources of importance to various tribes or may result in disproportionate adverse impacts to tribes and, thus, environmental injustice. WaterLegacy would request that the SNF Prospecting Permits EIS process, from its inception, solicit participation from

affected tribes and document not only tribal comments, but potential impacts to culturally significant resources. This EIS process may need to be held in abeyance at this time in order to ensure such participation.

**6. WaterLegacy Requests that Efforts be Made to Facilitate Public Participation in the Environmental Review and Permitting Process.**

WaterLegacy requests that SNF leadership take this opportunity to enhance the ability of members of the public to understand and participate in environmental review of activities pertaining to prospecting and mining in the Superior National Forest. Greater transparency would assist the SNF in obtaining public input and would allow members of the public to understand the permitting process and trust that their concerns will be considered along with other perspectives. Specific suggestions for enhancing public participation include the following:

- State clearly on the SNF web site any schedule or deadlines for any environmental review process, including dates for public meetings and deadlines for public comment, where applicable.
- Provide members of the public an opportunity, through the SNF web site, to sign up to receive electronic or postal service mail notices of 1) permit applications pertaining to mining or prospecting in the SNF, 2) steps in the process of environmental review of the SNF Prospecting Permits EIS, or 3) other environmental review processes with respect to mining or prospecting in the SNF.
- Create an on-line resource for the SNF Prospecting Permits EIS where members of the public may view key documents, including permit applications, technical documents and comments by agencies and members of the public on scoping, preliminary and draft environmental impact statement documents as well as final EIS documents.

WaterLegacy greatly appreciates the opportunity to comment regarding the scope of the SNF Prospecting Permits EIS. Please do not hesitate to contact me at 651-646-8890 if you have any questions.

Sincerely,



Paula Goodman Maccabee  
Attorney for WaterLegacy