

August 1, 2022

Title XVII Loan Guarantee Program RFI
U.S. Department of Energy, Loan Program Office
1000 Independence Avenue SW,
Washington, DC 20585-0121
Attn: LPO Legal Department

Submitted electronically via email to LPO.ProposedRuleComments@hq.doe.gov

Dear Director Shah,

Thank you for the opportunity to comment on the Department of Energy's (DOE) Loan Programs Office (LPO) Request for Information (RFI) for the Title XVII Innovative Technologies Loan Guarantee Program (Title XVII program).¹ We appreciate that DOE seeks to “improve the Title XVII Loan Guarantee Program” and “expand or modify the authorities applicable”, to align with the Administration's policies.² Please accept these comments on behalf of the undersigned organizations whose particular concerns relate to the human and environmental impacts of mining and mineral processing. We respectfully urge DOE to implement the Title XVII program to benefit and protect underserved communities.³

When DOE considers an Eligible Project in the mineral supply chain:

- 1) DOE should require Project Sponsors perform human rights and environmental due diligence (HREDD) on their mineral supply chains in accordance with internationally accepted standards.
- 2) DOE should require Project Sponsors execute a Community Benefits Agreement with underserved communities impacted by the Eligible Project where applicable.
- 3) DOE should require Project Sponsors obtain all federal, state, and local authorizations as a condition precedent to executing a Loan Guarantee Agreement.
- 4) DOE should prioritize funding for recycling, reuse and other circular economy projects above extraction for virgin minerals.

¹ See 87 Fed. Reg. 33,141 (June 1, 2022).

² Ibid.

³ See [Executive Order 13985: Advancing Racial Equity and Support for Underserved Communities Through the Federal Government](#), 86 Fed. Reg. 7,009 (Jan. 20, 2021). The term “underserved communities” refers to populations sharing a particular characteristic, as well as geographic communities, that have been systematically denied a full opportunity to participate in aspects of economic, social, and civic life, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality.

We discuss each of these four priorities in detail below.

General Comments

We appreciate the Administration's commitments to Justice40,⁴ environmental justice,⁵ secure supply chains,⁶ and Indigenous Traditional Ecological Knowledge (ITEK).⁷ We also support the Interior Department's new Missing and Murdered Unit,⁸ which seeks to address the staggering rates of violence against Indigenous persons, especially women and girls—much of which is connected to mineral supply chains. DOE should reflect these Administration values in the Title XVII program's Purpose and Scope.⁹ DOE should also recognize ITEK, where appropriate, as New or Significantly Improved Technology.¹⁰ These commitments also compel DOE to require mineral supply chain due diligence and Community Benefits Agreements in the Title XVII program.

DOE has the opportunity to live up to the President's promise to address “the historic injustices that too many mining operations have left behind.”¹¹ Those injustices stem, in part, from settler-colonial policies, including those enforced by the Departments of War and Interior, that targeted Indigenous peoples during the 19th century precious metals rush.¹² The Departments of

⁴ See FACT SHEET: President Biden Takes Executive Actions to Tackle the Climate Crisis at Home and Abroad, Create Jobs, and Restore Scientific Integrity Across Federal Government (Jan 27, 2021) at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/27/fact-sheet-president-biden-takes-executive-actions-to-tackle-the-climate-crisis-at-home-and-abroad-create-jobs-and-restore-scientific-integrity-across-federal-government/>.

⁵ See Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, 86 Fed. Reg. 7,491 (Jan. 26, 2021) at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-and-strengthening-nation-to-nation-relationships/>; Executive Order 13985: Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 86 Fed. Reg. 7,009 (Jan. 20, 2021) at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/>.

⁶ See 86 Fed. Reg. 11,849 (March 1, 2021) at <https://www.federalregister.gov/documents/2021/03/01/2021-04280/americas-supply-chains>.

⁷ See Office of Science and Technology Policy Memorandum on Indigenous Traditional Ecological Knowledge in Federal Decision Making (Nov. 15, 2021) at <https://www.whitehouse.gov/wp-content/uploads/2021/11/111521-OSTP-CEO-ITEK-Memo.pdf>.

⁸ See Secretary Haaland creates new missing and murdered unit to pursue justice for missing and murdered American Indians and Alaskan Natives DOI Press Release (April 2021) at <https://www.doi.gov/news/secretary-haaland-creates-new-missing-murdered-unit-pursue-justice-missing-or-murdered-american>.

⁹ See 10 CFR 609.1(d).

¹⁰ See 10 CFR 609.2. Simply because technology is new to DOE, does not make it new. Since time immemorial Indigenous Peoples have used traditional knowledge in stewarding their ancestral lands with resulting “avoidance, reduction, or sequestration of air pollutants and/or anthropogenic emissions of greenhouse gases”.

¹¹ See supra at note 2. President Biden's remarks on February 22, 2022 at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/02/22/remarks-by-president-biden-at-a-virtual-event-on-securing-critical-minerals-for-a-future-made-in-america/>.

¹² See Gregory Michno (2016), *The Deadliest Indian War in the West, The Snake Conflict, 1864-1868*. See also, Benjamin Madley (2016), *An American Genocide: the United States and the California Indian Catastrophe*. See

Defense's and Energy's mining subsidies and mineral activities compounded this intergenerational trauma during the 20th century uranium rush.¹³ DOE's Title XVII program must not perpetuate systemic injustices; instead the program should help ensure underserved communities benefit.

DOE Loan Guarantee Agreements Should Contain Mandatory Due Diligence Mechanisms

Project Sponsors receiving support through the Title XVII program must have mandatory due diligence standards to align with the Administration's values. DOE should require due diligence standards within the Term Sheets, Conditional Commitments, and Loan Guarantee Agreements, as applicable, to provide evidence of the Project Sponsor's human rights and environmental due diligence (HREDD) across their full supply chains. This means, for instance, Project Sponsors based in the U.S., whose mineral supply chains include sourcing raw materials from outside the U.S., should be required to show evidence of the steps they have taken to identify and address the human rights risks associated with the extraction of those minerals.¹⁴

Importantly, DOE's Title XVII Loan Program must respect the sovereignty of Indigenous peoples and other rights holders, specifically their right to Free, Prior, and Informed Consent (FPIC) with regard to the Eligible Project. The World Bank's International Finance Corporation (IFC) Performance Standards (PS) require FPIC for large scale infrastructure projects impacting the rights of Indigenous peoples.¹⁵ PS1 focuses on social and environmental impact assessments, emphasizing project information transparency to affected communities. PS2 through eight PS8

also, Federal Boarding School Initiative Investigative Report, Assistant Secretary of Indian Affairs, Bryan Newland (2022) at https://www.bia.gov/sites/default/files/dup/inline-files/bsi_investigative_report_may_2022_508.pdf.

¹³ See Eastern Navajo Dine' Against Uranium Mining (ENDAUM) et al. Petition before the Inter-American Commission on Human Rights (July 2021) at https://nmelc.org/wp-content/uploads/2021/07/endaum_final_petition_with_figures-1.pdf. See also Interior Department Press Release (March 17, 2022): Secretary Haaland Takes Equity and Inclusion to the Next Level at SXSX at <https://www.doi.gov/pressreleases/secretary-haaland-takes-equity-and-inclusion-next-level-sxsx>. "Like many people of color, I come from a community that has dealt with the decisions of an Interior Department and a federal government that didn't appreciate or respect our history, our culture, or our autonomy. All of that has led to environmental injustice. I know first-hand what it looks like to have a toxic, abandoned mine in my community. I've seen families struggle with the health impacts of that, and with the environmental degradation of what detonating dynamite every day for 30 years caused, while the largest open pit uranium mine in the world was made. The company then simply abandoned it when it was no longer cost effective, and it took decades to remedy."

¹⁴ See DOE LPO Announcement (April 18, 2022). LPO Offers First Conditional Commitment for Critical Materials Project for Syrah Vidalia to Support Domestic EV Supply Chain at <https://www.energy.gov/lpo/articles/lpo-offers-first-conditional-commitment-critical-materials-project-syrah-vidalia>. See also E&E/Politico (June 10, 2022): Attacks spark security concerns for potential U.S. graphite supplier, by Jael Holzman at <https://subscriber.politicopro.com/article/eenews/2022/06/10/attacks-spark-security-concerns-for-potential-us-graphite-supplier-00038841>.

¹⁵ See World Bank IFC Performance Standards at https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/policies-standards/performance-standards.

addresses common risks to projects like hardrock mines and mineral processing that require special safeguards, including FPIC.

DOE's due diligence standards should align with the UN Guiding Principles on Business and Human Rights (UNGPs), and reflect the Project Sponsor's past performance on human rights, anti-corruption, support for collective bargaining, project-level payment transparency, and beneficial ownership information.

The UN Guiding Principles on Business and Human Rights (UNGPs),¹⁶ the OECD Due Diligence Guidance for Responsible Business Conduct Guidelines,¹⁷ and supporting guidance on mineral supply chains provide the starting framework for responsible business conduct. These guidelines are internationally recognized, critical tools to advance responsible business conduct and address inequality. They create an ongoing obligation of companies to implement due diligence to identify and address the severe impacts these businesses cause the planet and people, women and girls in particular, in due consultation with affected rights-holders. Project Sponsors should have oversight and responsibility for performing due diligence.

There is a growing global movement to legally require companies to undertake human rights due diligence across their supply chains. In addition to the recently passed EU Battery Directive,¹⁸ mandatory due diligence schemes are being proposed by civil society and/or at various levels of the legislative process in Mexico,¹⁹ Canada,²⁰ the EU, and in the legislatures of more than a dozen European countries. The US risks falling further behind if it does not adopt its own legally-binding human rights due diligence schemes.

Taken together, the UNGPs and OECD Due Diligence guidelines and supporting guidance create an ongoing obligation of companies to implement HREDD to identify and address—through prevention or mitigation—the severe impacts these businesses cause the planet and people—women and girls in particular—in due consultation with affected rights-holders. Project

¹⁶ See Guiding Principles for Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework at <https://www.unglobalcompact.org/library/2>.

¹⁷ See OECD Due Diligence Guidance for Responsible Business Conduct Guidelines at <https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>.

¹⁸ See Transport & Environment and Amnesty International Press Release (March 10, 2022): “MEPs back new human rights and green rules for batteries” <https://www.transportenvironment.org/discover/batteries-will-need-to-comply-with-new-human-rights-and-green-rules/>

¹⁹ See “Mexico: Corporate “Due Diligence” in the field of Human Rights: the new challenge for companies” at <https://ecija.com/en/sala-de-prensa/mexico-corporate-due-diligence-in-the-field-of-human-rights-the-new-challenge-for-companies/#:~:text=Due%20diligence%20implies%20that%20States,to%20ensure%20the%20companies%27%20behavior.>

²⁰ See “Broad support for Canadian mandatory human rights and environmental due diligence legislation” at <https://cnca-rcrce.ca/2021/11/22/broad-support-for-canadian-mandatory-human-rights-and-environmental-due-diligence-legislation/>.

Sponsors should have oversight and responsibility for performing due diligence and report to DOE and underserved communities on performance.

HREDD involves assessing actual or potential adverse impacts on rights-holders, including Indigenous peoples', integrating findings into management plans, taking action, providing remedy and gender-responsive grievance mechanisms when violations occur, and tracking and communicating externally on performance. It is an ongoing process, requiring periodic review and revisions as project operations and operating contexts change.

DOE Should Require Community Benefits Agreements in the Title XVII program

DOE should require each Project Sponsor, as applicable, to execute a Community Benefits Agreement (CBA) with underserved communities impacted by the Eligible Project. A Community Benefits Agreement means a written agreement that, when entered into by and between a Project Sponsor and representatives from underserved communities, describes that portion of Project Costs offered to underserved communities to, at their sole discretion, "provide facilities and services related to safety and environmental protection".²¹ The CBA should be attached in Terms Sheets, Conditional Commitments, and Loan Guarantee Agreements.

The CBA should also obligate each Applicant, Borrower, or Project Sponsor, as applicable, to respect and uphold Indigenous Peoples and customary land rights holders right to Free, Prior and Informed Consent (FPIC). Other CBA terms may include, but not limited to, special protections for cultural heritage, opportunities for underserved communities in environmental management, equitable revenue sharing, local employment and training, and enforceable grievance mechanisms. DOE should adjust its fee structures at 609.11(f) for all CBA associated costs or expenses.

DOE Should Require Project Sponsors Obtain All Required Regulatory Authorizations

Eligible Projects within the mineral supply chain should obtain all required regulatory approvals before DOE executes a Loan Guarantee Agreement.²² Current rules allow for DOE to guarantee loans to Borrowers who have applied for, but not received, regulatory approval. This is inappropriate for mineral supply chain projects that may have significant environmental and social impacts.

Sometimes the applicable law may preclude at least one of the required permits sought along the project's mineral supply chain. Or, the Eligible Project will destroy lands sacred to Indigenous

²¹ See 10 CFR 609.10(a)(4).

²² See 10 CFR 609.8(c)(15). DOE rules require Borrowers to apply for applicable permits but do not expressly condition execution of a Loan Guarantee Agreement upon the Project Sponsor obtaining the permits.

Peoples or habitat for endangered species.²³ Or, the Eligible Project could later result in enormous taxpayer liability from pollution.²⁴ Allowing agencies with expertise in environmental and social governance to issue or deny permits, before DOE guarantees project loans will help mitigate investment risks. This deference to other agencies and underserved communities will assist DOE in making smart investment decisions for the Title XVII loan program.

DOE Should Prioritize Developing a Circular Economy

Meeting the nation's critical materials needs can and should not be met by new mining and mineral processing alone. Given the harmful environmental, social, and cultural impacts of hardrock mining, and given the enormous growth in demand for lithium, cobalt, nickel, and other materials already seen across many sectors, the government should work alongside underserved communities and other stakeholders to develop a robust materials recycling sector.

Reducing the demand for newly-mined materials should be a primary goal of the DOE LPO. DOE can accomplish this through developing and prioritizing recycling, reuse, and substitution policies. According to the University of Technology Sydney, effectively recycling end-of-life batteries could reduce global EV mineral demand 55% for newly mined copper, 25% for lithium, and 35% for cobalt and nickel by 2040.²⁵ Materials recycling will create good, permanent jobs, especially for communities that otherwise might be reliant on boom-and-bust mining. DOE's Title XVII program support can help overcome current infrastructure hurdles for a domestic circular economy by funding better design, collection, sorting, and transport of end use products such as batteries, and the minerals contained in them.

Conclusion

We appreciate DOE's interest in steering the Title XVII program to more closely align with the Administration's priorities. Given the President's priorities, we urge this program to impose due diligence standards and require Community Benefits Agreements with underserved communities, where applicable. DOE should prioritize material circularity; and generally allow all

²³ For example, if the Fish and Wildlife Service adds the Tiehm's Buckwheat to the endangered species list, DOE should not use the Title XVII program to support a mineral processing facility with supply linked to a proposed mine threatening Tiehm's habitat. Similarly, DOE should not use the Title XVII program to support mineral processing served by a mine on the sacred site of a Department of War massacre of at least 31 Northern Paiute on September 12, 1865. See also note 12, supra. Nor should DOE Title XVII funds support a mineral processing facility where the federally recognized tribes have passed resolutions of opposition, as with the White Mesa uranium mill.

²⁴ See *Chevron Mining Inc. vs. United States*, 2022 U.S. Dist. LEXIS 115141 *; 2022 WL 2314818 (Decided June 28, 2022). Holding that the Federal Government is liable to Chevron for \$1 billion under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund law) for the pollution resulting from a former molybdenum mine funded by a \$3 million Defense Production Act loan guarantee.

²⁵ See Recycling Electric Vehicle Battery Minerals Can Significantly Reduce Need for New Mining at <https://earthworks.org/releases/report-recycling-electric-vehicle-battery-minerals-can-significantly-reduce-need-for-new-mining/>.

communities impacted by Eligible Projects along the mineral supply chain to benefit from this program. Thank you for your consideration.

Sincerely,

Earthworks

Earthjustice

Observatoire d'étude et d'appui à la responsabilité sociale et environnementale

Common Defense

Center for Biological Diversity

Great Basin Resource Watch

Cultural Survival

Grand Canyon Trust