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July 29, 2011

Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Ave., NW
Washington, DC 20460

Attn: Docket ID No. EPA-HQ-OW-2011-0409

RE: U.S. EPA and U.S. Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the Clean Water Act

Dear Sir/Madam:

The Northwest Mining Association (NWMA) appreciates the opportunity to comment regarding the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) proposed “Guidance Regarding Identification of Waters protected by the Clean Water Act,” 76 Fed. Reg. 24,479 (May 2, 2011). NWMA views the draft guidance as an effort by the EPA and the Corps to implement, through mere guidance, the goals of the Oberstar/Feingold Clean Water Restoration Act legislation that justifiably failed in the 111th Congress.

NWMA is a 116 year old, 2,000 member, non-profit, non-partisan trade association based in Spokane, Washington. NWMA members reside in 42 states and are actively involved in exploration and mining operations on public and private lands, especially in the West. Our diverse membership includes every facet of the mining industry including geology, exploration, mining, engineering, equipment manufacturing, technical services, and sales of equipment and supplies. NWMA’s broad membership represents a true cross-section of the American mining community from small miners and exploration geologists to both junior and large mining companies. More than 90% of our members are small businesses or work for small businesses. Most of our members are individual citizens.

The proposed guidance, unlike previous guidance documents, will be used by the EPA and the Corps (Agencies) to interpret the term “waters of the United States” in the context of all programs authorized under the Clean Water Act (CWA), including Section 404 discharges of dredged or fill material, the Section 402 National Pollutant Discharge Elimination System (NPDES) permit program, the Section 401 state water quality certification process, and Section 303 water quality standards and total maximum daily load programs. As such, the proposed guidance will pervade all stages of mining operations, and will have a substantial negative impact on NWMA members and the U.S. mining industry.

The Agencies' decision to issue guidance on this topic as opposed to a rulemaking runs contrary to the expressed views of a majority of the U.S. Supreme Court and the requirements of the Administrative Procedure Act (APA). Despite repeated claims by the Agencies that they would promulgate a rulemaking, they have not. Instead, the Agencies continue to make important changes to their regulations and expand their CWA jurisdiction through mere guidance, shortcutting critical rulemaking requirements such as providing a response to public comments, providing a rationale and factual basis for an agency decision and producing a final decision that can be judicially reviewed.

The proposed guidance represents a significant rewrite of the current regulations, guidance and agency policy that governed jurisdictional determinations for the history of the regulatory program. It expands the universe of waters that will be considered "traditional navigable waters" by including for the first time ever, waters that support one-time recreational use. In addition, the proposed guidance gives new and expanded regulatory status to "interstate waters," equating them with traditional navigable waters, and in addition, making it easier to find jurisdiction for adjacent wetlands, tributaries and other waters judged by a newly crafted significant nexus test. The Agencies have expanded their CWA jurisdiction in a manner unsupported by their regulations and the Supreme Court decisions in *SWANCC* and *Rapanos*.

The proposed guidance completely eliminates any requirement that a hydrologic connection is necessary and further expands jurisdiction beyond what Congress and the Supreme Court intended by applying a broadened view of Justice Kennedy's significant nexus standard not only to wetlands (as Kennedy did in *Rapanos*) but also to tributaries and isolated water. Furthermore, the proposed guidance allows for decisions to be based on general scientific literature describing functions applicable to the types of waters in question, in lieu of actual case-specific analysis of the water itself.

Therefore, according to the proposed guidance, an entire group of waters could be determined jurisdictional without ever performing an analysis of those waters. This approach appears inconsistent with the Kennedy decision and not scientifically based. Moreover, when asked, the Agencies could not name a water that would not provide at least one of these functions, making the point that use of functionality to find federal jurisdiction is overly inclusive and threatens to capture all waters.

In addition, the proposed guidance creates a completely new concept of allowing for "aggregation" of the contributions of all similar waters *within an entire watershed*, making it far easier to establish a significant nexus between these small intrastate waters and newly expanded roster of traditional navigable waters. This novel concept results in a blanket jurisdictional determination for an entire class of waters within an entire watershed. Similarly, a blanket determination imposing federal CWA jurisdiction diminishes private property and mineral lease values while neglecting important due process rights of those individual property owners.

The proposed guidance is inconsistent with the Agencies' regulations and the Supreme Court decisions. For example, the current regulations say nothing about ditches, but the proposed guidance regulates all roadside and agricultural ditches that have a channel, have an ordinary

high water mark, and can meet 1 of 5 characteristics. In addition, the current regulations determine jurisdiction over all waters not in any of the other categories (also known as the “other waters”) based on certain specific connections to interstate commerce. The proposed guidance replaces this standard with the significant nexus test. Moreover, the proposed guidance defines a significant nexus as anything that is “more than speculative or insubstantial,” thus turning Justice Kennedy’s “significant” nexus into an “any” nexus standard. These and numerous other changes made by the proposed guidance that significantly broaden the Agencies’ CWA jurisdiction find no support in the Supreme Court decisions.

The Agencies have acknowledged some of the material economic impacts of the proposed guidance. EPA has estimated the annual costs of implementing the guidance will be between \$87 million and \$171 million, and the EPA arrived at that number without taking into consideration permitting costs, the increased delays associated with expanded federal jurisdiction and the costs of new land use restrictions. The proposed guidance will impose a significant economic burden on NWMA’s members.

The Metals Economics Group produces an annual report “World Exploration Trends” which tracks global exploration and industry trends. The 2011 report estimates that nonferrous exploration budgets for 2010 totaled \$12.1 billion. Despite significant mineral resources, the United States attracts only 8% of total world-wide exploration dollars. An annual report prepared by Behre Dolbear entitled “2011 Ranking of Countries for Mining Investment -- Where ‘*Not to Invest*’” provides insight into why the U.S. lags in attracting job creating exploration dollars.

According to the Behre Dolbear report, the U.S. ranks dead last in terms of permitting time among the top 25 mining countries in the world. Consequently, the U.S. is seeing fewer investment dollars for new projects, leading to an increased reliance on foreign imports. According to the U.S. Geological Survey, the U.S. is now 100% dependent on foreign sources for 18 strategic nonfuel mineral materials and more than 50% dependent for 43 nonfuel minerals, despite having abundant resources of many of these materials.

The Agencies’ proposal to unilaterally expand federal jurisdiction under the CWA on top of an already broken permitting process will lead to even more permitting delays, exacerbating the Nation’s dependence on foreign minerals and metals and frustrating job creation.

This Nation is in the midst of a fragile economic recovery. In January, President Obama acknowledged in his Executive Order on Improving Regulation and Regulatory Review that through regulations we at times place “unreasonable burdens on business – burdens that have stifled innovation and have had a chilling effect on growth and jobs.” The president’s Executive Order intends to root out those regulations. It is greatly disappointing to see the Agencies release the proposed guidance in direct contradiction to the common sense Executive Order from President Obama.

In addition, the proposed guidance has drawn bipartisan opposition in Congress. In an April letter to EPA Administrator Lisa Jackson and Assistant Secretary of the Army for Civil Works Jo Ellen Darcy, 170 Members of Congress expressed their concerns regarding the guidance.

Subsequently, the House Appropriations Committee included funding prohibitions for the Agencies from using any funds to implement, administer or enforce a change to a rule or guidance document pertaining to the definition of waters under the jurisdiction of the Clean Water Act. Clearly, there is overwhelming opposition to the Agencies' proposal.

In conclusion, the proposed guidance is intended to and will have a material impact on CWA permitting and enforcement nation-wide because it broadly expands the Agencies' CWA jurisdiction. As such, the Agencies violated the APA and the express views of the Supreme Court by issuing guidance on this topic as opposed to a formal rulemaking.

The Agencies purport that the proposed guidance will increase clarity and improve the consistency and predictability of Corps and EPA jurisdictional determinations, but the guidance itself is convoluted and complicated. The proposed guidance will undermine the federal-state CWA partnership that has long existed, resulting in confusion and further delaying permitting processes and will unnecessarily stifle job creation. Therefore, we urge you to withdraw the proposed guidance immediately.

Thank you for your consideration of our comments.

Sincerely,

A handwritten signature in cursive script that reads "Laura Skaer".

Laura Skaer
Executive Director