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10 N Post St Ste 305 | Spokane WA 99201-0705

Phone: 509.624.1158 | Fax: 509.623.1241

E-mail: nwma_info@nwma.org | Web: www.nwma.org

January 19, 2010

Christopher Knopes, Director
National Planning, Measures, and Analysis Staff
Office of Enforcement and Compliance Assurance
Mail Code: M2221A
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Attention Docket ID No. EPA-HQ-OECA-2009-0986; FRL-9098-3

Dear Mr. Knopes:

The Northwest Mining Association (NWMA) appreciates the opportunity to submit the following comments in response to the U.S. Environmental Protection Agency's (EPA) notice for "Public Comment on Candidate National Enforcement and Compliance Assurance Priorities for Fiscal Years 2011-2013."

NWMA is a 115 year old, 1,800 member, non-profit, non-partisan trade association based in Spokane, Washington. NWMA members reside in 40 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.

For Fiscal Years 2011-2013, EPA proposes 15 priority candidates. Three of these priority candidates directly impact the mining industry and our members: (1) mineral processing (a national priority since 2005); (2) energy/mining resource extraction (a new priority candidate targeting mountaintop mining specifically and eastern U.S. coal in general); and (3) wetlands (a new priority generally targeting dredge and fill permits). Two of these priorities may indirectly impact the mining industry: (1) surface impoundments (a new priority); and (2) environmental justice (a new priority).

NWMA is strongly opposed to the proposed continuation of the mineral processing national priority, as well as EPA's plans to establish new national enforcement and compliance assurance priorities on energy/mining resource extraction and wetlands. Additionally, we have concerns regarding the potential impact on the industry of the surface impoundments and environmental justice priorities.

NWMA Opposes Continuing the Mineral Processing National Priority

EPA is requesting comment on whether to continue the national enforcement and compliance priorities for mineral processing through FY 2013. EPA's background paper refers to the inspections completed in FYs 2005-2008 to support its continuation of the priority. EPA states that these inspections "demonstrate a pattern of violations of environmental laws for solid and hazardous waste disposal at mineral processing and mining facilities at a significantly higher percentage in this sector than in other sectors." EPA concludes that "mining and mineral processing waste stored in surface impoundments leak and cause widespread environmental damage even if a portion of the hazardous waste is continuously recycled on-site." EPA further concludes that "many facilities inspected by EPA do not accurately record the specific chemical composition of the substances present in soil or waste impoundments."

However, EPA's rationale for continuing the enforcement and compliance priority for mineral processing through 2013, as stated in the background document, completely disregards the fact that compliance rates have increased for the mineral processing industry. In fact, the agency touts on its website that it completed inspections at 40 non-phosphoric mineral processing facilities. Of those facilities, 47 percent are "currently taking the necessary steps to achieve compliance" and the other 53 percent "were found to be in compliance, or had only minor violations." EPA also states: "Of the 18 facilities in the phosphoric acid sub-sector that were determined to be in non-compliance, 100% of these facilities are now taking the necessary steps to achieve compliance."

EPA's stated goal is to "achieve maximum compliance with environmental regulations in order to protect human health and the environment." The results of the inspections prove that the agency has achieved this goal. Consequently, EPA's proposed continuation of the enforcement and compliance priority for the mineral processing industry is unsubstantiated. In fact, EPA provides no new evidence that any compliance issues exist for the mining and mineral processing industry. Instead, the agency repeats references to past environmental damage cases (without providing the name of the facility, the date of the occurrence, or whether it was successfully resolved), and generally cites "[a] growing body of evidence" showing environmental damage from leaking surface impoundments. This alleged evidence, however, is not provided in the docket.

Overall, it is completely unclear why EPA believes "process-based inspections and sampling by [the agency] are necessary." What significant environmental benefits can be gained, or risk to human health or the environment be reduced, through this proposed action, particularly when the agency has not proven a pattern of noncompliance? If EPA believes there continues to be a pattern of noncompliance, EPA must share the inspections, data, or other information relied upon with the mining and mineral processing industry, and allow an opportunity to comment on that information.

EPA has expended significant resources on this national priority over the last several years; resources should not be wasted on a national priority that has already achieved success in increasing compliance rates.

NWMA Urges EPA Not to Duplicate Efforts

EPA proposes to add surface impoundments as a national enforcement and compliance priority for FYs 2011 through 2013. Generally, EPA cites the potential for illegal discharges of hazardous waste into surface impoundments, as well as environmental risks related to poorly constructed or mismanaged surface impoundments. EPA targets the chemical and allied products, petroleum products, and paper and allied products in the background paper for this candidate priority.

While EPA does not specifically mention the mining and mineral processing industry as a focus of this candidate priority, NWMA is concerned that the agency will use this priority to duplicate efforts already completed in the mining and mineral processing national priority.

EPA should not use or threaten to use a separate enforcement initiative on surface impoundments to conduct further inspections of mining and mineral processing facilities. These facilities have already been inspected and thoroughly scrutinized by the agency under the mining and mineral processing enforcement and compliance initiative. EPA provides no new evidence of noncompliance that warrants the continuation of that initiative or the application of the surface impoundment candidate priority to the mining and mineral processing industry.

EPA Should Reconsider Finalizing a Broad Environmental Justice National Enforcement and Compliance Priority

EPA proposes a geographically based enforcement and compliance priority dealing with environmental justice. According to EPA, “[t]his priority candidate would further support the Agency’s commitment to protect vulnerable communities.” Even though EPA incorporates environmental justice concerns in all of the candidate priority background papers, the agency believes that a separate priority focused solely on environmental justice “would signify OECA’s commitment to apply enforcement tools as an important means of protecting at-risk communities.”

We believe that a national enforcement priority target is ill-suited for rectifying the alleged historical underrepresentation of vulnerable populations in EPA’s decision making process. First, EPA has yet to complete its own internal guidance documents on how the agency should consider environmental justice concerns in regulatory decisions. Second, EPA just began to implement a number of new environmental justice initiatives in its program offices that should be allowed to mature before starting an unfocused enforcement and compliance initiative.

Furthermore, EPA has not identified the noncompliance issues or patterns of violations that it seeks to address through this enforcement priority. Instead, EPA summarily concludes: “The types of non-compliance data vary from community to community and cannot be specified until the communities of focus are identified.” It is premature for EPA to begin a national enforcement and compliance priority when it has not even completed the necessary analysis. EPA must abandon the flawed premise that vulnerable or at risk communities automatically equate with facility noncompliance.

While NWMA supports increased community outreach and input into environmental regulatory and permitting decisions, we do not support an unfocused national enforcement and compliance priority on environmental justice. EPA would be better served to incorporate environmental justice solely in the sector-based national priorities, and only when it is deemed that those sector-based national priorities have noncompliance issues related to environmental justice.

EPA Should Not Include Energy/Mining Resource Extraction as a New Priority Candidate

EPA proposes to include energy/mining resource extraction as a new national enforcement priority candidate. EPA has not made available any of the comments or data that would suggest there exists any noncompliance issues related to these industries that would substantiate the need for a national enforcement focus. Without the ability to review any of EPA's analysis of responses from the states and EPA Regions, it is difficult to provide the agency with much meaningful comment.

Based on our review of the EPA prepared background paper for the energy/mineral resource extraction candidate, EPA seems to suggest that an increase in the pace and intensity of energy development, including large-scale coal mining, is commensurate with environmental enforcement problems. This is simply not a fair or even reasonable assumption, and EPA supplies no data to substantiate it.

NWMA Opposes Inclusion of Wetlands as a National Priority Candidate

EPA has proposed to include wetlands as a potential enforcement candidate. The EPA background paper prepared for the wetlands candidate expresses concerns over loss of wetlands due to dredge and fill material placement as the basis for the need for national focus on wetlands enforcement compliance. However, the paper fails to report any non-compliance data. What the paper does include is a 2004 study indicating an average annual net gain in wetland acres realized over a six year period.

More recent wetland data from the Council on Environmental Quality shows that wetland gains continue to trend in the upward direction, reporting 3,600,000 acres of wetlands restored or created, improved or protected since 2004.¹ In addition, there are a number of state and Federal agencies that report successful implementation of voluntary programs. These programs are anticipated to deliver wetland increases through the next several years as new programs, policies and incentives are implemented.

These proven wetland increases reflect the federal and state regulatory agencies' commitment to wetland creation and protection. These increases, together with EPA's failure to identify any concrete evidence of widespread non-compliance in this area, would appear to suggest that EPA's enforcement resources should be focused elsewhere.

¹ See Council on Environmental Quality "Conserving America's Wetlands 2008: Four Years of Partnering Resulted in Accomplishing the President's Goal," available at <http://www.whitehouse.gov/news/releases.2008/10/20081003-10.html>.

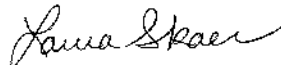
Conclusion

National enforcement priorities directed at the mining industry are unnecessary and unwarranted given the comprehensive suite of state and federal environmental laws and regulations applicable to the industry and EPA's failure to specify or substantiate any specific noncompliance issues.

EPA provides no evidence that any compliance issues exist for the mining and mineral processing industry, and scarce taxpayer resources should not be wasted on national enforcement priorities that have already achieved success in increasing compliance rates.

EPA should reconsider its National Enforcement and Compliance Assurance Priorities for Fiscal Years 2011-2013. Thank you for the opportunity to comment.

Sincerely,



Laura Skaer
Executive Director