February 27, 2013

Via http://www.regulations.gov

Michele McKeever, Branch Chief
National Planning, Measures, and Analysis Staff
Office of Enforcement and Compliance Assurance
Mail Code: M2221A
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Attention Docket ID No. EPA-HQ-OECA-2012-0956; FRL-9773-8

Dear Ms. McKeever:

The National Mining Association (NMA) submits these comments in response to the U.S. Environmental Protection Agency's (EPA) notice for "Public Comment on EPA's National Enforcement Initiatives for Fiscal Years 2014-2016." 78 Fed. Reg. 5799 (Jan. 28, 2013). EPA is seeking public comment on whether to extend the current six national enforcement initiatives, including the initiative on mineral processing, for fiscal years (FYs) 2014 through 2016. According to EPA, priority enforcement areas are chosen every three years "to focus federal resources on the most important environmental problems where noncompliance is a significant contributing factor and where federal enforcement attention can make a difference." *Id*.

NMA has a direct interest in the proposed continuation of this national priority into FYs 2014 through 2016. NMA is a national trade association representing the producers of most of America's coal, metals, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and the engineering and consulting firms, financial institutions and other firms serving the mining industry. NMA has been actively engaged in the mineral processing national enforcement initiative since EPA first proposed its inclusion in 2000, as well as the agency's formal listing of mineral processing as a priority sector in 2005. Most recently, NMA submitted extensive comments opposing EPA's proposal to continue the national enforcement initiative for the mining and mineral processing sector into FYs 2011 through 2013. NMA's comments are again attached for your information.

For the last eight years,[1] EPA has formally targeted mining and mineral processing facilities as a priority sector for enforcement.[2] As NMA argued in comments to EPA on

[1] EPA formally listed the mining and mineral processing industry as a national enforcement and compliance priority for FYs 2005 through 2007. EPA's enforcement interest in mining and mineral

Jan. 19, 2010, the agency's proposal to continue the enforcement target into FYs 2011 through 2013 was wholly unsubstantiated by the information found in the *Federal Register* notice and the supporting background documentation. Specifically, NMA expressed frustration with the fact that EPA provided no new evidence on compliance issues for the mining and mineral processing industry to justify continuation of the enforcement initiative and failed to release any details on the alleged pattern of noncompliance that it relied on to propose a continuation of the enforcement initiative. In fact, NMA pointed out the direct contradiction between the agency's rationale for continuation and the increased compliance rates the agency publicly flaunted on its website. NMA also pointed out the agency's complete disregard for the achievements made with the Office of Compliance Assistance on a keystone project to identify best management practices within the copper mining sector. Not surprisingly, NMA's concerns went unanswered and the mining and mineral processing industry was again listed as a priority sector for enforcement.

The current proposal to continue the enforcement initiative for the mining and mineral processing sector similarly fails to acknowledge key accomplishments over the last several years, while also doing a greater injustice to industry stakeholders and the public by omitting any meaningful detail on why the enforcement target should continue, the goals for the initiative or what proposed activities the agency plans to initiate over the next three years to justify agency expenditures for continuing this enforcement target. In fact, EPA's notice in the *Federal Register* provides no detail on the nature of concern for the sector as done in previous notices, except to say that the initiative "address[es] hazardous waste at phosphoric acid facilities and high risk mineral processing sites." 78 Fed. Reg. at 5799. Note that even this statement on the scope of the enforcement initiative is severely lacking because it fails to properly characterize the enforcement initiative as a multi-media effort (i.e., waste, water, toxics release reporting, etc.) that applies to mineral processing *and* mining facilities.

To fully understand the egregious lack of transparency with this year's proposal, it's necessary to compare the background documents provided by the agency at the

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processing, however, has existed since 1996. At that time, the primary non-ferrous metals (smelting/refining) sector was listed as a "national priority sector." Mining, on the other hand, was considered a "significant sector." *See* Memorandum from Steven A. Herman, EPA Assistant Administrator for Enforcement and Compliance to Regional Administrators, "Final FY 96/97 OECA Memorandum of Agreement Guidance" (July 22, 1995). *See also "*Enforcement and Compliance Assurance Accomplishments Report for FY 1997", available at http://cfpub.epa.gov/compliance/resources/reports/accomplishment/details.cfm.

[2] According to EPA, "[t]he [industry's] mishandling of mineral processing wastes [had] caused significant environmental damage and resulted in costly cleanups" and thus required a systematic inspection process of high-risk facilities that would result in solving noncompliance within the sector. 68 Fed. Reg. 68,893 (Dec. 10, 2003). More generally, EPA proffered that the mineral processing and mining sector met the selection criteria because: (1) increased national attention could lead to significant environmental benefits; (2) there were patterns of non-compliance; and (3) EPA was well-suited to take action in this strategy area.

inception of this enforcement initiative to the materials currently posted on the agency's website (no supporting documents are provided in the docket). At the start of the enforcement initiative, EPA provided a relatively detailed roadmap on how it would achieve its "performance-based strategy goal" of reducing harm to human health and the environment from the mining and mineral processing sector by achieving increased compliance rates. *See* Memorandum from Thomas V. Skinner, OECA's Acting Assistant Administrator to Regional Administrators, "Fiscal Years (FY) 2005-2007 National Program Managers Guidance (May 19, 2004) at 10-11 (detailing the agency's performance-based strategy goal for mineral processing).[3] Specifically, EPA's OECA National Program Manager's Guidance acknowledged the agency's plan to conduct 18 phosphoric acid facility inspections, five mining facility inspections and 25 mineral processing facility inspections.

EPA later provided a three-page background paper that supplied some information (although arguably limited and inappropriate information) on why the agency selected the mineral processing and mining sector as an enforcement priority, the alleged environmental problem it sought to address and how the agency would meet its goal for the priority.[4] *See* U.S.EPA, Background Paper: "Compliance and Enforcement National Priority: Mining Processing and Mining" (Nov. 2004). The background paper reiterated the plans for inspections found in EPA's OECA's National Program Managers Guidance. The paper also described the agency's plan to "[a]ggregate information on 'marquee' compliance problems—those that occur throughout an industry—and best management practices and disseminate it to the regulated community and all state and private providers of assistance."[5] This project[6] – spearheaded by the Office of Compliance and largely driven by the participation of NMA, several gold and copper mining companies and the states of Arizona and Montana – became an important goal of the national enforcement initiative known as the gold and copper compliance assistance dialogue.

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[3] This guidance was updated over the course of the three-year enforcement period. *See* Final FY2006 Update, OECA National Program Managers' Guidance (June 2005) (revised Oct. 2005) at 7-8 (retaining the same activities for meeting the performance-based strategy goal). *See also* Memorandum from Granta Y. Nakayama, OECA Assistant Administrator, to Regional Administrators and State Environmental Commissioners, "Fiscal Year (FY) 2007 Update to the FY2005-2007 National Program Managers' Guidance (June 12, 2006) at 8-9 (same as prior activities).

[4] EPA's overall goal was "to ensure that high-risk facilities in the mineral processing and mining sectors [were] in compliance, on a path to compliance or [were] otherwise working to address existing harm and reduce risk to human health and the environment."

[5] *See also* FY2006 Update, OECA National Program Managers' Guidance (June 2005) (revised Oct. 2005) at 8.

[6] EPA's invitation to join this dialogue detailed the agency's objectives: (1) discuss environmental issues encountered by both the regulators and the industries; (2) collect compliance assistance materials that are currently available; (3) determine if additional compliance assistance tools are needed; and (4) gather information necessary to develop such tools.

By the end of FY 2007, EPA completed all 50 inspections (two more than originally planned). *See* U.S.EPA, Final: Mineral Processing Summary, FY08 – FY10 Compliance and Enforcement National Priority for Mineral Processing, Planning Summary (Oct. 2007) (detailing highlights from the FY 2005 through 2007 planning cycle). While EPA stated that most of the investigations were on-going, the agency also acknowledged it was "working closely with these facilities to ensure they achieve compliance." According to the agency "any enforcement in the mining sector that was initiated during the FY2005-2007 strategy cycle, either under [the Resource Conservation and Recovery Act (RCRA)] or other regulatory authorities, [would] proceed as planned." EPA also completed its first project under the gold and copper compliance assistance dialogue – a compendium of compliance assistance resources –[7] and began work on a resource intensive dialogue with the copper sector to identify best management practices for certain environmental releases from their processes.

Moving into FY 2008 through 2010, EPA continued the enforcement initiative against the mining and mineral processing industry and broadened its plan to include other activities such as: evaluating regulatory tools other than RCRA to address environmental risks from mining operations before planning additional mining inspections and forging partnerships with the U.S. Bureau of Land Management, the U.S. Forest Service and states. *See* U.S. EPA, Final: Mineral Processing Summary, FY08 – FY10 Compliance and Enforcement National Priority for Mineral Processing, Planning Summary (Oct. 2007). EPA also recognized the ongoing compliance assistance dialogue and its commitment to moving that forward over the three-year cycle. Interestingly, EPA's OECA National Program Managers Guide contained very little information on this enforcement initiative, opting not to provide any detail on inspections previously found in the 2005 to 2007 guides. *See* Memorandum from Granta Y. Nakayama, Assistant Administrator, to Regional Administrators and State Environmental Commissioners, "Fiscal Year (FY) 2008 National Program Manager Guidance" (June 19, 2007) at 6. OECA's National Program Managers Guide also failed to recognize the important ongoing work in the compliance assistance dialogue.

Notably, during this cycle, the U.S. Department of Justice and CF Industries entered into the first settlement under the national enforcement priority for mining and mineral processing. *See* U.S. Department of Justice, ENRD Accomplishment Report, Fiscal Year 2010 at 30. EPA highlighted this consent decree as a "groundbreaking mineral processing enforcement case" that would "achieve an estimated 9.9 billion pound pollutant reduction of hazardous waste in the first year after the facility return[ed] to compliance." *See* U.S. EPA, National Enforcement Initiatives for Fiscal Years 2008 – 2010: Resource Conservation and Recovery Act (RCRA): Mineral Processing (available on EPA's website). EPA also highlighted other accomplishments achieved through the national enforcement initiative. For example, EPA acknowledged that three of the 18

[7] U.S.EPA, "Mining and Mineral Processing Compliance Assistance Resources for the Gold and Copper Industries" (March 19, 2007), *available at* http://www.epa.gov/oecaerth/resources/publications/assistance/sectors/miningcompendium.pdf (last visited Feb. 25, 2013).

phosphoric acid facilities were undergoing closure in compliance with state and federal environmental laws. According to the agency, the remaining 15 facilities were "taking necessary steps to achieve compliance and reduce environmental risk." Furthermore, the agency lauded its targeted enforcement actions on improper waste management at phosphoric acid and other mineral processing facilities that "reduc[ed] an estimated 12,000 million pounds of hazardous waste in the first year after the facilities return[ed] to compliance."

Despite all of these accomplishments and NMA's opposition to continuing the enforcement initiative against the mining and mineral processing industry, EPA retained the initiative for FY 2011 through 2013, citing only "widespread support for continuing EPA's work on reducing pollution from mineral processing operations." EPA's background paper supporting the initiative bewilderingly referred to the inspections completed in FYs 2005 through 2008 as support, even though the agency previously acknowledged that those inspections had been completed and the agency was working with those facilities to ensure compliance. *See* U.S.EPA, Background Paper for Candidate National Enforcement Priority: Mineral Processing (Jan. 2010). In fact, EPA entirely disregarded the fact that compliance rates increased for the mining and mineral processing industry since the agency began the enforcement initiative in 2005,[8] as well as the progress made in the gold and copper compliance assistance dialogue to draft a compliance assistance guide for the mining and mineral processing industry. Furthermore, the background paper provided no detail on how the agency planned to move forward on this enforcement initiative. The agency listed no new goals or performance measures for meeting those goals.

Today marks the fourth time EPA has publicly solicited comments on an enforcement target on the mining and mineral processing industry. Yet today also marks the first time EPA has essentially provided absolutely no new information on which to comment. EPA simply directs the public to its website for further information, where the public can access summaries for each of the six priorities. The summary for the mineral processing enforcement initiative includes: (1) a two sentence statement of the alleged problem with no supporting documentation (i.e., inspection reports or data); (2) an incredibly generic single sentence on the goal of the initiative with no performance measures for meeting that goal; and (3) information on the progress of the enforcement and compliance initiative that includes completely irrelevant information. The summary provides none of the history discussed above regarding the initial goals or performance measures and the accomplishments made since 2005. EPA also does not mention any of the work completed with the Office of Compliance on the compliance assistance

[8] As stated in our previous comments, EPA touted on its website in January 2010 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 stated: "Of the 18 facilities in the phosphoric acid sub-sector that were determined to be in non-compliance, 100 [percent] of these facilities are now taking the necessary steps to achieve compliance." These statistics are mysteriously no longer available on EPA's website, having been replaced with other key results.

dialogue, which is slated to complete an in-depth compliance assistance guide for the copper industry later this year. This omission is an insulting oversight, particularly considering the amount of time and resources both industry and the Office of Compliance have devoted to this project over the last several years. This project will achieve one of the major goals of the national enforcement initiative – information on "marquee" compliance problems that is disseminated to the public – and should be appropriately recognized by the agency on the enforcement website.

Not only is the website entirely deficient in the amount of information provided, it also includes completely unrelated information by highlighting two enforcement cases that have absolutely nothing to do with the mineral processing industry. Both enforcement cases listed – Triad Mining, Inc. and Ohio Valley Coal Company – are coal mining enforcement cases that have no relation to EPA's activities in regards to the mining and mineral processing enforcement initiative. The fact that the agency has not listed the CF Industries settlement shows how grossly inadequate this website is for documenting the agency's actions to date for this initiative.

Interestingly, the charts provided on the cumulative number of phosphoric acid and mineral processing facilities inspected and addressed since FY 2003 (before the formal listing of the mining and mineral processing sector as a national enforcement priority) does shed light on the progress made under the initiative. It also provides information as to why this national enforcement target should not be extended for another three years. For example, EPA states that it has inspected 20 phosphoric acid facilities between FY 2003 to 2011, addressed three facilities between FY 2003 and 2011 and addressed an additional facility in 2012.[9] EPA states that its goal is to address all 20 facilities by 2014, but the chart shows that the goal has not been met. Yet, compare these statistics and goal to EPA's statements in 2010. Then, EPA acknowledged three of 18 inspected facilities were undergoing closure in compliance with state and federal environmental laws and that the "remaining 15 phosphoric acid facilities [were] taking the necessary steps to achieve compliance and reduce environmental risk." Thus, since 2010, EPA by its own words acknowledges meeting the compliance goal it set out to achieve. This achievement, however, is not reflected in the current progress report for this initiative. In fact, this omission strongly begs the question: What does EPA consider to be an exit plan for this sector? Without clear parameters, the agency will assuredly waste federal resources on an ever-changing goal that has no end in sight.[10] The phosphoric acid

[9] See U.S.EPA, Cumulative Progress Toward Inspecting and Addressing Phosphoric Acid Facilities, *available at* http://www.epa.gov/compliance/data/planning/initiatives/2011mineralsmining.html (last visited Feb. 25, 2013).

[10] The EPA Office of Inspector General has criticized the agency before for not providing a "full range of measures to monitor the progress and achievements" of its national enforcement priority areas. *See* U.S.EPA, Office of Inspector General, "EPA Has Initiated Strategic Planning for Priority Enforcement Areas, but Key Elements Still Needed" (Sept. 25, 2008). While EPA may have provided a more detailed blueprint of its plans for the mineral processing enforcement initiative when it first started (OIG noted the existence at the time of its review of an exit strategy), the agency has not continued to provide the level of detail required by EPA's OIG. In fact, EPA's website for the enforcement initiatives completely disregards

facilities impacted by this enforcement initiative deserve to know what the agency is planning on doing in terms of evaluating their sector and the goals for removing it as a national enforcement priority and returning it to the core enforcement program.

Reviewing the chart on mineral processing facilities further sheds light on the need for an exit plan for the entire sector. EPA acknowledges a universe of 175 facilities and that 49 out of 84 inspected facilities have been addressed as of FY 2012.[11] EPA originally set out to inspect 25 mineral processing facilities and five mining facilities, which it successfully completed before the FY 2008 through 2010 enforcement cycle. EPA now provides no goal whatsoever for the mineral processing or mining sector, either in inspections or number/percentage of facilities it wants to address.[12] Again, what is EPA's exit plan for this enforcement initiative? As the statistics show, over half of the inspected facilities have been "addressed" by the agency. What will equal success for EPA on this enforcement initiative so as to return the mining and mineral processing sector back to the core enforcement program? NMA sees no reason why EPA must continue this national priority on the mining and mineral processing sector given the achievements made over the last eight years in increasing compliance rates. Removing this sector from the list would not mean an end to enforcement but that federal resources would be re-directed to other priorities where significant noncompliance actually exists.

To illustrate, EPA has formally removed an industry sector from the national priority enforcement list before. In 2007, EPA announced that it would no longer consider the petroleum refining sector as a priority in FYs 2008 to 2010. *See* EPA Solicitation of Recommendations and Comments, "Stakeholder Comment on Proposed National Enforcement and Compliance Assurance; Priorities for Fiscal Years 2008, 2009 and 2010," 72 Fed. Reg. 6239 (Feb. 9, 2007). At that time, EPA acknowledged that "[t]he priority ha[d] met its primary goal of addressing 80% of the national refining capacity." *Id.* The agency also cautioned that "discontinuation as a national priority [did] not mean that the Agency [would] no longer focus on these areas, but rather the work [would]

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the template created by OECA for developing a performance-based strategy for national compliance and enforcement priorities. *See id*. at 10 (Appendix B).

[11] EPA entirely contradicts these findings in the most recent OECA National Program Manager Guidance. EPA states in that guidance that "EPA has inspected 65 mining and mineral processing sites that pose significant risk to communities and found many to be in serious non-compliance with hazardous waste and other environmental laws." U.S.EPA, "FY 2013 Office of Enforcement and Compliance (OECA) National Program Manager Guidance (April 30, 2012) at 50. NMA does not know how to reconcile this adverse conclusion with the most recent progress report posted on EPA's website or other statements made by the agency on its achievements from this initiative.

[12] EPA's OECA National Program Manager's Guide sheds light on the agency's plan for this year, revealing that EPA expects "there will be approximately 12 mineral processing inspections required for 2013 nationally." U.S.EPA, "FY 2013 Office of Enforcement and Compliance (OECA) National Program Manager Guidance (April 30, 2012) at 50. However, there is no more detail provided on these inspections or how they fit into the agency's plan for ultimately concluding this enforcement initiative. Again, this lack of clear goals and performance measures is wholly inappropriate for an enforcement initiative that has already lasted eight years.

continue as part of the Agency's core program activities." *Id.* The petroleum refining sector had been a national enforcement priority for 11 years (since 1996). However, EPA kept close track of its performance-based strategy goals and appropriately delisted the sector from the priority enforcement list when the goals were met. NMA seeks the same treatment for the mining and mineral processing industry as that given to the petroleum refining industry. NMA believes that the time has come to take the mining and mineral processing sector off the agency's priority enforcement list.

In conclusion, EPA has failed since 2007 to provide a clear set of performance-based strategy goals or a well-defined exit plan for this initiative. In a time of severely constrained budgetary resources, it is the agency's duty to demonstrate it is appropriately allocating limited federal resources on agency programs. EPA's OECA is no exception. Given that the mining and mineral processing sector has been an enforcement priority for more than eight years and has seen notable increases in compliance rates, NMA believes that the mining and mineral processing industry should be removed from the priority list and returned to the core enforcement program. However, if EPA continues the initiative into FYs 2014 through 2016, the agency must define and defend the remaining goals of this initiative and provide an exit plan for closing out this initiative. If EPA continues the enforcement target, it is imperative that the agency does so in a transparent manner. Such actions will ensure that the agency does not continue to unnecessarily expend federal resources on an enforcement and compliance program that has already proven to be successful.

If you have any questions regarding NMA's comments, please contact me at tbridgeford@nma.org or (202) 463-2629.

Sincerely,

Tawny A. Bridgeford
Deputy General Counsel

January 19, 2010

Via http://www.regulations.gov

Christopher Knopes, Director
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Attention Docket ID No. EPA-HQ-OECA-2009-0986; FRL-9098-3

Dear Mr. Knopes:

The National Mining Association (NMA) submits these 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." 75 Fed. Reg. 146 (Jan. 4, 2010). EPA proposes 15 priority candidates. Three of these priority candidates directly impact the mining industry: (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).

NMA is a national trade association representing the producers of most of America's coal, metals, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and the engineering and consulting firms, financial institutions and other firms serving the mining industry. NMA has been deeply engaged in the mineral processing national priority since EPA first proposed its inclusion in 2000. NMA has a direct interest in the proposed continuation of this national priority, as well as EPA's plans to establish new national enforcement and compliance assurance priorities on surface impoundments, environmental justice, energy/mining resource extraction and wetlands.

1. NMA Opposes Continuing the Mineral Processing National Priority

EPA first selected the "mining" industry as a preliminary national enforcement and compliance assurance priority for fiscal years (FYs) 2002 and 2003. 65 Fed. Reg. 58,273 (Sept. 28, 2000). EPA cited several "significant cross-media problems" related to the mining industry including: abandoned mines, coal mining tailings site, and mineral mining operations. On Oct. 31, 2000, NMA submitted extensive comments on EPA's notice. These comments are attached for your information. Overall, NMA argued that EPA's proposal to implement a national enforcement priority for the mining industry was unsubstantiated by the two-page fact sheet provided in the docket.

Specifically, NMA strongly urged EPA not to apply a new enforcement priority to abandoned mine lands due to existing federal, state and voluntary programs already addressing the risks from these sites. NMA also urged EPA not to apply a new enforcement priority to coal mines because of enforcement efforts already undertaken by the states and the U.S. Department of Interior's (DOI) Office of Surface Mining under the Surface Mining Control and Reclamation Act. Finally, NMA argued that a national enforcement priority was unnecessary for non-coal mines given the plethora of state and federal environmental regulations applicable to the mining industry and EPA's failure to specify or substantiate any specific noncompliance issues.

Despite NMA's comments, EPA proceeded in 2003 to propose "mineral processing" as a priority candidate for FYs 2005 through 2007. 68 Fed. Reg. 68,893 (Dec. 10, 2003). At that time, EPA stated that "[e]vidence gathered in recent inspections indicate[d] that mineral processing facilities [were] failing to obtain the necessary permits and adequately manage their wastes." EPA billed this enforcement priority as one focused on violations of the Resource Conservation and Recovery Act (RCRA), even though the environmental impacts alleged were multimedia. EPA supported its proposal with a three-page fact sheet that built upon and in some parts were identical to the fact sheet developed in 2000.

On Jan. 12, 2004, NMA submitted comments on EPA's proposal again arguing that the agency failed to substantiate the need for an enforcement priority for the mineral processing industry. These comments are attached for your information. NMA repeated its arguments from 2000 on the inaccurate, misleading and erroneous information provided in the fact sheet regarding the industry's operations and potential environmental risks. This time, however, NMA also called EPA to task for not providing any information on the "recent inspections" the agency relied on in proposing the national priority.

Notwithstanding NMA's comments, EPA finalized its national enforcement and compliance priorities for FYs 2005 through 2007 and included "mining and mineral processing" on the list. At this time, EPA alleged that facilities within the mining

and mineral processing sectors failed "to comply with state or federal environmental requirements or legally permissible waste management practices," which resulted in contamination to groundwater, surface water and soil. In particular, EPA cited the improper management and disposal of mineral processing wastes in surface impoundments. EPA put a particular emphasis on mineral processing facilities that produce phosphoric acid and phosphate compounds.

EPA also developed a strategy and outlined the agency's action plan for the priority. EPA's overall goal was "to ensure that high-risk facilities in the mineral processing and mining sectors [were] in compliance, on a path to compliance or are otherwise working to address existing harm and reduce risk to human health and the environment." EPA planned inspections at 25 non-phosphoric acid mineral processing facilities, 18 phosphoric acid facilities and five mining sites to assess their compliance. EPA also planned to aggregate information on best management practices for the mining and mineral processing industry, which would then be disseminated to the public. This project became known as the gold and copper sector compliance assistance dialogue.

In February 2007, EPA, for the third time, proposed to include "mining and mineral processing" as an enforcement and compliance priority for FYs 2008 through 2010. 72 Fed. Reg. 6239 (Feb. 9, 2007). According to EPA, feedback from EPA regions, states and tribes generally supported retaining the existing set of national priorities outlined for FYs 2005 through 2007. While NMA opposed the continuation of the national priority for mining and mineral processing, NMA did not file comments. Instead, NMA decided to continue its active support of and participation in the gold and copper sector compliance assistance dialogue.

EPA finalized the "mining and mineral processing" national priority for FYs 2008 through 2010. 72 Fed. Reg. 58,084 (Oct. 12, 2007). At this time, EPA's strategy appeared to shift to a "special emphasis on mineral processing facilities that dispose of hazardous wastes in surface impoundments." EPA generally cited "a growing body of evidence showing that even if a portion of the hazardous waste is continuously recycled on-site, the surface impoundments leak and cause widespread environmental damage." *EPA, however, did not reveal the specific evidence relied upon in reaching this conclusion.*

EPA did acknowledge that during FYs 2005 through 2007, the agency completed inspections of 20 phosphoric acid facilities, 25 other mineral processing facilities and five mine sites. According to EPA, "the most common violations found were illegal disposal of hazardous waste and failure to identify and characterize hazardous waste." *EPA provided no documentation on the inspections completed or their results.*

EPA's strategy for FYs 2008 through 2010 included evaluating the regulatory tools available under other environmental statutes to address the risks from mining operations. EPA planned no additional inspections of mining or mineral processing

facilities for FYs 2008 through 2010. EPA, however, stated its intentions of forging partnerships with states and federal land management agencies to combine mining-related resources. EPA also planned to continue the gold and copper sector compliance assistance dialogue it had started in 2005, which had successfully completed a compendium of compliance assistance resources.[1]

EPA is now requesting comment on whether to continue the national enforcement and compliance priorities for mineral processing through FY 2013. EPA's background paper again refers to the inspections completed in FYs 2005 through 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 again 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."

Yet, 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 Web site that it completed inspections at 40 non-phosphoric mineral processing facilities.[2] 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 [percent] 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."[3] *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.

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[1] "Mining and Mineral Processing Compliance Assistance Resources for the Gold and Copper Industries" (March 19, 2007), *available at* http://www.epa.gov/oecaerth/resources/publications/assistance/sectors/miningcompendium.pdf (last visited Jan. 13, 2010).

[2] U.S. EPA, "Enforcement and Compliance Assurance Priority: Resource Conservation and Recovery Act (RCRA): Mineral Processing," *available at* http://www.epa.gov/compliance/data/planning/priorities/rcra.html (last visited Jan. 13, 2010).

[3] *Id.*

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. Moreover, if the agency were to decide to continue the priority, EPA should narrow it to those sub-sectors of the mining and mineral processing industry that still show a provable pattern of noncompliance.

EPA has expended a significant amount of resources on this national priority over the last ten years. EPA's resources should not be wasted on a national priority that has already achieved success in increasing compliance rates. This success not only relates to the results discussed above, but also the extensive work completed through the gold and copper sector compliance assistance dialogue during the last four years. This work goes completely unnoticed by EPA in the background paper.

As noted above, EPA pledged during the enforcement and compliance period for FYs 2008 through 2010 to continue this project. NMA and several member companies have been extensively involved with EPA over the past two years in drafting a best management practices guide for the copper mining sector. This project is expected to be completed this year and should be properly considered by EPA before extending this national enforcement priority through 2013. EPA Office of Compliance staff involved in this project should also be consulted on the progress of this project, which most recently involved visits to several copper mining and mineral processing facilities in Arizona and Texas. Their report on these visits should be considered before continuing the national priority for mining and mineral processing.

2. NMA Urges EPA Not to Duplicate Efforts Already Expended on the Mining and Mineral Processing National Priority through Application of the Proposed Surface Impoundments Priority to Mining and Mineral Processing Facilities

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, NMA is concerned that the agency will use this priority to duplicate efforts already completed in the mining and mineral processing national priority. NMA members have reportedly been told by EPA staff that this enforcement initiative could be used to conduct further inspections of surface impoundments at mining and mineral processing facilities.

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.*

3. NMA Urges EPA to 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."

In determining the national enforcement priority candidates for FYs 2011 through 2013, EPA stated it considered the following factors: (1) Can significant environmental benefits be gained, or risk to human health or the environment be reduced, through *focused EPA action*; (2) Are there identifiable and important *patterns of environmental law violations*; and (3) Are the environmental law and human health risks or patterns of noncompliance sufficient in scope and scale (i.e., occur nation-wide) such that *EPA is best suited to take action*.

NMA believes 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.[4]

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 NMA 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.

4. NMA Opposes Inclusion of the Coal Mining Industry in the Energy/Mining Resource Extraction Candidate as it Would be Duplicative of Other Federal Enforcement Initiatives

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

Based on NMA's 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.

Instead of providing any data, the vaguely drafted paper alleges concerns with eastern mountain top mining activities associated with environmental justice. EPA states that "in Region 3, increased incidents of environmental and human health impact related to resource extraction operations are more often associated with low income communities or in environmentally sensitive ecosystems." This statement,

[4] For example, the Office of Solid Waste and Emergency Response on January 15, 2010, released a draft environmental justice analysis for the definition of solid waste rulemaking under RCRA.

without anything more, does not imply there is an issue of noncompliance with environmental laws.

Concerns with environmental justice or disproportionate impact on low income communities from mining projects are also simply not an appropriate basis for designating national enforcement priorities. In the case of mining permits, environmental justice issues are already addressed through the public outreach required for permitting any new or expanding mining operation. Similarly, projects occurring in environmentally sensitive ecosystems are also dealt with by managing the impacts through permit issuance. There is simply no way to measure and enforce environmental justice concerns on the back end of these projects.

In addition, a number of mining states have established a specific office for the purpose of increasing community environmental awareness and involvement. In Pennsylvania, for example, the Pennsylvania Department of Environmental Protection's Office of Environmental Advocate seeks to expand the visibility and role of the department within communities to assist them with permit review, as well as environmental monitoring, restoration and education programs.[5] NMA believes such programs that spring from state and local communities will prove far more effective at involving local communities in decisions about projects proposed in these communities.

Furthermore, most mining companies already know the importance of engaging local communities, including minority and low income communities, in project planning either because they are required to do so under federal or state law or because they do so voluntarily. Modern mining companies typically make significant contributions, including job creation and investments in schools and much needed public services, while at the same time understanding the importance of their continuing responsibility to maintain a social license to operate within these communities.

Notably, EPA is already addressing how to better address low income communities and environmentally sensitive areas in the context of mining operations. The Obama administration on June 11, 2009, announced it was taking "unprecedented steps to reduce environmental impacts of mountaintop coal mining." EPA, U.S. Army Corps of Engineers (Corps) and DOI entered into a Memorandum of Understanding (MOU) to implement an interagency action plan that would focus on minimizing environmental impacts from coal mining in six Appalachian states.[6] Under the MOA, the administration identified both near and long term tasks that

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[5] *See* http://www.depweb.state.pa.us/portal/server.pt/community/office of environmental advocate/14049.

[6] *See* Memorandum of Understanding among the U.S. Department of the Army, U.S. Department of the Interior, and the U.S. Environmental Protection Agency Implementing the Interagency Action Plan on Appalachian Surface Coal Mining (June 11, 2009).

would result in more stringent environmental reviews for mining permits. A new robust environmental justice analysis is included in this review.

In addition, DOI's Office of Surface Mining, on Nov. 18, 2009, proposed a number of Oversight Improvement Actions designed to improve federal oversight of state mining regulatory programs. Here again, with almost no evidence that states were not doing a good job regulating the mining industry, the federal government moved to increase its oversight of these programs by, among other things, increasing federal oversight inspections, federal review of state-issued permits, increased public participation and bond release.

The mining industry is also already subject to EPA's enforcement initiative under the Clean Water Act.[7] According to EPA, the goal of this new enforcement initiative is to raise the bar for clean water enforcement performance. Clearly, any additional compliance investigations of the mining sector would be duplicative of these other federal actions.

It appears little coordination has been done within EPA itself, not to mention among the other federal agencies charged with mining regulation. If any of that preliminary investigation would have been done, OECA would have learned of these other ongoing initiatives. Failure by EPA to discuss any of these existing initiatives reveals how thinly veiled the proposal really is.

5. NMA Opposes Inclusion of Wetlands as a National Priority Candidate as Recent Evidence of Consistent Wetlands Gains Diminishes the Need for a Federal Compliance and Enforcement Focus

Finally, 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 noncompliance 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 shows that wetland gains continue to trend in the upward direction, reporting 3,600,000 acres of additional wetlands restored or created, improved or protected since 2004.[8] In addition, there are a number of state and Federal agencies that report successful implementation of voluntary programs.

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[7] *See* Memorandum from Lisa Jackson, U.S. EPA Administrator to Cynthia Giles, Assistant Administrator for Enforcement and Compliance Assurance (July 2, 2009).

[8] *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.

These programs are anticipated to deliver wetland increases through the next several years as new programs, policies and incentives are implemented.[9]

This recent trend, showing increases in newly developed and restored wetlands, is due in large part to the mitigation required from Clean Water Act Section 404 authorizations and voluntary wetlands protection programs. For the mining industry, wetland and stream relocation and creation is part and parcel to the mining operation.

Unlike other industries that may relocate a project to avoid impacting waters, the mining industry must mine where the resource lies, meaning impacts to waters are often unavoidable. Consequently, the mining industry is responsible for creating wetlands and stream acres as mitigation for unavoidable impacts that are inherent with the mining operation. The Corps has recognized that surface mining operations can result in the creation of intermittent and/or perennial streams when it issued guidance in 2004 encouraging such opportunities for on-site mitigation.[10]

Moreover, since 2002, the Corps has increasingly required long-term monitoring (10 years and more) and other mechanisms for perpetual protection of mitigation projects. And, in 2008, EPA and the Corps jointly developed new regulations designed to enhance compensatory mitigation requirements and for the first time, required measurable, enforceable performance standards and regular monitoring for all mitigation projects. 73 Fed. Reg. 19,594 (April 10, 2008).

These proven wetland increases and protection measures 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.

Please contact me at (202) 463-2629 or tbridgeford@nma.org if you have any questions regarding NMA's comments.

Sincerely,

Tawny A. Bridgeford
Associate General Counsel

Enclosures

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9 *Id.*

10 U.S. Army Corps of Engineers, "Mitigation for Impacts to Aquatic Resources from Surface Coal Mining" (May, 7, 2004).

National Mining Association
Foundation For America's Future

Enforcement & Compliance Docket and Information Center (2201A)
Docket No. EC–2000–006
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
401 M Street, SW
Washington, D.C. 20460

RE: Stakeholder Comment on Preliminary National Enforcement and Compliance Assurance Priorities for Fiscal Years 2002 and 2003 (65 FR 58273, September 28, 2000); Docket No. EC–2000–006

Dear Sir or Madam:

The National Mining Association (NMA) hereby submits its written comments in response to the Environmental Protection Agency's (EPA's or agency's) solicitation of recommendations and comments on the above Federal Register notice.

NMA comprises the producers of most of the nation's coal, metals, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and the engineering and consulting firms, financial institutions and other firms serving the mining industry. Not surprisingly, NMA and its members have considerable interest in the selection of the mining industry as a potential "national enforcement and compliance assurance priority" industry.

In this Federal Register notice, the agency's Office of Enforcement and Compliance Assurance (OECA) identified several "suggested new areas" as potential national enforcement and compliance assurance priorities for fiscal years 2002-2003. Among those "suggested new areas" was "mining". 65 FR 58273.[1]

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[1] The September 28 notice also identified other potential national enforcement priorities, including fuels management, federal facilities, cruise ships, automotive salvaging, hazardous waste transport/storage, pesticides, and air emissions/PM-10. 65 FR 58274.

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NMA's comments reflect its members' concern not only with the rationale behind the selection of possible enforcement priorities, but also with the process by which those potential priorities have been identified. In the context of the agency's attempts to identify new national enforcement priorities, the issue of substantive due process carries as much or more weight as other issues.

Due process, however, is not the only concern addressed in these comments. The Federal Register notice and the docket material on mining offer only minimal, vague and confusing descriptions of the agency's alleged concerns about "mining". It is not clear if EPA's focus in this notice is on active versus abandoned mines, on hardrock mining, non-metal mining, coal mining, or simply "mining" in general. Furthermore, the Federal Register notice and the docket's two-page "fact sheet" on mining ("Proposed Priority: Mining") demonstrate an extensive lack of knowledge of mining, down to and including the geographic location of major mining sectors.

The OECA notice and fact sheet on Mining ignore applicability of major federal statutes to this industry, including statutes that EPA itself administers. In addition, the meager docket material does not in any way reflect the plethora of federal, state and local environmental statutes and regulations with which the mining industry must comply.

It is as if, in putting together the Federal Register notice and the docket fact sheet on Mining, OECA chose to ignore even those materials readily available to it within the agency itself. NMA can only conclude that the decision to include mining as a potential national enforcement priority was reached without any regard for factual accuracy or completeness.

OECA Behavior Raises Fundamental Due Process Issues

According to the Federal Register notice, EPA in the Spring of 2000 solicited input from "stakeholders, EPA Regions, States, and Tribes" on possible new enforcement priorities for fiscal years 2002-2003. According to OECA docket materials, the first memo on this subject was sent to EPA Regions on March 9, 2000.[2] Thus, for a period of over six months, OECA has been soliciting, receiving and analyzing "many excellent comments" leading up to the September 28 Federal Register notice. 65 FR 58273. The September 28 notice informed readers that "greater detail and background on each proposed priority can be found" in the OECA docket, and instructed parties interested in obtaining "further background information regarding current or proposed...Priorities" to request a hard copy or an electronic version of OECA's docket material. Id. at 58275.

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[2] EPA Office of Compliance memorandum, dated March 9, 2000, addressed to OECA Office Directors, Regional Enforcement Division Directors, and Regional Enforcement Coordinators, referred to in an April 5, 2000, memorandum from Michael M. Stahl, Acting Director, Office of Compliance, to those same addressees.

While seeking copies of any and all docket materials relevant to mining, NMA also submitted a request for an extension of the minimal, one-month comment period.[3] To our astonishment, on the subject of mining the OECA docket contained only a two-page fact sheet entitled "Proposed Priority: Mining". The "many excellent comments" underlying selection of mining (and supposedly the other selected enforcement "priorities") were not to be found in the docket. NMA's request for an extension of the comment period now became of even more significance, since the "many excellent comments" would first have to be located before they could be reviewed in order to comment meaningfully on the OECA notice.

On October 20, NMA telephoned OECA to: (1) learn if OECA would grant the request for an extension of the comment period; and (2) obtain copies of the "many excellent comments" that apparently undergirded the September 28 OECA notice. An agency official informed NMA (1) there would be no extension of the comment period, and (2) the agency would not provide copies of the "many excellent comments". That docket shows, however, and the OECA official confirmed, that OECA had accepted comments from non-governmental stakeholders as well as from EPA Regions, states and Indian tribes. Yet no input was solicited from the affected industries themselves until publication of the September 28 Federal Register notice.

OECA thus has created a situation in which for over six months it has actively solicited, received and analyzed comments from a wide variety of stakeholders, including private party stakeholders, that lead to the identification of mining (along with a handful of other industries) as potential national enforcement priority targets. The agency apparently provided no public notice, and assuredly no Federal Register notice, of the initial solicitation of this input in the Spring of 2000. As support for its September 28 notice soliciting comment on its proposal of mining as a potential national enforcement priority, OECA offered only a vague, confusing and misleading two-page fact sheet. OECA then deliberately refused (1) to extend the one-month comment period and (2) to provide copies of the "many excellent comments" that purportedly support the selection of these proposed new enforcement priorities.

OECA has clearly foreclosed any possibility that NMA and its member companies can have a reasonable opportunity to understand, and respond to, the September 28 Federal Register notice identifying mining as a proposed national enforcement priority. Given the scope of civil and criminal penalties and sanctions for violating the myriad environmental statutes for which EPA is responsible, the manner in which OECA has arbitrarily and capriciously restricted parties ability to comment meaningfully puts NMA and its members at a fundamentally unfair disadvantage.

Abandoned versus Active Mines

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[3] NMA was not the only entity to request an extension of the comment period. Barrick Goldstrike filed a similar request on October 20. It is NMA's understanding that the American Petroleum Institute (API) has also requested an extension.

It is unclear from both the September 28 Federal Register notice and the Mining fact sheet whether EPA is concerned with active or abandoned mining operations. Further, whether the concern be with active or abandoned operations, it is no more clear whether the agency's concerns are with hardrock mines, coal mines or nonfuel, non-metal mines. The "many excellent comments" OECA allegedly received and analyzed might help resolve these uncertainties, but OECA has refused to release copies of those comments.

On the issue of abandoned versus active mines, several points must be emphasized. First, in dealing with abandoned mines generally, the environmental problems associated with abandoned mine sites are not truly appropriate considerations when making decisions about the status of active mining operations as a national enforcement priority. This is particularly true if the purpose of establishing such a national priority is to achieve increase compliance with environmental regulations. By definition, an abandoned mine site is one where: (1) mining operations have terminated, (2) no viable owner can be identified, and (3) mining operations are not subject to a current regulatory program. By their very nature, therefore, abandoned mines offer no target for "enforcement actions that could contribute to an environmental improvement, much less environmental compliance, at the site.

Second, a thoughtful examination of the question of abandoned mines quickly leads to the realization that various programs already are in place at the federal and state level to address unreasonable risks from abandoned mines. For example, Congress intended the federal Surface Mining Control and Reclamation Act (SMCRA, enacted in 1977) to address environmental impacts of both active and abandoned coal mines.[4] Coal mines abandoned without adequate reclamation prior to 1977 are to be reclaimed by the states and the federal government using the abandoned mine lands fund created by SMCRA in 1977.[5] A coal mine site abandoned without adequate reclamation after 1977 is subject to forfeiture of reclamation bonds, and the state contracts to have the site reclaimed to the extent of the reclamation bond. In addition, most states that issue permits for hardrock mining maintain similar mechanisms to fund cleanup of abandoned hardrock mines, while federal land management agencies have appropriated funds allocated to the cleanup of abandoned hardrock mines. Moreover, the mining industry has demonstrated its willingness to address abandoned sites voluntarily when the threat of incurring unwarranted new liabilities (e.g., under CERCLA or the Clean Water Act) can be abated.[6]

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[4] It is interesting to note that the OECA factsheet on mining does not even mention SMCRA, nor does the fact sheet correctly identify coal mining as SIC Code 12.

[5] It should be noted that SMCRA's provisions allow states, under certain circumstances, to apply SMCRA funds to non-coal mine reclamation. The focus of such state actions thus far has been predominantly on safety issues (e.g., bulkheading or fencing off adits to prevent unauthorized access). Colorado is one example of a state taking such actions.

[6] Industry has spent tens of millions of dollars in voluntary, on-the-ground, cleanups of abandoned mine lands, a significant industry contribution that is too often overlooked or ignored.

For these reasons, NMA strongly recommends that OECA not attempt to apply new enforcement priorities to abandoned mine lands. Any significant environmental degradation at abandoned mines should be addressed pursuant to those state and federal programs established specifically for that purpose.

Metal, Non-Metal, and Coal Mining

As noted above, the OECA docket materials are equally unclear as to whether OECA's focus is on alleged releases from metal, non-metal or coal mines.

As far as coal mines are concerned, the principal environmental enforcement efforts are those conducted by the states and the Department of Interior's Office of Surface Mining under provisions of SMCRA. For OECA to engage in a new level of enforcement against coal mining operations runs the clear risk of duplicating existing enforcement efforts, thus wasting limited enforcement resources.

Noncoal mines, whether they be metal or non-metal, are already subject to a plethora of federal and state statutes and regulations. The OECA fact sheet on mining identifies the Clean Air Act, the Clean Water Act and CERCLA, and further states: "All mining operations must be reclaimed and comply with all applicable state and federal laws, including air and water quality standards such as those established under the CAA and CWA, and standards for disposal of solid waste under RCRA." (Mining fact sheet, pg.2). These statements are accurate as far as they go, but they do not even begin to scratch the surface of the actual regulations under which the industry operates. For example, any non-coal mine on federal lands must also comply with regulations established by the pertinent federal land management agency, e.g., the Interior Department's Bureau of Land Management (BLM) or the Agriculture Department's Forest Service. As the National Research Council reported in September, 1999:

> **Existing regulations are generally well coordinated, although some changes are necessary.** The overall structure of the federal and state laws and regulations that provide mining-related environmental protection is complicated, but generally effective. The structure reflects regulatory responses to geographical differences in mineral distribution among the states, as well as the diversity of site-specific environmental conditions. It also reflects the unique and overlapping federal and state responsibilities.[7] (emphasis in original)

See "Reclaiming Inactive and Abandoned Mine Lands – What Really Happened", D. Struhsacker and J. Todd (July, 1998), pg.33.

[7] National Research Council Report "Hardrock Mining on Federal Lands" (1999), Executive Summary, pg.5.

The NRC report, unlike the OECA fact sheet or Federal Register notice, clearly recognizes the existing regulatory structure's effectiveness and its complexity. The physical realities of life, e.g., what mineral deposits are found in which locations and under what local conditions, are clearly recognized as important in the NRC report. The relationship of state and federal agencies, including the federal land-managing agencies, also is recognized as "unique". In contrast, the OECA notice and fact sheet simply ignore site-specific, physical realities and complex, unique federal-state relationships. Instead, OECA proposes mining as a target for a nationwide EPA enforcement effort, regardless of the fact that the real expertise in regulating mining lies not within EPA but in the states and in federal land managing agencies.

The OECA fact sheet also refers to state standards. The extent of those state standards, however, - their number, scope, and depth - is blissfully ignored. OECA would do well to consider a variety of publicly available resources on state regulation of mining. One example is "Hardrock Mining: State Approaches to Environmental Protection", published by the Environmental Law Institute.[8] This particular book grew out of earlier research, ironically enough funded by EPA itself, that yielded a 1992 ELI report: "State Regulation of Mining Waste: Current State of the Art". In addition, NMA has included as Attachment A to these comments "Mining Regulatory Programs in the Western United States - A Survey of State Laws and Regulations"[9]. This survey provides an excellent overview of the range and depth of Western states' mining regulatory efforts.

To illustrate the complexities of mining regulation, and particularly the complex and unique state-federal land managing agency relationship, NMA has also included copies of its

- May 10, 1999, comments[10] on BLM's "Proposed 3809 Rules" (64 FR 6422, Feb.9, 1999); and,
- February 23, 2000, comments[11] on BLM's "Supplemental Proposed Rule and Reopening of Comment Period on Draft Environmental Impact Statement (64 FR 576513); Mining Claims Under the General Mining Laws, Surface Management (64 FR 6422, Feb.9, 1999); and Notice of Availability of the Draft EIS (64 FR 7905, Feb. 17, 1999).

Particularly noteworthy in the February 2000 NMA comments is the series of comparisons of

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[8] J. McElfish, T. Bernstein, S. Bass, E. Sheldon, "Hardrock Mining: State Approaches to Environmental Protection" (ELI, 1996).

[9] February 23, 2000, prepared by Steven G. Barringer, Esq., of Dickstein, Shapiro, Morin & Oshinsky, LLP on behalf of the Precious Metals Producers.

[10] Attachment B to these comments.

[11] Attachment C to these comments.

current state mining regulations to the recommendations in the NRC Report (supra). These seven comparisons cover the states of Arizona, California, Colorado, Idaho, Montana, Nevada, and Utah.

Fact Sheet Ignorant of Industry Locations, Operations, Applicable Statutes and Regulations

Unfortunately, the two-page fact sheet, "Proposed Priority: Mining", does not display a very accurate, much less complete, understanding of the operations, and even the locations, of the "proposed enforcement priority" mining industry. For example, in the section entitled "Geographic Range", the Mining fact sheet states: "mining for industrial rocks and minerals is more common in the eastern US". Mining in the eastern US includes mining for coal (e.g., West Virginia, Pennsylvania, Kentucky, Tennessee, Virginia, Ohio, Indiana, Illinois, Alabama), base (e.g., zinc in Tennessee, lead and zinc in New York) and precious metals (e.g., gold in South Carolina), as well as agricultural and industrial minerals. Industrial rocks and minerals are mined in virtually every state in the country. For example, in 1998 Arizona, which ranks first in copper production, also produced 46.9 million tons of sand and gravel, worth $229 million, as well as 7.4 million tons of stone worth$43.3 million. Colorado produced 37.7 million tons of sand and gravel worth $172 million, plus 12 million tons of crushed stone worth $78.9 million.[12]

The fact sheet speaks, too, of wastes such as overburden, waste rock, and of tailings that "contain a mixture of impurities, trace metals, and residue of chemicals used in the beneficiation process". It is worth emphasizing that EPA determined in 1986, after ten years of study, that none of these wastes warranted regulation as RCRA hazardous wastes. Indeed, EPA affirmed that Subtitle C regulations were "likely to be environmentally unnecessary, technically infeasible, or economically impractical when applied to mining waste"(51 FR 24497, July 3, 1986). That regulatory determination was subsequently upheld by a unanimous D.C. Circuit in Environmental Defense Fund v. EPA ("EDF I")(852 F.2d 1309, 1988).

The fact sheet's discussion of "Acid mine drainage" would lead a reader to conclude that AMD is universal - all mine sites, all locations, all mineral sectors. NMA will not minimize the concern with acid drainage, but neither should OECA exaggerate such concern. Even the ill-starred EPA "National Hardrock Mining Framework" recognizes that acid drainage is a highly site-specific phenomenon, e.g.: "acid drainage primarily depends on the mineralogy of the rock material and the availability of water and oxygen....The potential for a mine or its associated waste to generate acid and release contaminants depends on many site-specific factors."[13]

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[12] "State Mining Annual, Mineral & Coal Statistics - 2000 Edition", National Mining Association (June 2000).

[13] EPA's National Hardrock Mining Framework, Appendix B Potential Environmental Impacts of Hardrock Mining, pg.3 (September, 1997).

The "Applicability of Federal/State Regulations" section of the Mining fact sheet contains at least two glaring errors. First, the fact sheet fails even to mention the Surface Mining Control and Reclamation Act (SMCRA), the principal environmental regulatory statute for the coal mining industry. Second, the Mining fact sheet is flat-out wrong when it states "facilities involved in mining metals are not currently required to report chemical releases and transfers" under the Toxics Release Inventory (TRI) program of section 313 of the Emergency Planning/Community Right to Know Act (EPCRA). Pursuant to EPA's final rule of May 1, 1997, facilities in Sic Codes 10 (metal mining) and 12 (coal mining) have been filing TRI reports since July 1, 1999.[14] The relevance of TRI data to enforcement actions, however, is highly questionable. For one thing, TRI "releases" may indeed be releases permitted by appropriate state or federal authorities, and thus are not evidence of "non-compliance". Furthermore, in the mining industry, most of the reported "releases" are "releases to land" which consist of the placement of inert materials with trace metals in engineered repositories pursuant to an approved plan of operations and state/federal permits.[15]

Among the fact sheet's other inaccuracies are:

- "Acid leaching operations use high concentrations of acids to extract metals from ore". Where the industry employs leaching technologies (principally in the copper, precious metals, and uranium sectors), the leaching solutions usually contain acid at *low* concentration. Furthermore, once the metals are removed from the leaching solution, the solution is recycled, and not discharged to the environment.

- "Acid leaching operations use high concentrations of acids to extract metals from ore...Significant risks are posed to human health due to **metal contamination...**" high blood lead levels in "children living near abandoned lead and zinc mines" (emphasis in original). The logical connection between leaching operations and abandoned lead and zinc mines is difficult to discern. Large-scale leaching operations are employed principally in the precious metals and copper sectors (leaching in the uranium sector is generally performed in-situ), and would not likely have been used at lead and zinc mines.

- Alleged impacts from "Erosion and Sedimentation", "Habitat Modification", and "Aesthetics". Even assuming the truth of these alleged impacts, it is difficult on

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[14] 62 FR 23834. Facilities in these two SIC codes thus are currently in their *third* TRI reporting cycle; for OECA not even to recognize this fact is truly remarkable.

[15] As EPA notes, "98.9 percent of the [metal mining] industry's reported releases" were releases to land. EPA, "1998 Toxics Release Inventory - Public Data Release" (September, 2000), pg.3-26. In the coal mining sector (SIC Code 12), 86.1 percent of the reported releases were "releases to land". Id. at 3-41. Copies of the EPA 1998 TRI Public Data release may be downloaded from www.epa.gov/tri/tri98/pdr.

such bases to differentiate the mining industry from, e.g., highway construction or commercial and residential building projects. The fact sheet fails to mention another way, however, in which mining can be differentiated from these other activities - mining is required to reclaim its sites so that they may be used for other purposes.

Throughout the Federal Register notice and in the supporting fact sheets, OECA appears to confuse a fundamental, important point: any enforcement effort should be limited to those areas that will achieve significant environmental benefit through reductions of impermissible releases. Focusing on "mining" will not achieve this enforcement goal. For example, the Mining fact sheet focuses solely on the alleged impacts of mining; the fact sheet repeatedly, and at times incorrectly, refers to impacts or the magnitude of releases without any corresponding reference to non-compliance.

Yet, from an enforcement perspective the impact of an activity that is permitted by statute and regulation is irrelevant. The agency itself acknowledges this fact in various public fora. For example, EPA's website presenting the National Emissions Trend report states:

> Pollutants emitted from a particular source may have little impact on the immediate geographic area, and the amount of pollutants emitted does not indicate whether the source is complying with applicable regulations.[16]

From the Federal Register notice and Mining fact sheet, however, it appears that non-compliance is not the rationale for mining's selection as a potential national enforcement priority. Compared to discussions of non-compliance in the fact sheets for other priority areas and industries, the absence of any reference to non-compliance in the Mining fact sheet is glaring.

The Mining fact sheet, for example, refers to "Fugitive Dust Emissions", but offers no perspective on the industry's compliance or non-compliance with relevant permit terms, nor on industry operations relevant to fugitive dust. It is important to recognize that fugitive dust emissions are regulated primarily through operational conditions included in state permits. These operational conditions include such practices as using frequent watering or approved chemical dust suppressants to minimize dust from mine road traffic. Violation of these conditions is extremely rare. A review of AIRSData Source Compliance Report confirms that violations of coarse particle requirements are not widespread in the mining industry.[17] Violations of permit operating conditions controlling fugitive dust are generally considered rare within the industry, states have not demonstrated laxity in enforcing permit conditions related to fugitive dust, and a paucity of data exists to support a conclusion that non-compliance is a significant issue.

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[16] http://www.epa.gov/airprogm/airs/data/sources.htm

[17] http://www.epa.gov/airprogm/airs/data/srccompl.htm

Given this, agency enforcement resources should be directed toward areas for which there is ample supporting evidence of non-compliance.

Air Emissions/PM-10

The Federal Register notice identifies coarse particles (PM10) as a "suggested new area" for a national enforcement priority. 65 FR 58274. The alleged basis for this identification is that coarse particles present a health threat. This focus on coarse particles from a health standpoint, however, ignores EPA's most recent draft of the PM criteria document prepared as part of the periodic review of the National Ambient Air Quality Standard.[18]

In that review document, EPA was unable to find epidemiological data sufficient to demonstrate mortality effects from coarse particles. Specifically, the draft notes that the currently available studies:

- produced conflicting results;
- reported only modest effects;
- appear subject to bias from confounding, model-mis-specification and measurement error and model selection strategy; and
- suffer from the use of different PM indices in different locations.[19]

Thus, the selection of coarse particles/PM10 as a potential national enforcement priority is contrary to the agency's current regulatory focus and is inconsistent with EPA's findings in the criteria document.

The Mining fact sheet lists fugitive dust emissions which are comprised primarily of coarse PM and heavier particles. It is important to note that sensitive populations are unlikely to be exposed to significant PM from mines' fugitive dust, as the mines typically are located far from population centers.

In targeting coarse particles, OECA states that one of its concerns is visibility. Yet the impact of wildfires and prescribed federal burns are given only passing mention. Impacts from fire (which is not within OECA's jurisdiction) overwhelm the effects of other contributors to coarse PM, and thus OECA enforcement efforts in this area will show little visibility gain.

While the vagueness of the Air Emissions/PM-10 fact sheet makes it unclear, the agency appears to be basing its targeting of coarse particles partly on redesignations of non-attainment under the eight hour standard that EPA intends to require of states. NMA notes, however, that EPA may lack the authority to impose such a requirement. Under the Linder/Collins Non-

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[18] EPA Air Quality Criteria for Particulate Matter, October 1999 External Review Draft.

[19] Id. at 6.6.2

Attainment language passed by the House of Representatives and the Senate as part of FY2001 VA-HUD Appropriations bill, EPA will be barred from imposing that requirement. Thus, if the bill is enacted (as now appears probable), "non-attainment based on the eight hour standard" would no longer be available as a supporting rationale for making coarse particles/PM10 a national enforcement priority.

EPA also mischaracterizes fugitive dust impacts from deposition of toxic heavy metals into surface waters, with resulting sedimentation. Coarse particles appear to consist primarily of non-toxic minerals. Indeed, metals generally are a very small component of coarse particles and, where metals are present, they are frequently in non-toxic forms. For instance, crustal material includes aluminum, silicon, magnesium, and iron, but these are not generally considered toxic in this form.

Conclusion

In a recent report on OECA enforcement-related actions, the U.S. General Accounting Office stated:

> Both the quality of and quality controls over these [OECA enforcement-related] data have been widely criticized by the regional and state officials we interviewed, and recent internal OECA studies have acknowledged the seriousness of the problem."[20]

These concerns about OECA enforcement data are borne out by the September 28 Federal Register notice and its accompanying fact sheets on Mining and on Air Emissions/PM-10. The quality of the information set forth in those documents is woefully inadequate and cannot possibly support any decision to make mining a national enforcement priority for fiscal years 2002-2003.

It should be clear that OECA's selection of the mining industry as a potential national enforcement priority is unsubstantiated. Such a selection would lead to a squandering of enforcement resources. As NMA's comments have shown, from an enforcement perspective many of the issues raised in the Federal Register notice and the Mining fact sheet are either irrelevant, such as the focus on abandoned mines, or misdirected, such as the focus on fugitive dust emissions.

These OECA documents are not only inaccurate and incomplete, they also lack any overall focus. It is impossible to tell from these documents whether OECA is concerned with abandoned or active mines. Beyond that confusion, is OECA's focus on hardrock? non-metals? coal? all of these sectors and more?

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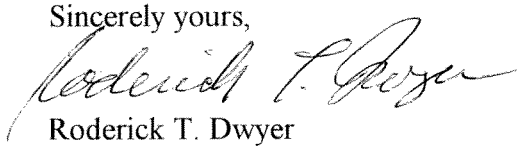
[20]U.S. GAO, "Environmental Protection - More Consistency Needed Among EPA Regions in Approach to Enforcement", pg.43 (June 2000).

Underlying all of the fundamental factual mistakes, inaccuracies and mischaracterizations, there still remains OECA's failure to provide any semblance of due process to industries potentially affected by the Federal Register notice and accompanying fact sheets. OECA's minimal comment period and refusal to provide underlying comments allegedly supporting the Federal Register notice and fact sheets clearly have foreclosed any possibility that NMA, its member companies, or other concerned parties would have a reasonable opportunity to understand and respond to the September 28 Federal Register notice.

Should there be any questions concerning NMA's comments, please do not hesitate to contact John Shanahan, Esq. (Director, Air Quality, 202/463-9793), Karen C. Bennett, Esq. (Director, Water & Waste Policy, 202/463-3240) or the undersigned (202/463-9782).

Sincerely yours,



Roderick T. Dwyer
Deputy General Counsel

Enc

cc NMA Environment Committee
State Mining Associations

January 12, 2004

Enforcement & Compliance Docket and Information Center (2201T)
Docket No. OECA-2003-0154
Office of Enforcement & Compliance Assurance
US Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

RE: Stakeholder Comment on Preliminary National Enforcement and Compliance Assurance Priorities for Fiscal Years 2005, 2006 and 2007 (68 FR 68893, Dec. 10, 2003)

Dear Sir or Madam:

The National Mining Association (NMA) hereby submits written comments in response to the Environmental Protection Agency's (EPA's or agency's) solicitation of comments on EPA's Preliminary National Enforcement and Compliance Assurance Priorities for Fiscal Years 2005, 2006 and 2007 ("Preliminary Enforcement Priorities" or "Preliminary List").

NMA comprises the producers of most of the nation's coal, metals industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and the engineering and consulting firms, financial institutions and other firms serving the mining industry. A number of NMA members are directly involved in extraction, beneficiation and mineral processing operations, while numerous other member companies engage in the extraction and beneficiation of ores and minerals. Because the December 10 Federal Register notice included "RCRA-Mineral Processing" as one of the "Suggested New Areas" for EPA national enforcement priority, NMA and NMA member company interest is readily understandable.

Furthermore, this 2003 national enforcement priority notice follows a very similar notice in September 2000.[1] That earlier notice was ostensibly aimed at "Mining", while the December 2003 notice refers to "RCRA-Mineral Processing".

[1] "Stakeholder Comment on Preliminary National Enforcement and Compliance Assurance Priorities for Fiscal Years 2003 and 2003" (65 FR 58273, September 28, 2000).

A change in title, however, cannot disguise the fact that in both 2000 and in 2003 the agency's docket has lacked any firm foundation whatsoever for selecting "Mining" or "Mineral Processing" as a national enforcement priority. In the 2003 Office of Enforcement and Compliance Assurance (OECA) docket, the sole support for the nomination of mineral processing is a vague, confused and internally contradictory three-page paper entitled "Proposed Priority: Mineral Processing". This paper betrays a critical lack of knowledge of (1) the industry's nature and operations and (2) the extensive federal and state regulatory programs that apply to mining and mineral processing.

The lack of support for the December 2003 suggestion of mineral processing as a national enforcement priority is not surprising, since the 2003 "background paper" builds upon – and in key instances is identical to – a similarly flawed September 2000 background paper entitled "Proposed Priority: Mining".[2]

Mineral Processing – A RCRA Enforcement Priority?

Both the December 10 Federal Register notice and the background paper contain the sentence: "Evidence gathered in recent inspections indicates that mineral processing facilities are failing to obtain the necessary permits and adequately manage their wastes." 68 FR 68895; Background Paper, p.1. To evaluate the validity or non-validity of mineral processing as a national enforcement priority target, it would be very helpful (and only fair) if the agency identified the number and timing of these "recent inspections", what facility or facilities had failed to obtain which specific permits, and which types of "waste" were at issue. Unfortunately no such supporting information is offered.

NMA is aware that in the summer of 2000 EPA Region IX undertook inspections of primary mineral processing operations, especially in the copper sector. It is our understanding that these extensive inspections (each took approximately five days) yielded only a handful of minor recordkeeping violations, that those violations were corrected within two weeks and that the agency certified those corrections in April, 2002 letters to the inspected facilities. These hardly appear to be the kinds of violations described in the December 10 Federal Register notice or in the background paper.

The language of the Federal Register notice and the background paper recalls somewhat similar language in the OECA "Enforcement Alert" of November, 2000 (only a few months after the Region IX inspections occurred). In that issue of the "Enforcement Alert", OECA asserted: "Evidence gathered by [EPA] indicates that some mineral processing facilities may be failing to properly identify and manage hazardous waste regulated under [RCRA]."[3]

[2] On October 31, 2000, NMA submitted extensive comments to EPA in response to the agency's September 2000 request for input on OECA national enforcement priorities. A copy of those comments is attached and NMA hereby incorporates by reference its October 2000 comments into these current comments.

[3] EPA "Enforcement Alert", November 2000, p.1

It should be noted that, at the time of the Region IX inspections and the subsequent "Enforcement Alert", the agency was wrestling with the implications of the decision in *Association of Battery Recyclers v. EPA*.[4] In that case the National Mining Association successfully challenged EPA attempts to impose RCRA regulations on mineral processing secondary materials. The D.C.Circuit held unanimously that such industry materials were not discarded and thus, by terms of the RCRA statute, could not be wastes subject to the agency's RCRA jurisdiction.

NMA suggests that, in the absence of specific evidence to the contrary, the statements in the December 10 Federal Register and the background paper reflect a continuing failure to appreciate the scope and impact of the *ABR* decision.

Is EPA's Focus on "Mineral Processing" or "Mining"?

Broadly viewed the three basic steps in mining and mineral processing are (1) the extraction (mining) of ores and minerals from the earth, followed by (2) the beneficiation of those ores and minerals to make them ready for (3) mineral processing operations (e.g., smelting and refining) that produce commercial grades of metals and other minerals. The December 10 Federal Register notice lists "RCRA-Mineral Processing" as a "suggested new area" for national enforcement priority, while the docket's background paper is entitled "Proposed Priority: Mineral Processing". At first glance, then, it would appear that the agency is focusing its concern on one segment of the mining and mineral processing industry, i.e., mineral processing.

Nonetheless, neither the Federal Register notice nor the background paper ever mentions smelters or refineries, the mainstays of mineral processing operations. Indeed, neither the Federal Register notice nor the background paper even mention the Standard Industrial Classification code for mineral processing: SIC code 33.

Instead, under "Universe and Types of Facilities", the background paper speaks of SIC codes 10 and 14, i.e., metallic and non-metallic mineral *mining* activities, respectively. Furthermore, that same section of the background paper never discusses the nature of mineral processing operations. Rather it describes extraction (mining) of ores and minerals, and not the processing of those materials.

EPA's View of "Mining" Is No Clearer Than in 2000

With the exception of the first three sentences in the 2003 background paper, every word of that paper is taken verbatim from the equally flawed, vague and confused September 2000 background paper. For that reason NMA has attached to these comments a copy of its October 31, 2000 comments. As NMA noted in 2000:

[4] 208 F.3d 1047 (D.C. Circuit; April 21, 2000).

> It is not clear if EPA's focus in this [2000] notice is on active versus abandoned mines, on hardrock mining, non-metal mining, coal mining, or simply "mining" in general. Furthermore, the [2000] Federal Register notice and the docket's two-page "fact sheet" on mining ("Proposed Priority: Mining") demonstrate an extensive lack of knowledge of mining, down to and including the geographic location of major mining sectors.
>
> NMA Comments, p.2

The same criticisms can be made of the 2003 notice and background paper. NMA addressed the extensive failings of the 2000 notice and background paper in NMA's October 31, 2000, comments. To the extent the same problems exist in the 2003 Federal Register notice and background document, NMA's earlier comments apply equally to this latest agency effort.

The 2003 background paper does not incorporate the 2000 paper's references to coal mines (SIC code 12). Other than that, however, the latest background paper is just as confusing, unfocused and misdirected as was its predecessor. It repeats factual errors, inaccuracies and mischaracterizations of the industry that were made in the 2000 background paper. Neither paper offers any support for the selection of mining – much less mineral processing – as a national enforcement target.

The OECA background papers would clearly benefit were they to be revised in light of a 1999 National Academy of Sciences (NAS) report on hardrock mining. In late October 1998, Congress asked the NAS to conduct an independent study on mining of hardrock minerals on federal lands, including consideration of the adequacy of existing environmental and reclamation requirements to prevent "unnecessary or undue degradation." See *Hardrock Mining on Federal Lands*. National Academy Press, 1999.[5] The main conclusion of the NAS Report is that "the overall structure of the federal and state laws and regulations that provide mining-related environmental protection is complicated but *generally effective*." NRC Report at pp. 89-90 (emphasis added). The NAS study belies the supposed need to make mining and mineral processing (or a part thereof) a national enforcement priority.

Procedural Issues

Once again, as it did in 2000, OECA apparently has spent six months conferring with regional offices, states, tribes and environmental justice advocates[6] concerning national environmental enforcement priority targets. NMA understands the need for such consultation but wonders why EPA made no effort to contact potentially targeted industries.

We can understand agency reluctance to discuss sensitive enforcement information. At the very least, however, discussions with the mining and mineral

[5] The NAS Report can be found at http://www.nap.edu/books/0309065968/html/ .
[6] See 68 FR 68894.

processing industry might have helped eliminate some of the fundamental factual errors in OECA's perceptions of the industry. In turn such improvements might very well help the agency to utilize its limited enforcement resources more efficiently and effectively.[7]

Conclusion

NMA recognizes the need for any regulatory agency to consider – thoughtfully and thoroughly – how best to utilize limited enforcement resources. Integrating enforcement efforts with an overall agency strategic plan also seems to make good sense, as does focusing on environmental results rather than particular programs or agency units.

Unfortunately, good intentions appear to have come to naught in this particular exercise. The 2003 suggestion of "RCRA – Mineral Processing" as a national enforcement target is as unfocused and fundamentally flawed as was OECA's 2000 suggestion of "Mining" as a national enforcement priority. The identification of mineral processing as a possible priority enforcement target lacks any firm foundation. It could not be otherwise when the agency in 2003 advances – verbatim - the same inaccurate, incomplete, misleading and erroneous information that it tried to use in 2000 to support the nomination of mining as an enforcement priority.

Should there be any questions concerning NMA's comments, please do not hesitate to contact the undersigned (202/463-9782).

Sincerely yours,

Roderick T. Dwyer
Deputy General Counsel

Enclosure

[7] Although it spent up to six months conferring with regional, state and tribal offices, and then with environmental justice advocates, EPA provided only a 30-day comment period (including the Christmas-New Year's holidays) for all other interested parties – including targeted industries.