231

National Mining Association
Foundation For America's Future

May 24, 2000

USDA Forest Service
Content Analysis Enterprises Team
Attn: UFP, Building 2, Suite 295
5500 Amelia Earhart Drive
Salt Lake City, UT 84116

MAY 25 2000
CAET RECEIVED

RE: Unified Federal Policy for Ensuring a Watershed Approach to Federal Land and Resource Management 65 Fed. Reg. 8833 (February 22, 2000)

The National Mining Association (NMA) hereby submits its written comments on the Unified Federal Policy for Ensuring a Watershed Approach to Federal Land and Resource Management, hereinafter referred to as the "Policy." 65 Fed. Reg. 8833 (February 22, 2000).

NMA comprises the producers of most of the nation's coal, metals, industrial and agricultural minerals; and the engineering and consulting firms, financial institutions and other firms serving the mining industry. Recognizing that the largest share of our national mineral resources for precious and base metals is located in the areas that lie mainly within federally-managed public lands, the interest of NMA member companies in any federal policy that would influence federal land use decision-making is obvious.

General Comments

NMA has a number of concerns regarding the proposed Policy. The Association's primary concerns include but are not limited to: the lack of authority for implementing the proposal; the overall intent and purpose of the proposed policy remains unjustified; the lack of clarity of the proposal makes it impossible to provide meaningful comment; the failure to recognize implications for the regulated

1130 17TH STREET, N.W. WASHINGTON, D.C. 20036-4677 (202) 463-2625 FAX: (202) 463-6152

community, both on federal lands and on the state or private lands located adjacent to the federal lands.

NMA is also concerned that the Policy fails to recognize the jurisdictional boundaries established by the CWA between ground and surface water and state and federal waters. For example, the Policy implies that federal watershed policy will address both ground and surface water, flow quantities, etc. Therefore, NMA requests that the proposal clarify that a federal policy must recognize existing State programs administered under the CWA and existence of federal/state jurisdictional boundaries established by the CWA.

Finally, and perhaps most important, NMA is concerned that the proposal fails to consider recent developments under the CWA such as the EPA's proposed revisions to the Water Quality Planning and Management Regulations (40 C.F.R. Part 130) and the corresponding provisions of the National Pollutant Discharge Elimination System (NPDES) Program and Federal Antidegradation Policy (40 C.F.R. Parts 122, 123, 124, 131). 64 Fed. Reg. 46012. Developments under the CWA are of critical importance to justifying the need for a unified federal approach to watershed management because such changes may very well obviate the need for any additional and separate federal policy for water quality protection. In short, the NMA believes the proposed Policy will result in an additional layer of federal oversight of federal lands management decisions that are not authorized by law or necessary to ensure that the nations water quality be protected.

Specific Comments

The Agencies Should Not Move Forward With the Proposal Until the Clean Water Action Plan Litigation is Complete

The notice states that the Policy is one of the "Key Action" items developed pursuant to the *President's Clean Water Action Plan (CWAP)* and "would provide a framework for a watershed approach to Federal land and resource management activities." 65 Fed. Reg. at 8833.[1] It is important to note that the CWAP itself was never published for public comment and never received congressional oversight or approval. Yet, the CWAP expands the EPA's authorities provided under the CWA and its 111 "Key Actions"will directly affect state and local governments, agriculture and other natural resource-based industries, and public land use.

In an effort to remedy the procedural shortcomings in this regard, a number of individuals and organizations filed suit in June 1999 against the EPA claiming,

---

[1]The CWAP directs the Department of the Interior and the Department of Agriculture to "develop a Unified Federal Policy to enhance watershed management for the protection of water quality and health of aquatic ecosystems on federal lands." CWAP at 32.

OAET RECEIVED

MAY 25 2000

among other things, that the CWAP violates the National Environmental Policy Act (NEPA) and the Administrative Procedures Act (APA) and is therefore illegal. In this regard, NMA believes that both the APA rulemaking provisions and the NEPA environmental analysis requirements appropriately apply to the CWAP. Accordingly, since the proposed Policy was initiated pursuant to the CWAP, the Policy should not be implemented until such time as the underlying document, the CWAP, has met with the requirements of both the APA and the NEPA.

The NEPA mandates that all agencies of the federal government complete an environmental impact statement or an environmental assessment for "every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment." 42 U.S.C. Section 4332(2)(c). A major federal action includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. The implementing regulations describe a "major federal action" as "adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based." 40 C.F.R. Section 1508.18(b)(2). NMA agrees that the CWAP is a major federal action requiring NEPA analysis and that neither the CWAP nor any of its "Key Actions" should be implemented until such time as the necessary environmental impact analysis is complete.

The Proposal Fails to Establish that a Need for Such a Policy Exists

The Agencies failed to establish that a need exists for a "federal, unified policy" for watershed management. In fact, without the necessary NEPA analysis, NMA suggests it is impossible to justify moving forward with the proposed policy at this time. The NMA is concerned that valuable federal resources will be expended adopting and incorporating the new Policy into federal lands' management without the benefit of making a showing that the Policy is justified.

First, NMA points out that the "coordination" among federal, states, tribal and local government agencies is already provided for in federal land management regulations and therefore, further coordination among these entities will only serve to add another layer of federal oversight, providing no additional environmental benefit. Furthermore, NMA points out that it is the EPA and the States that have been charged under the CWA with the primary role of achieving water quality objectives. Therefore, NMA suggests that reponsibility for coordinating watershed assessment, hydrologic analysis, resource inventory, and classification; monitoring and evaluation methods are misplaced in the context of the proposed Policy. 65 Fed. Reg. 8835.

Second, NMA is concerned that such "coordination" will interfere with the statutory mandates under which the federal lands' managers operate, thereby placing a higher priority on water quality than prescribed by the relevant statutes. In

underlying authority for incorporating such an approach into federal land management decision-making and how this approach will NOT impact current and future land use permits, leases, and licenses.

The Policy Interferes with Congressional Mandates for Managing Federal Lands

Congress mandated that management of federal lands must be consistent with principles of multiple use and sustained yield pursuant to acts such as the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. Section 1701 et seq., Multiple Use and Sustained Yield Act ("MUSYA") 16 U.S.C. Section 531 et seq. and the National Forest Management Act ("NFMA") 16 U.S.C. Section 1600 et seq. These acts establish detailed land use planning procedures for federally managed lands. The proposed Policy threatens to change how federal lands are managed without the necessary congressional action to change the underlying statutes. The Policy requires mandatory coordination and planning of federal programs and resource management activities among federal agencies, control of nonpoint source pollution via best management practices, integration of watershed restoration as a "key" part of land management planning, and the designation of waters or watersheds in "need of special protection," all without congressional authorization. 65 Fed. Reg. at 8835. NMA requests clarification about how the proposed Policy will NOT interfere with the aforementioned congressional mandates.

Federal Role Not Clear in Process for Delineating, Assessing and Classifying Watersheds

NMA seeks clarification regarding the proposed process for delineating, assessing and classifying watersheds. First, NMA requests information explaining what role the federal parties will play in making such designations, what criteria will guide such evaluations, and how such federal designations will be coordinated with ongoing state and local watershed assessments so as not to prove inconsistent with State standards or redundant with existing State programs and procedures. Furthermore, NMA requests information regarding how the Agencies propose to deal with the various jurisdictional issues in making such designations. For example, the federal government has no jurisdiction to influence decisions over groundwater sources, or to interfere with state adjudicated water rights decisions. The proposal fails to make such considerations. In fact, the proposal implies a federal, one-size-fits-all approach would become the "common framework" for making such decisions. NMA requests that such implications be removed from the proposal and that the proposal be drafted and consistent with the Agencies existing authorities.

NMA is also concerned that the proposal fails clearly define it's intend regarding waters identified as in need of "special protection." NMA requests information about what "actions" will be required or precluded on the basis of providing the necessary

"special protection." Furthermore, NMA requests information regarding what criteria will be used to determine which waters are deserving the "special protection" designation, what authority does the agency's cite for making such designations, and what procedures will be required for ensuring data used for making such determinations is based upon sound science. It is important to note that without rigorous data quality control procedures in place, the basis for any watershed assessment and designation will be open to challenge.

NMA suggests that the process for designating watersheds for special protection is redundant. States are already required under the CWA to designate water bodies as impaired and to keep an inventory of those waters that are failing to meet water quality standards, develop antidegradation policy, complete triennial review of water quality standards and complete source water assessments under the Safe Drinking Water Act. The EPA also requested, in 1999, that states complete watershed assessments under the CWAP. Therefore, NMA requests clarification regarding what additional purpose such federal designations will serve and an analysis of the environmental impact on the federal lands and resources of diverting funds in the manner suggested.

Conclusion

The NMA appreciates the opportunity to comment on the proposed policy for establishing a unified federal watershed approach to federal land and resource management. In this regard, the NMA requests that the Agencies delay moving forward with the proposal until such time as the CWAP litigation is resolved. NMA also requests that, at a minimum, the Agencies consider reproposing the Policy providing the public adequate opportunity to comment on a clarified, more detailed proposal.

Sincerely,

Karen Bennett
Director of Water and Waste Policy

Harold P. Quinn, Jr.
Senior Vice President and
General Counsel