**2020 NATIONAL MINING ASSOCIATION PLAN: CROSS-CUTTING**

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2020 CROSS CUTTING PLAN

RATIONAL CWA PERMITTING REGIME

Waters of the United States (WOTUS)

In early 2020, EPA and the Corps will finalize a replacement WOTUS Rule that sets clear, legally defensible limits on federal CWA authority while preserving existing exemptions for on-site water management features used in mining. Focus in 2020 will be defending both the repeal and replacement rules in the courts and defending the waste treatment system exclusion in legal challenges.

STRATEGY:

Litigation: Intervene in defense of the final repeal rule and final replacement rules where necessary. Monitor and evaluate any cases that specifically target the mining industry or the waste treatment system exclusion.

Legislative: Work with coalition, state, and congressional allies to support the replacement rule.

Groundwater Permitting

A lack of clarity on whether discharges to groundwater are subject to regulation under the CWA has led to an increasing number of CWA citizen lawsuits that could impact the mining industry and the question is now before the U.S. Supreme Court. Once the Court has made its decision in the *Maui* case, the focus in 2020 will be to build upon the success of securing a favorable interpretive memo in 2019 and urge EPA to codify a rule that provides durable clarification that groundwater discharges are not subject to CWA regulation.

STRATEGY:

Regulatory: Support expedited issuance of proposed EPA rule that provides durable clarification that discharges to groundwater are not subject to CWA regulation and expand that interpretation to other indirect discharges such as those from smokestacks or from rail cars carrying coal.

Litigation: Assess developments in the Supreme Court’s Maui decision and monitor any decisions that rely on or cite EPA’s interpretive statement on groundwater in the interim.

Legislative: Advocate for the inclusion of appropriations report language directing EPA to promulgate a rulemaking, if needed after the Maui decision.

Compensatory Mitigation

In 2019, the Corps and EPA took important steps to on favorable compensatory mitigation reforms initiatives including the drafting of a mining-specific Corps Regulatory Guidance Letter and initiation of a broader compensatory mitigation rulemaking. Focus in 2020 will be to build upon those steps to secure both the release of the mining RGL and the issuance of the broader proposal.

STRATEGY:

Regulatory: Ensure NMA review of the final mining RGL before interagency review and urge expedited release with a short comment period. Submit comments in support of the mining RGL and any regional guidance (e.g. potential Appalachian guidance). Provide comment on agencies broader rule to clarify procedures for in lieu fee programs and mitigation banks.

Legislative: Oppose any efforts to include language in the Water Resources Development Act of 2020 to codify the 2008 mitigation rule and further promote mitigation banking credits over permittee-responsible mitigation to the detriment of the mining industry.

404 Vetoes

Under the Obama administration, EPA significantly expanded the application of its CWA Sec. 404(c) veto to both retroactively revoke an existing 404 permit for a coal mining operation (Spruce/Mingo Logan), and to preemptively veto a minerals mining operation (Pebble) prior to the submission of a permit application. Focus in 2020 will be to push to secure commonsense limitations on EPA’s 404(c) authority in order to restore regulatory certainty, reinstate state authority over land use permitting, and foster capital investment, job creation and economic growth.

STRATEGY:

Regulatory: Advocate expedited issuance of proposed EPA rule that would restrict the circumstances under which EPA can utilize its 404(c) authority.

Legislative: Support legislation to repeal or limit EPA veto authority.

404 Guidance

The current administration has taken several significant steps to rescind draft or outdated guidance and increase transparency in how the agencies use guidance documents. Focus in 2020 will be to push EPA and the Corps to rescind various memoranda and guidance documents related to the CWA 404 program that were previously identified by NMA as problematic for the mining industry.

STRATEGY:

Regulatory: Advocate for rescission of or changes to various EPA and Corps memoranda including those related to state water quality certifications (Oct. 29, 2009, memorandum, Corps Regulatory Guidance Letter 90-94); CWA Sec 404(q) (1992, 2002, 2006, and 2008 memoranda); and the 1998 Memorandum of Agreement Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of Exemptions Under Section 404(f) of the CWA (modified in 1993).

Water Quality Standards – Aluminum, Conductivity and Selenium

The Obama administration undertook several actions with respect to water quality criteria derivation that adversely impacted mining operations including a fundamentally flawed aluminum criteria, a scientifically questionable draft study on conductivity and an arbitrarily low numeric selenium limit. In 2020, we will advocate for dovetailed solutions for each of the three criteria at issue.

STRATEGY:

Regulatory: Schedule member meeting with EPA in early 2020 to discuss next steps on aluminum technical support documents and advocate for EPA to address the mining industry’s concerns prior to finalization. Consider requesting that EPA prepare selenium guidance. Determine whether EPA’s conductivity standard can be rescinded as no longer reflecting the best available science.

Nationwide Permits

The Corps is seeking to modify nine energy-related nationwide permits, including several that are directly related to mining. Focus on 2020 is engagement with the agency to ensure the mining industry’s perspective is considered in the rulemaking process.

STRATEGY:

Regulatory: Work with the Corps to ensure that the modifications are broad enough to truly benefit the mining industry. Provide comment on any proposed rule when published.

TRADE POLICY

In 2019, trade matters proved increasingly challenging with the continued use of unilateral actions to compel concessions in negotiation/renegotiation of various trade agreements. In 2020, the focus will be on implementation of the phase one China agreement, other key multilateral/bilateral agreements (e.g., European Union, India and Indonesia) and the importance of inclusion of investor-state dispute settlement (ISDS) protections in future agreements.

STRATEGY:

Regulatory: Engage with Departments of Commerce and State, as well as Office of the U.S. Trade Representative to provide industry’s views regarding impacts on, and opportunities for, domestic and international business in the negotiation and implementation of trade agreements.

Legislative: Educate members of Congress on member priorities and importance of ISDS protections to promote inclusion of such provisions in implementing legislation if not included in the underlying text of a trade agreement.

RATIONAL AIR QUALITY STANDARDS

National Ambient Air Quality Standards (NAAQS): Ozone and Particulate Matter

In 2019, EPA began implementation of a fast-tracked NAAQS review process for ozone and particulate matter with a recommendation for reducing the particulate matter standard and retaining the ozone standard. Focus in 2020 will be on retention of the ozone standard opposition to reduction of the particulate matter standard to avoid additional permitting requirements and controls for major stationary sources operating or seeking to operate in nonattainment areas.

STRATEGY:

Regulatory: Lead NAAQS Regulatory Review and Rulemaking Coalition in building consensus industry-wide comments to support the retainment of the ozone standard and oppose any tightening of the particulate matter standard. Additionally, work with member companies to determine whether additional mining-specific comments are warranted on coarse particulate matter.

Legislative: Engage in broad coalition of trade associations on legislative advocacy initiatives.

NSR Reform – Project Emission Accounting

Description: In 2019, EPA published a proposed rule to codify recent guidance revising a key component of the NSR pre-construction permitting program. In 2020, the focus will be on finalization of the rule to allow permit applicants to consider projected emissions decreases, as well as increases, at the first step of deciding whether a planned construction project is subject to strict NSR permit requirements.

STRATEGY:

Regulatory: Urge expedited issuance of final EPA rule to memorialize this more flexible approach.

Litigation: If the final rule is challenged, consider engagement with a broader industry coalition to defend EPA’s action in federal court.

Potential for Significant Deterioration (PSD)/NSR Fugitive Emissions

Under the Obama administration, EPA stayed and agreed to reconsider a 2008 final rule that excluded fugitive dust from activities such as blasting, movement of material and haul road traffic in calculations of major source status and the threshold regulatory analysis for major modifications. In 2020, focus will be on securing an official denial of the reconsideration petition and reinstatement of the 2008 favorable rule.

STRATEGY:

Regulatory: Support EPA’s denial of reconsideration petition and push for expedited final rule reinstating the 2008 policy.

Litigation: If the final rule is challenged, consider engagement with interested NMA members to defend EPA’s action in federal court.

Clean Air Act Cost-Benefit Reform

Following up on a 2018 advance notice of proposed rulemaking (ANPRM), in 2019, EPA issued a memo on “Increasing Consistency and Transparency in Considering Benefits and Costs in the Rulemaking Process.” The memo directs each EPA Assistant Administrator to proceed with benefit-cost reforms using a media-specific approach and in 2020, focus will be on EPA’s Office of Air and Radiation as the first to issue a proposed rule.

STRATEGY:

Regulatory: Build upon comments submitted on the ANPRM regarding the improper reliance on co-benefits and unquantifiable, subjective factors in justifying costly regulatory decisions. Engage and partner with industry allies as appropriate.

RATIONAL SAFETY STANDARDS

Certification and Approval of New Technology

MSHA’s approval and certification process for testing permissible machinery, equipment and safety technology is fraught with delays that are exacerbated by the agency’s recognition of only its own testing laboratory to approve and certify new technology for use in mining operations. In 2020, focus will be on securing streamlined MSHA testing and certification regulations that recognize and accept international standards so U.S. businesses and miners can have access to safe products.

STRATEGY:

Regulatory: Engage with MSHA, Department of Labor and the White House to expedite final rules and policies that streamline approval of new technologies to advance miners’ safety and health.

New Health Standard for Silica

In 2019, MSHA issued a request for information (RFI) preparatory to a proposed rulemaking to manage miners’ exposures to silica in all mining sectors, both coal and metal/nonmetal (MNM).  The proposal, anticipated in 2020, will likely reduce the silica exposure limit to match the level that the Occupational Safety and Health Administration (OSHA) enforces but without the flexibility provided by OSHA’s allowance of use of administrative controls and personal protective equipment to achieve any reduction in the permissible exposure limit. Focus in 2020 will be on advocating for similar flexibilities in MSHA’s approach.

STRATEGY:

Regulatory: Build upon 2019 comments that recommended that MSHA accept work practices and technologies such as personal protective equipment (e.g., respirators) as alternative methods for miners to lower their exposures.

Refuges and Escapeways in Underground Metal/Nonmetal Mines

In 2019, MSHA proposed a policy change that improperly ignores that actual language of the existing to increase the stringency of the siting standard for refuge alternatives in underground metal/nonmetal mines. In 2020, the focus will be on advocating for adherence to the language of standard, rather than reducing the amount of time from 30 minutes to 10 minutes that underground MNM miners have to access an escapeway refuge in the event of a mine emergency.

STRATEGY:

Regulatory: Build upon 2019 comments opposing the reduced time limit for access to refuges.

Rightsizing the Mine Safety and Health Administration (MSHA)

The current structure of the Mine Safety and Health Administration (MSHA) does reflect today’s mining industry, particularly the significant decline in the number of operating coal mines. MSHA has too many mine inspectors resulting in nearly daily inspections at some mines, a significant distraction for mine operators who could otherwise use that time for activities designed to promote safety. In 2020, focus will be on reforming the organization through combining functions and building upon the nearly 500 employee reductions since 2017.

STRATEGY:

Regulatory: Engage with MSHA, DOL and White House to advocate for NMA recommended organizational changes including removal of layers of management and streamlining operations.

Legislative: Advocate for additional targeted reductions for agency-wide staff, field offices and over-funded programs.

RATIONAL ENDANGERED SPECIES ACT STANDARDS

The Obama administration issues a series of rules and policies that broadened the scope of the ESA, including expansion of critical habitat designations, new mitigation requirements and the requirement of a “net conservation gain” outcome. The focus in 2020 will be to build upon the successful ESA reforms finalized in 2019 that avoid unnecessarily expansive critical habitat designation and overly restrictive definitions that impede project approvals.

STRATEGY:

Regulatory: Engage agencies to ensure proper implementation of the ESA regulatory reforms; engage on species-specific (e.g., Guyandotte River and Big Sandy crayfish; northern long-eared bat) and regional habitat designations likely to adversely impact mining operations.

Litigation: Form an industry coalition to submit an amicus brief to support ESA reforms that are being challenged in federal court. Litigation: Form an industry coalition to submit an amicus brief to support ESA reforms that are being challenged in federal court.

Legislative: Support congressional efforts to modernize and reform the ESA and leverage opportunities to codify administrative reforms.

RATIONAL TAILINGS IMPOUNDMENT REQUIREMENTS

Recent catastrophic failures of a mine tailings dams in Canada and Brazil has revived and heightened scrutiny from the global community including investors, insurance underwriters and governments. An inability to provide these stakeholders sufficient comfort with rigorous standards and practices could have devastating impacts including (1) erosion of our license to operate (2) reduced access to or increased capital costs; (3) increased insurance premiums and reduced liability coverage; and (4) imposition of unnecessarily stringent regulations. The focus in 2020 will be on international developments on tailing standards and their operational implications for domestic mining operations.

STRATEGY:

Regulatory: Evaluate domestic vulnerabilities and work to avoid duplication.

International: Support membership through coordination with key international stakeholders.