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In Re: National Mining Association Definition of "Waters of the United States" – Pre-Proposal Recommendations; Docket ID No. EPA-HQ-OW-2017-0480

To Whom It May Concern:

The National Mining Association (NMA) submits the following recommendations for the U.S. Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) to consider as they develop a revised definition of "waters of the United States" (WOTUS) under the Clean Water Act (CWA). NMA appreciates the opportunity to comment on this key initiative, and welcomes the Agencies' encouragement of stakeholder engagement.

NMA and Its Members

NMA is a national trade association representing producers of most of America's metals, coal, and 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's members produce energy, metals, and minerals that are essential to social and economic prosperity, environmental improvement, and a better quality of life. NMA's members have pledged to conduct their activities in a manner that recognizes the needs of society and the need for environmental responsibility, national security, and economic growth. Accordingly, NMA is committed to integrating social, environmental, and economic principles into mining operations from exploration through development, operation, reclamation, closure, and post-closure activities.

The U.S. mining industry is heavily regulated under various state and federal environmental statutory regimes. In advance of any land disturbances, mining operators must obtain multiple environmental licenses and permits, which frequently include CWA

Section 404 and 402 permits, and Section 401 state certifications. Mining operators are likewise subject to other state and federal water quality and management requirements, including state groundwater regulations and, in the case of coal mining, Surface Mining Control and Reclamation Act (SMCRA) provisions. Mining companies expend significant resources on engineering, treatment, and mitigation measures designed to ensure that modern mining does not negatively impact water quality.

NMA has therefore engaged extensively with the Agencies regarding the proper scope of federal CWA jurisdiction for decades. With respect to the 2015 WOTUS Rule, NMA filed comprehensive substantive,[1] technical,[2] and coalition[3] comments on the proposed rule. NMA also met with agency staff on multiple occasions to further discuss the aspects of the rule most important to the mining industry. Due to the extensive state and federal environmental regulations applicable to the mining industry, as well as the fact that mining operations require significant capital investment (for, among other things, environmental engineering, treatment, and mitigation measures), NMA stressed the need for regulatory clarity and the application of appropriate limits on the reach of federal CWA jurisdiction.

Although aspects of the final 2015 WOTUS Rule did seek to address certain concerns raised by NMA and others, ultimately the rule included multiple overly expansive, unclear, and unlawful provisions. Thus, NMA joined with dozens of other industry and agricultural organizations – as well as 31 states – in challenging the rule in court. NMA remains committed to working with the Agencies to help ensure that a revised WOTUS definition is protective of water quality, administrable, lawful, and clear.

Summary of Recommendations

As noted above, due to the overlapping environmental regimes the mining industry operates pursuant to, NMA's members have a substantial interest in ensuring that any final rule defining the extent of federal CWA jurisdiction (1) provides clarity to the regulated community and agency field staff alike; (2) unambiguously excludes on-site water management features from jurisdiction; and (3) places reasonable, defined limits on federal jurisdiction to ensure appropriate environmental protections while avoiding undue permitting delays and allowing federal and state regulators to focus their resources on environmental mandates rather than protracted jurisdictional determinations.

NMA also encourages the Agencies in drafting a future WOTUS definition to take into consideration (1) the text of the CWA; (2) all applicable Supreme Court precedent; (3)

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[1] Nov. 14, 2014 Comments of the National Mining Association on the Proposed Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22,188 (Apr. 21, 2014).
[2] Nov. 14, 2014 Comments Prepared by GEI Consultants for the National Mining Association on the Proposed Waters of the U.S. Rule With Respect to Definitions of Excluded Erosional Features.
[3] Nov. 13, 2014 Waters Advocacy Coalition Comments on the EPA's and Corps' Proposed Rule to Define "Waters of the United States" Under the Clean Water Act.

Constitutional limitations on federal authority and due process requirements; and (4) policy considerations, such as administrability and regulatory certainty.

With those aims in mind, NMA suggests that the Agencies incorporate the following concepts in any future proposed WOTUS revision:

The Agencies should consider defining the following as "waters of the United States" –

(1) The territorial seas;
(2) Waters subject to the ebb and flow of the tide;
(3) Waters which have been used, are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce;
(4) Tributaries to waters identified in categories (1)-(3);
(5) Wetlands adjacent to waters identified in categories (1)-(4);

Where –

The term "waters" means relatively permanent, standing or continuously flowing bodies of water forming geographic features such as streams, oceans, rivers, and lakes.

The term "relatively permanent" means the continuous natural presence of water for at least three continuous months of the year during years of typical precipitation.

The term "tributary" means a water that flows to a (1)-(3) water for at least 90 continuous days at a specified flow magnitude (such as, for example, x cubic feet per second or x percentage of flow contribution to downstream navigable waters).

The term "adjacent" means directly abutting.

The Agencies should also expressly exclude the following from the definition of "waters of the United States," even where they otherwise meet the terms of the preceding paragraphs –

(1) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the CWA;
(2) Groundwater;
(3) Water-filled depressions or excavations incidental to mining or construction activity, including mine scars and pits excavated for obtaining minerals, fill, sand, or gravel that fill with water;
(4) Ditches;
(5) Existing long-standing agricultural exclusions, including those for prior converted cropland;

Where –

The Agencies clarify in the preamble of the rule that waste treatment systems include manmade waters and wetlands, systems created in "waters of the United States" or with impounded "waters of the United States," and systems created in or with impounded non-jurisdictional waters and wetlands. For purposes of the application of the waste treatment system exclusion, the term "treatment" includes any active or passive method to retain, concentrate, settle, or reduce or remove pollutants from wastewater and/or stormwater. The term "system" encompasses all components of a waste treatment system, including but not limited to ponds and impoundments, and any features necessary to convey water to and from such ponds and impoundments.

Legal Background

The objective of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[4] While Congress envisioned that the federal government would play an important role in working toward that objective, it explicitly announced its policy in the CWA to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter."[5]

With limited exceptions, the CWA prohibits "discharg[ing]...any pollutant"[6] without a Section 402 permit for discharges covered by the National Pollutant Discharge Elimination System (NPDES) program or a Section 404 permit for discharges of dredged or fill material. The CWA defines the term "discharge of a pollutant" as the "addition of any pollutant to navigable waters from any point source."[7] "Navigable waters," in turn, are defined to mean "the waters of the United States, including the territorial seas."[8] Thus, the extent of federal CWA jurisdiction depends on the scope of the term "waters of the United States."

The Supreme Court first addressed the Agencies' interpretation of "waters of the United States" within the meaning of 33 U.S.C. §1362(7) in *United States v. Riverside Bayview Homes, Inc.*,[9] which involved a wetland adjacent to a navigable water where "the area characterized by saturated soil conditions and wetland vegetation extended beyond the boundary of respondent's property" to "a navigable waterway."[10] Noting that "the Corps must necessarily choose some point at which water ends and land begins,"[11] the Court upheld the Corps' interpretation of "waters of the United States" to include a wetland that is directly connected to, and thus "actually abuts on a navigable waterway."[12]

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[4] 33 U.S.C. §1251(a).
[5] 33 U.S.C. §1251(b).
[6] 33 U.S.C. §1311(a).
[7] 33 U.S.C. §1362(12)(A).
[8] 33 U.S.C. §1362(7).
[9] 474 U.S. 121 (1985).
[10] *Id.* at 131.
[11] *Id.* at 132.
[12] *Id.* at 135.

The Supreme Court next addressed the proper scope of federal CWA jurisdiction in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC).*[13] There, the Court struck down the so called "Migratory Bird Rule," which purported to extend the Agencies' jurisdiction to include any intrastate waters "which are or would be used as habitat" by migratory birds.[14] Specifically, noting that "it was the significant nexus between the wetlands and 'navigable waters' that informed [the Court's] reading of the CWA in *Riverside Bayview,*" the Court held that "nonnavigable, isolated, intrastate waters" which did not "actually abut a navigable waterway" were not "waters of the United States."[15]

Finally, in *Rapanos v. United States,*[16] the Supreme Court "consider[ed] whether four Michigan wetlands, which lie near ditches or man-made drains that eventually empty into traditional navigable waters, constitute 'waters of the United States' within the meaning of the [CWA]."[17] Prior to *Rapanos,* "the Corps [had] interpreted its own regulations to include 'ephemeral streams' and 'drainage ditches' as 'tributaries' that are part of the 'waters of the United States.'"[18] "This interpretation extended the 'waters of the United States' to virtually any land feature over which rainwater or drainage passes and leaves a visible mark."[19] A four-Justice plurality outright rejected that interpretation, holding that "[waters of the United States] do not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."[20] Justice Kennedy, concurring in the judgment, agreed that jurisdiction may have been lacking in *Rapanos* because there may not have been a requisite "significant nexus" between the waterbodies at issue and any navigable waters.[21]

As evidenced by the cases above, the Supreme Court has recognized important limits on the scope of CWA jurisdiction. In enacting the CWA, Congress intended "to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term."[22] But Congress's use of the term "navigable" reflects a fundamental limit on federal CWA authority, and that term must be given some effect.[23] As Chief Justice Rehnquist noted in the Supreme Court's *SWANCC* opinion, "the term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."[24] Indeed, Congress was exercising its "commerce power over navigation."[25] States challenging the 2015 WOTUS Rule likewise noted that "in order to preserve the federal-state regulatory

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[13] 531 U.S. 159 (2001).
[14] *Id.* at 163-164.
[15] *Id.* at 167, 171.
[16] 547 U.S. 715 (2006).
[17] *Id.* at 729.
[18] *Id.* at 725 (citing 33 C.F.R. §328.3(a)(5)).
[19] *Ibid.*
[20] *Id.* at 739.
[21] *Id.* at 759-87.
[22] *Riverside Bayview,* 474 U.S. at 133; *SWANCC,* 531 U.S. at 171-72.
[23] *SWANCC,* 531 U.S. at 172; *Rapanos*, 547 U.S. at 779 (J. Kennedy, concurring).
[24] *SWANCC,* 531 U.S. at 172.
[25] *Id.* at 168 n.3.

balance, the statutory term 'waters of the United States' must be given a meaning that is consistent with the primary purpose of the CWA – to protect navigable-in-fact waters."[26]

Detailed Recommendations

Approach to Defining WOTUS

The statutory definition of the term "navigable waters" contained in the CWA – "the waters of the United States" – is ambiguous, and the Agencies will therefore receive deference from the courts during their "step two" rulemaking under *Chevron USA Inc. v. Natural Res. Def. Council, Inc.*[27] if the rule articulates reasonable definitions of those terms based on the Agencies' statutory interpretation and policy decisions. Importantly, however, courts generally do not afford similar deference to agency interpretations of ambiguous Supreme Court decisions because courts, not agencies, are the experts with regards to analyzing judicial decisions.[28] Indeed, NMA's opening brief in the litigation challenging the 2015 WOTUS Rule presented that very argument: that the 2015 rule did not deserve *Chevron* deference because it was based on an interpretation of Justice Kennedy's *Rapanos* "significant nexus" discussion. NMA therefore encourages the Agencies to avoid basing their "step two" rulemaking on an interpretation of a single judicial opinion, and to instead consider the CWA's text, all applicable Supreme Court decisions, key policy goals, and relevant scientific information as it moves forward with a revised WOTUS definition.

On-Site Waters and Water Management Features

As NMA has pointed out to the Agencies throughout their various WOTUS actions, mine sites typically contain features used and constructed to manage stormwater and process waters that must be expressly excluded from any WOTUS definition. For example, diversion and conveyance ditches and channels, closed loop systems, on-site containment, sedimentation and treatment ponds and impoundments, and other components of water treatment facilities are integral to mining operations. Importantly, these features are used to manage, contain, convey, and treat on-site waters in order to facilitate reuse and recycling, protect water quality, and comply with existing environmental standards pursuant to the CWA and numerous other federal and state mining laws and regulations. It is vital to the mining industry that the Agencies clarify in their "step two" rulemaking that such features are "waste treatment systems" excluded from the definition of WOTUS. Furthermore, additional clarity concerning the scope of the waste treatment exclusion is needed to ensure that water management features at

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[26] State Petitioners' Brief, *Murray Energy Corp. et al. v. U.S. EPA,* No. 15-3751 (6th Cir.) at 3.
[27] 467 U.S. 837 (1984).
[28] *See, e.g., Atkins v. FEC,* 101 F.3d 731 (D.C. Cir. 1996)(en banc)(There is "no reason for courts – the supposed experts in analyzing judicial decisions – to defer to agency interpretations of the [Supreme] Court's opinions").

mine sites can be utilized to properly manage and store water and wastes associated with mining operations and protect downstream water quality.

Water Management at Mine Sites

Mining operations encompass vast stretches of land—typically several square miles – and generally include complex process water systems. Mining operations are also dynamic, with different phases of activities such as construction, extraction and removal, and reclamation occurring concurrently or at varying times and in different areas throughout the mine site. Mining companies depend on a variety of water management features within their mine sites to manage stormwater runoff from disturbed areas, recycle water for reuse, or convey water to ponds or basins where solids are settled out prior to reuse or discharge. Some water management features are created on dry lands, while others are created by impounding or modifying existing "waters of the United States" pursuant to Section 404 permits.[29]

For example, mine operators rely on a broad range of ponds and impoundments (*e.g.*, sediment ponds, heap leach ponds, tailings impoundments, slurry impoundments, mine pits intercepting ground water, etc.) to support mining operations. Mine operators depend on these features, as well as ditches and other conveyances, to manage, store, treat, and beneficially reuse water within the mine site. According to EPA, these ponds and impoundments are considered to be a treatment method because they physically remove suspended solids and metals. By way of example, one of the main functions of on-site ponds and impoundments is to promote the settling of solids. After solid particles settle to the bottom of the water column, those solids are often removed for disposal or further treatment,[30] and the water can be evaporated, reused in mining processes, or discharged from the mine site to navigable waters pursuant to an NPDES permit.

Importantly, on-site water management features are highly regulated during and after the life of the mining operation. Among other things, these systems are designed to ensure that any surface discharge from a mine site into navigable waters is covered by an NPDES permit and as such will not cause or contribute to violations of water quality standards. Moreover, such features are often required to be permitted in accordance with state groundwater protection laws. In fact, many water management features within mine sites are designed to be zero discharge systems. At those sites, water that is collected and managed is either reused in mining processes or it evaporates; it is not discharged to navigable or other state waters.

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[29] As noted in the preamble to the 2015 WOTUS Rule, CWA Section 404 permits are needed to construct waste treatment systems in "waters of the United States," and CWA Section 402 permits may be required for downstream discharges from waste treatment systems to "waters of the United States." *See* 80 Fed. Reg. 37,054 at 37,097.

[30] In some mining operations, solids are designed to stay in impoundments and, at the end of the operating life of the mine, the impoundment is reclaimed.

History and Scope of the Waste Treatment System Exclusion

On-site water management features like those listed above historically have not been deemed "waters of the United States." EPA has in fact determined that these on-site waters are "treatment systems" that represent the best practicable control technology and best available technology economically achievable for purposes of managing process wastewater consistent with the requirements of the CWA, or in other cases, that these features are part of required non-process and stormwater management systems.[31] Likewise, under SMCRA, these features are considered components of required water management systems or, in the case of coal slurry impoundments, are considered part of a coal preparation plant's water circuit.[32]

As such, most on-site waters that could potentially be deemed jurisdictional under current regulations, including ditches and conveyances, fall within the scope of the long-standing waste treatment system exclusion, as the Agencies have recognized in prior guidance documents and practice.[33] The waste treatment system exclusion has been codified in EPA's and the Corps' regulations since 1979 and applied to hundreds of mining permits. However, the application and scope of the exclusion have not always been consistently applied in the courts, and have been misconstrued by mining opponents. Consequently, mining permittees have had to undergo costly jurisdictional determinations and defend against citizen lawsuits.

For example, in *Ohio Valley Envtl. Coalition v. Aracoma Coal Co.*, citizen groups challenged the scope of the waste treatment exclusion by alleging that coal mine operators had to obtain a CWA Section 402 permit for discharges from stream segments used to convey on-site, non-process runoff water to sediment ponds. Contrary to the citizen groups' claims, however, the U.S. Court of Appeals for the Fourth

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[31] *See* effluent limitation guidelines development for the coal, hard rock, and phosphate mining sectors, determining the use of ponds, impoundments, and basins to be the best practicable control technology for controlling discharges of process generated waste water. 42 Fed. Reg. 21,380 (Oct. 17, 1975); 44 Fed. Reg. 2,586 (Jan. 12, 1979); 46 Fed. Reg. 28,873 (May 29, 1981); 47 Fed. Reg. 45,382 (Oct. 13, 1982); 50 Fed. Reg. 41,296 (Oct. 9, 1985); 67 Fed. Reg. 3,370 (Jan. 23, 2002); 42 Fed. Reg. 35,843 (Jul. 12, 1977); 43 Fed. Reg. 9,808 (Mar. 10, 1978); 43 Fed. Reg. 29,711 (Jul. 11, 1978); 47 Fed. Reg. 54,598 (Dec. 3, 1982); 53 Fed. Reg. 18,764 (May 24, 1988).

[32] 30 C.F.R. Part 816; 50 Fed. Reg. 41,296 at 41,303 (Oct. 9, 1985).

[33] *See*, Wilcher, LaJuana S., Memorandum to EPA Director Region X EPA CWA Regulation of Mine Tailings Disposal (Oct. 2, 1992)(clarifying that the discharge of mine tailings for disposal/treatment into impounded waters for the purpose of containing and treating those materials does not require a permit under the CWA, but that any downstream discharge from the waste treatment system requires a CWA Section 402 permit); Regas, Diane, et. al., to EPA Director Region X CWA Regulation of Mine Tailings (May 17, 2002)(affirming revised definitions of fill and discharge of fill material did not alter EPA's interpretation of the exclusion of waste treatment systems from CWA regulation); Grumbles, Benjamin H., Memorandum to Hon. John Paul Woodley, Assistant Secretary of the Army (Civil Works) (Mar. 1, 2006) (recognizing that at times in mining operations some segment of a stream must be used to convey water from a fill to a sediment pond and that such stream segment is an unavoidable and necessary component of the treatment system because it is required to convey water and because it also provides initial treatment by settling some fraction of suspended sediments in the flow, and clarifying that the entire system contributes to ensuring that the discharge from the sediment pond meets the requirements of the CWA and is exempt from CWA regulation).

Circuit upheld the Corps' application of the waste treatment system exclusion to in-stream sediment ponds and stream segments flowing into those ponds within a coal mining site.[34] In so holding, the Court drew upon discussions from agency guidance documents explaining that stream segments are a necessary component of treatment systems because they are required to convey water and provide initial treatment by settling suspended sediment, and because the entire system contributes to ensuring that the discharge from the sediment ponds meets the requirements of the CWA. Importantly, the court emphasized the Agencies' "consistent administrative practice."[35]

CWA technology-based regulations also clearly contemplate that the scope of the waste treatment system includes all structures, channels, ponds[36] and other water treatment components.[37] Furthermore, in developing effluent limitations for the mining sectors, EPA incorporated the use of settling ponds and tailings impoundments for pre-treatment prior to recycle/reuse or discharge, as well as the use of stormwater diversion ditches for keeping non-contaminated water from comingling with process wastewater, as the best practicable control technology currently available.[38] Similarly, environmental standards pursuant to SMCRA also require the use of ditches and sediment ponds as the best technology currently available for preventing additional contributions of suspended solids to stream flow or runoff outside the permit area, as well as for compliance with state and federal water quality standards.[39]

Economic analyses associated with these effluent guideline development efforts were based on the assumption that such "treatment facilities" and "treatment systems" would be used to meet water quality requirements.[40] The guidelines expressly define the term "treatment system" to include "all structures which contain, convey, and as necessary, chemically or physically treat coal mine drainage, coal preparation plant process wastewater, or drainage from coal preparation plant associated areas, which remove pollutants…from such waters. This includes all pipes, channels, ponds, basins, tanks and all other equipment serving such structures."[41] It is therefore clear that waste treatment systems include all those components that together ensure that any discharges from the system to "waters of the United States" meet the requirements of the CWA.

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[34] 556 F.3d 177, 212-216 (4th Cir. 2009).
[35] *Id.* It should also be noted that, in the context of surface coal mining, features such as on-site ponds and conveyances are regulated under SMCRA.
[36] On-site ponds that should be excluded from jurisdiction can also include mine pits that intercept ground water, emergency cooling water ponds, emergency firewater ponds, ponds used for dust suppression water, evaporation ponds, and water recycle ponds.
[37] See 40 C.F.R. Part 434 (o).
[38] *See* Part 436 Mineral Mining and Processing Point Source Category, Final Rule, 42 Fed. Reg. 35,843 (Jul. 12, 1977); Part 436 Mineral Mining and Processing Point Source Category Standard of Performance for New Sources, Phosphate Rock Mining, Final Rule, 43 Fed. Reg. 9,808 (Mar. 10, 1978); Coal Mining Point Source Category; Effluent Limitations Guidelines and New Source Performance Standards, Final Rule, 50 Fed. Reg. 41,296 (Oct. 9, 1985); Part 440 Ore Mining and Dressing Point Source Category; Part 434 Subpart H Western Alkaline Coal Mining.
[39] 30 U.S.C. Section 1265(b) (10).
[40] 50 Fed. Reg. 41,296, 41306 (Oct. 9, 1985); 42 Fed. Reg. 35,843, 35,846 (Jul. 12, 1977).
[41] *Id.*

"Step Two" Waste Treatment System Clarifications

NMA urges the Agencies to retain the current text of the waste treatment exclusion,[42] and to provide additional clarity in the preamble of the "step two" rulemaking regarding its application and scope. Specifically, the Agencies should clarify that on-site water management features, including all structures – natural and man-made – that contain, convey, and, as necessary, chemically or physically treat on-site water associated with mining operations are waste treatment systems and excluded from the definition of "waters of the United States." A lack of clarity concerning this key exclusion would have severe consequences for the mining industry, as on-site water management features would potentially not be able to serve their intended purpose, which would lead to substantial increases in both water usage and treatment costs for mining operations, conflict with the requirements of the CWA, and harm downstream water quality.

As such, the Agencies should explicitly recognize, as they have in prior practice,[43] that the term "system" includes all channels, diversions, ditches, feeder streams, wetlands, and other on-site natural or man-made features carrying flow to and from ponds and impoundments used to treat wastewater and stormwater, as these features are part and parcel of waste treatment systems at mine sites. Such features are necessary to convey and manage wastewater and stormwater within the mine site, and they help sediment and other pollutants settle out before any water is released to downstream "waters of the United States." Water that is conveyed from the mine site to downstream jurisdictional waters requires an NPDES permit and, not surprisingly, NPDES permitting authorities have typically agreed that it would be senseless to require additional permits above the point of discharge to downstream jurisdictional waters. Nevertheless, to avoid any potential confusion in the field concerning the scope of the waste treatment system exclusion, the Agencies should make it clear that the exclusion encompasses all components of the treatment system, including but not limited to ponds/impoundments *and* the related flowing waters within a mining project site that are necessary to convey waters to and from those ponds and impoundments.

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[42] However, NMA does request that the Agencies change the waste treatment system text currently found at 40 C.F.R. § 122.2, which, unlike all other regulatory waste treatment system references, inappropriately includes a sentence proclaiming that "[t]his exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States," along with a confusing accompanying footnote explaining that EPA suspended the sentence in question since July 21, 1980. The now-suspended sentence would have limited the scope of the waste treatment system exclusion substantially, as many waste treatment systems within the mining industry, as well as in other industries, incorporate "waters of the United States." Even though EPA suspended the sentence attempting to limit the waste treatment system exclusion back in July 1980, the limitation has been erroneously applied since that time, even by some federal courts. *See, e.g.*, *United States v. TGR Corp.*, 171 F.3d 762, 765 (2d Cir. 1999); *Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng'rs*, 2007 WL 2200686 (S.D. W.Va. June 13, 2007), *rev'd by* 556 F.3d 177 (4th Cir. 2009). To avoid future erroneous attempts to revive the suspended language and to ensure uniformity across all regulatory programs under the CWA, the Agencies should delete the suspended sentence and accompanying footnote 1 from 40 C.F.R. § 122.2. This would also help further clarify that waste treatment systems resulting from the impoundment of jurisdictional waters are excluded from the definition of "waters of the United States."

[43] *Supra* note 31.

The Agencies should also clarify that the term "treatment" for purposes of the waste treatment system exclusion includes, but is not limited to, methods such as wastewater and stormwater retention, concentration (evaporation), settling, or active and passive treatments (in-situ or in-process) to remove or reduce pollutants. Mining companies uniformly rely on these forms of treatment to support their operations and ensure that, if there are any downstream discharges, they meet all applicable NPDES permitting requirements. Waste treatment does not necessarily require the addition of chemicals or the use of complex technologies like ion exchange or reverse osmosis. Natural processes such as detention over time, evaporation, or pollutant uptake by aquatic vegetation can effectively help solids settle out and even remove pollutants as in the case of neutralization and/or geochemical transformations in pipeline mixing. Collecting and retaining wastewater and stormwater runoff in on-site water management features is also a widely used form of waste treatment in many industries, including mining, and as discussed above is widely recognized by EPA and SMCRA authorities.

Without such clarity, mining operations could continue to be subject to onerous administrative and judicial proceedings in which mining companies bear the burden of disproving jurisdiction over water features that the Agencies did not intend to include within the scope of "waters of the United States." Mining companies would also be faced with substantial implementation challenges not anticipated or intended by the Agencies, and the Agencies themselves would likely be forced to waste resources by having to clarify their intent through *amicus* briefs during protracted litigation.

To avoid these unintended consequences, therefore, NMA strongly urges the Agencies to (1) retain the longstanding regulatory exclusion for waste treatment systems; (2) include in the preamble of the "step two" rulemaking language that clarifies that the exclusion includes systems containing manmade waters and wetlands, systems created in "waters of the United States" or with impounded "waters of the United States," and systems created in or with impounded non-jurisdictional waters and wetlands; (3) clarify that the term "treatment" includes any active or passive method to retain, concentrate, settle, or reduce or remove pollutants from wastewater and/or stormwater, and the term "system" encompasses all components of a waste treatment system, including but not limited to ponds and impoundments, and any natural and man-made features necessary to convey water to and from such ponds and impoundments; and (4) remove the suspended language and accompanying footnote from 40 C.F.R. § 122.2, and instead include the same waste treatment language as is found in all other regulatory sections.

Traditional Navigable Waters and Tributaries

As noted above, the text of the CWA "shows that the Act's term 'navigable waters' includes something more than traditional navigable waters,"[44] but the word "navigable" must still be given some effect.[45] In other words, "the term 'navigable' has at least the

[44] *Rapanos,* 547 U.S. at 731.
[45] *SWANCC,* 531 U.S. at 172.

import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."[46] Indeed, Congress was exercising its "commerce power over navigation."[47] NMA's suggested definition therefore includes waters that have been used, are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce.

Likewise, WOTUS should include tributaries to such waters. However, to give effect to both the statutory term "navigable" and adhere to the Section 101(b) policy objective of recognizing and preserving the role of the States, NMA suggests that the Agencies limit the definition of "tributary" to those waters that flow to such navigable waters for at least 90 continuous days at a specified flow magnitude, such as, for example, x cubic feet per second or x percentage of flow contribution to downstream navigable waters. Such a definition is consistent with the plurality opinion in *Rapanos,* and would clearly exclude non-navigable ephemeral streams and drainages. This definition is also consistent with the Agencies' 2008 *Rapanos* guidance, which states that the Agencies should categorically assert jurisdiction over "non-navigable tributaries of traditionally navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally."

NMA's proposed definition of "tributary" also takes into account flow duration, magnitude, and frequency, and as such provides regulatory certainty for the public. If historic baseline flow information is unavailable, the Agencies could implement such a standard by modeling it to watershed size so that watershed mapping techniques can be easily used to determine whether a particular waterbody is jurisdictional without the need for flow meters etc. (though site-specific measurements could be taken by landowners that wanted to do so). Converting the flow metric to a watershed area would also necessarily take into account regional differences, as modeled watershed sizes of tributaries that flow 90 continuous days at a specified rate would differ in different regions of the country.

Notably, federal agencies including the Federal Emergency Management Agency (FEMA), U.S. Geological Survey (USGS), Office of Surface Mining Reclamation and Enforcement (OSMRE), National Oceanic and Atmospheric Administration (NOAA), and the Corps, have successfully used watershed modeling to approximate similar flow statistics and watershed areas. This approach would also be consistent with the Corps' previous practice of using a flow metric (such as mean annual flow) as a jurisdictional threshold and equating it to a watershed area. The Agencies are therefore capable of utilizing such an approach with respect to WOTUS, and it would provide much needed regulatory certainty while being easily administrated.

However, NMA cautions that under such an approach, the jurisdictional extent of streams will be dependent on the particular flow frequency, magnitude, and duration metrics used and, where site-specific measurements are not utilized, on modeling

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[46] *SWANCC,* 531 U.S. at 172.
[47] *Id.* at 168 n.3.

accuracy. NMA therefore requests that, should the Agencies utilize this approach, the regional watershed areas resulting from the metrics chosen be provided in the proposed rule so that the Agencies and regulated community can fully assess the potential impacts of the proposal.

Wetlands

In light of the policy objective of preserving the role of the States outlined in CWA Section 101(b), as well as the need for an administrable rule that provides certainty for the regulated public, wetlands should only be subject to CWA jurisdiction when they are adjacent to a navigable water or tributary. Adjacency should in turn be defined to mean "directly abutting," meaning that the wetlands share a common boundary with – and therefore either begin or end in - a WOTUS.

This definition would be consistent with the Supreme Court's holding in *Riverside Bayview,* where the Court upheld federal jurisdiction over wetlands "inseparably bound up with the 'waters of the United States,'"[48] as well as the plurality opinion in *Rapanos,* which held that "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act."[49] The definition would also appropriately limit the scope of federal jurisdiction and allow for States to regulate wetlands isolated from WOTUS, thereby helping to further the Congressional policy outlined in CWA Section 101(b). Importantly for NMA's members as well, such a definition would help minimize the current uncertainty and complex factual disputes that have arisen with previous interpretations of adjacency.

Any revised WOTUS definition should also specify that, to be jurisdictional, a wetland must meet all three of the Corps' longstanding criteria for wetlands. Specifically, the Corps' regulations define wetlands as "those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions."[50] As such, the Agencies should require in a "step two" rulemaking that wetlands must have a prevalence of hydrophytic vegetation, hydric soils, and permanently or periodically inundated soils saturated to the surface at some time during the growing season to be subject to CWA jurisdiction.

Additional Exclusions

Ditches: While, as noted above, many ditches should be excluded from the definition of WOTUS due to their function as part of a waste treatment system, ditches that serve

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[48] *Riverside Bayview,* 474 U.S. at 134-135.
[49] *Rapanos,* 547 U.S. at 742.
[50] 33 C.F.R. 328.3(c)(4).

functions other than as part of a waste treatment system and/or that existed on the landscape prior to mining should likewise not be jurisdictional "waters of the United States."

Ditches are commonly found on mine sites nationwide, and due to the dynamic nature of mining, mining companies constantly have to maintain, modify, move, and reclaim them. A clear exclusion for ditches – both mining-related and other – should be included in any revised definition of WOTUS. Notably, ditches have generally been excluded from CWA jurisdiction. In 1977, the Corps stated that the agency "adopted the suggestion of many commenters that [it] incorporate into [the regulatory] definition...the statement that nontidal drainage and irrigation ditches that feed into navigable waters will not be considered 'waters of the United States'...To the extent that these activities cause water quality problems, they will be handled under other programs of the [CWA]."[51] While since 1986 the Corps has regulated certain ditches on a case-by-case basis, the Agencies' historic practice has been to generally exclude ditches from CWA jurisdiction. Likewise, the plurality opinion in *Rapanos* explained that it would make little sense to treat statutory point sources, such as ditches, as WOTUS, as "the separate classification of 'ditch[es], channel[s], and conduit[s] – which are terms ordinarily used to describe watercourses through which *intermittent* waters typically flow – shows that these are, by and large, *not* waters of the United States."[52] The Agencies should therefore include a clear exclusion for ditches in their "step two" rulemaking.

Groundwater: As recognized in the 2015 WOTUS Rule, groundwater is not a "navigable water" for purposes of the CWA, and any "step two" rulemaking should clearly state that groundwater is not a "water of the United States."

Water-Filled Depressions: Water-filled depressions incidental to mining or construction activity, including mine scars and pits excavated for obtaining minerals, fill, sand or gravel that fill with water, should be excluded from the definition of WOTUS. Such features could come in under the above definition of "tributary," as some contribute flow to downstream WOTUS for 90 consecutive days, but as in the 2015 WOTUS rule, they should be excluded from CWA jurisdiction as they are not part of the natural tributary system and exclusion encourages environmentally beneficial land reclamation activities.

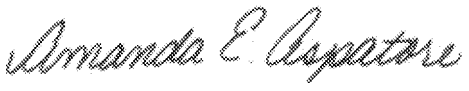
Conclusion

NMA appreciates this opportunity to provide early input on a potential revised WOTUS definition, and supports the Agencies' goal of developing a rulemaking that supports the CWA's stated policy of recognizing, preserving, and protecting the primary responsibility of the States in addressing water pollution and planning the development and use of land and water resources. A definition of WOTUS that furthers this key Congressional objective, provides regulatory certainty, and articulates appropriate limits on federal jurisdiction is vital to the mining industry, and NMA and its members look forward to

[51] 42 Fed. Reg. 37,121 at 37,127 (July 19, 1977).
[52] *Rapanos,* 574 U.S. at 735-36.

working with the Agencies as they move forward with their "step two" rulemaking. Please contact me at aaspatore@nma.org or (202) 463-2646 if you have any questions concerning these comments, or need any additional information.

Sincerely,



Amanda E. Aspatore
Vice President, Water Law & Policy
National Mining Association