215

ARIZONA MINING ASSOCIATION

CHUCK SHIPLEY
President

May 16, 2000

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

RE: Comments of Arizona Mining Association on Proposed Unified Federal Policy for Ensuring a Watershed Approach to Federal Land and Resource Management, 65 Fed. Reg. 8834 (February 22, 2000)

Dear Sir/Madam:

This document contains the comments of the Arizona Mining Association ("AMA") on the above-referenced draft policy. AMA also fully supports the comments on the draft policy submitted by the National Mining Association.

The AMA's member companies are ASARCO Incorporated, BHP Copper, Inc. and Phelps Dodge Corporation. The member companies' Arizona operations produce more than 66% of the nation's newly-mined copper each year. AMA member companies have an interest in this draft policy because they own facilities (including inactive facilities) located on or in close proximity to federal lands.

General Comments

The AMA does not object, in principle, to the concept of federal agencies identifying and prioritizing waters on federal lands for the purposes of directing limited federal resources. However, the AMA has a number of concerns with the draft policy. Most of these concerns relate to the somewhat ambiguous scope and intent of the policy, and to the uncertainty over how it will fit with existing federal and state programs and requirements.

Briefly, the AMA's most significant general concerns are as follows:

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215

- The scope of the policy is unclear. At 65 Fed. Reg. 8835, the notice indicates that the policy could apply in up to 40% of the nation's watersheds because they "include Federal lands or resources," implying that the presence of any federal land or resources is sufficient to trigger the policy. At 65 Fed. Reg. 8837, however, the policy indicates that watershed assessments will be conducted for watersheds that have "significant Federal lands and resources." This ambiguity should be clarified by limiting the application of the policy to watersheds where the lands are completely under federal control. Any reference to lands "or" resources should be eliminated because it implies that the presence of federal "resources" (whatever that means) alone is sufficient to trigger the policy.

- The precise intent of the policy is also somewhat unclear. Although the draft policy does set forth some broad agency objectives, it is unclear how these objectives are intended to fit with already existing state and federal programs addressing similar topics. For example, with respect to watershed assessment and management, EPA already has developed guidance for states to develop watershed assessments, and many states have already made significant strides in this regard. In addition, the imminent revisions to the TMDL program are likely to create another tool for management on a watershed basis. Likewise, with respect to identification of high priority waters, states already have the ability to identify such waters pursuant to their water quality standards programs. For example, Arizona has designated a class of "unique waters" that are given special protection (more restrictive standards, highest level of antidegradation protection pursuant to 40 C.F.R. § 131.12(a)(3)). See A.A.C. R18-11-112. Because of this overlap, the agencies should clarify precisely what "gaps" the draft policy is intended to fill, and then clearly define objectives based on these gaps (assuming the agencies have the statutory authority to take the steps they propose, of course).

- The policy should make absolutely clear that it does not represent an attempt to expand existing agency authorities. The current draft states that the policy will be implemented "to the extent possible" within the existing federal land and resource management planning programs and resources. See 65 Fed. Reg. at 8835. This could be read as expressing the position that where existing programs are inadequate to achieve what the agencies perceive to be called for in the policy, new programs will somehow be created or utilized. This is not permissible unless the programs are clearly consistent with existing statutory authority. The policy should make absolutely clear that it is not attempting to expand the authority of federal land management agencies. Any such attempt would be unlawful; only Congress can expand an agency's authority, by amending the relevant statutes. The Clean Water Action Plan, which is neither statute nor rule nor executive order (but is instead at best a statement of goals and policies), cannot confer on federal agencies any

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215

authority beyond that which they have been explicitly granted by statute. The final policy, if adopted, should be very clear on this point.

- Any final policy must recognize and protect existing land uses, whether they are on federal land or adjacent non-federal land. The AMA is very concerned that this policy could be used to attempt to halt ongoing, legally authorized activities in or near "priority watersheds," on the grounds that these activities are somehow contributing to the "degradation" of the watershed. Although the AMA supports the policy's references to dialogue with private or other non-federal stakeholders in making watershed decisions, we are concerned that the final policy will be used to attempt to halt or modify activities deemed "undesirable" by the federal agency or some portion of stakeholders. In addition, as noted above, AMA believes that other tools may be more appropriate for addressing watershed issues (e.g., the TMDL program or state unified watershed assessments, both of which allow involvement of federal agencies as stakeholders). For all these reasons, the final policy should explicitly state that it will not be used to attempt to halt existing and legally authorized activities.

- As with virtually all Clean Water Act programs, the AMA feels that data quantity and quality are essential to any decisions. Reliable and current data is necessary to make meaningful decisions pertaining to water quality and watershed management. The AMA therefore supports those portions of policy that stress good science (e.g., Part II.B.1, 65 Fed. Reg. at 8838). For the same reason, any references in the policy to participation by stakeholders in monitoring efforts (e.g., Part III.D.3.b, 65 Fed. Reg. at 8838), should be accompanied by requirements to use appropriate QA/QC in collecting and analyzing data. In addition, the final policy should include the statement that agencies will not make determinations regarding water quality or watershed conditions unless and until they have acquired adequate, reliable and reasonably current data that was collected using appropriate QA/QC.

Comments on Specific Portions of Draft Policy

- At 65 Fed. Reg. 8834, the notice suggests that the watershed approach should take into consideration groundwater flow. Neither the Clean Water Act nor any other federal statute grants regulatory authority over groundwater to EPA or any other federal agency. As a result, any reference to groundwater should be removed from the final policy. States are the appropriate authority to evaluate groundwater considerations because they regulate groundwater (e.g., Arizona's aquifer protection permit program). (This is another reason why evaluation of watersheds, even those on federal land, is better addressed under a state's unified watershed assessment than under a policy governing federal agencies.)

- The AMA supports the statement in the notice (65 Fed. Reg. at 8835) that the policy is not intended to affect water rights in any fashion. This should be repeated in the text of the policy itself. Moreover, the policy should go further and state that

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215

avoiding impacts to water rights will be a factor considered in developing any strategies under the policy. For the same reasons, the reference to changes to flow regime should be deleted from Part II.B.1.b(3) (65 Fed. Reg. at 8837), the section on identifying priority watersheds most in need of restoration.

- In identifying priority watersheds (or any other class of watershed included in the final policy), the agencies should consider the extent to which any impacts to the watershed result from natural sources. It has been the experience of AMA member companies that in some areas, natural sources (e.g., naturally mineralized areas, sediment flowing into ephemeral streams during storm events, etc.) are a significant contributor to measured exceedances of water quality standards. The policy should allow for consideration of this fact in determining priority watersheds. See 65 Fed. Reg. at 8838.

- AMA generally supports the concept of best management practices ("BMPs") as the most appropriate manner in which to address nonpoint sources. See 65 Fed. Reg. at 8838. However, it is unclear from the discussion in the draft policy whether the BMPs it calls for are voluntary or not. If they are not voluntary, it is unclear what statutory authority the agencies would utilize in requiring the development of BMPs. This is an example of how the uncertain legal authority for the policy affects the proposed actions to be taken under the policy. At a minimum, the final policy should clarify that the reference to BMPs encompasses actions that are voluntary or that may be required under existing legal authorities (to whatever extent such authority exists).

- The draft policy talks in several places about watershed "restoration" but does not define that term. The obvious question is: restoration to what level? For example, is the intent to restore watersheds to conditions that we think existed before the influence of man (assuming solely for the sake of argument that we could somehow identify such conditions)? If not, what is the restoration goal, or range of goals? The AMA suggests that references to "restoration" be replaced with references to "improvement." Because the policy professes not to be expanding the authority of the agency, the goal of improvement efforts would be established pursuant to procedures under whatever statutory authority the improvement is being undertaken. If the efforts are purely voluntary and are not controlled by a particular statute, then the agencies (and other involved parties) would have flexibility to determine the target for improvement. In those cases, use of the term "restoration" would be equally disturbing because it implies that voluntary efforts would be held to such a high standard that a significant disincentive to participation would be created.

- The policy's creation of two new classes of water (priority watersheds and watersheds designated for a special protection) is confusing and creates uncertainty as to how it will fit with existing programs. The first category (priority watersheds) are those where resources will be targeted for improving water quality. See, e.g., 65 Fed. Reg. at 8837. To some extent, this appears to duplicate the prioritization process that states will be undertaking in the TMDL program (i.e., identifying impaired waters and

215

determining which waters should be first subject to TMDL development). It would seem to make more sense for federal agencies to participate in this process rather than creating a separate federal mechanism for identifying priority watersheds that could result in federal dollars being spent in advance of (and potentially in a manner inconsistent with) a later-developed state TMDL. It would be more logical for the federal agencies to articulate their concerns during the state TMDL listing and prioritization process, rather than developing a separate independent prioritization process.

The second category discussed in the draft policy consists of watersheds designated for a special protection. As noted above, this category sounds very much like the category of "unique waters" recognized in Arizona's surface water quality standards regulations. See A.A.C. R18-11-122. (Most states have some analogous category.) These waters are afforded the highest level of antidegradation protection, and also may have more stringent surface water quality standards applied to them. It is unclear how the approach set forth in the draft policy with respect to watersheds designated for special protection fits with the existing category of "unique waters" (or their equivalent) found in most states. Again, it would seem to be more efficient for the federal agencies to work within an existing framework than to develop yet another category of water, one that would apply only to watersheds under federal management and that would determined solely by federal agencies using rather vaguely defined criteria.

- AMA has no objection to the development of reliable improved methodologies for measuring water quality. See 65 Fed. Reg. at 8836. However, it is unclear precisely what sort of tools the agencies contemplate when they refer to developing enhanced "watershed assessment, hydrologic analysis, resource inventory and classification" measures, or how these analytical or classification tools would be consistent with similar tools under development in state or federal water quality standards programs. The agencies need to explain what tools they hope to develop, the need for such tools, the scientific basis for such tools, and the manner in which such tools are consistent with and not duplicative of similar tools being developed under other programs. Most critically, any such tools must be verified by rigorous scientific scrutiny before they are used as the basis for any decisionmaking, and stakeholder input should be provided during the development of such tools.

- As noted above, wherever the policy refers to increased opportunities for stakeholders to participate in monitoring and assessing watershed conditions (e.g., 65 Fed. Reg. at 8838), the policy should stress the need for following appropriate QA/QC in data collection and analysis. Particularly for very sensitive parameters such as metals (most notably mercury), appropriate sampling and analytical techniques (e.g., clean or ultra-clean sample collection and/or analysis) are critical to ensure the validity of any results. This is an especially critical concept if samples are being collected by personnel who have not been trained in appropriate sample collection techniques.

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215

- The final policy should state explicitly that data for which QA/QC cannot be documented will not be utilized in decision making.
- In identifying priority watersheds (65 Fed. Reg. at 8837-38), a factor the agency should consider is where the agencies will achieve the greatest benefit for their investment, given that resources are limited.
- Also with respect to identifying priority watersheds, the AMA has concerns with using as one of the six factors to identify such watersheds "the extent of public interest." See 65 Fed. Reg. at 8838. Identification of priority watersheds should not be a popularity contest. The AMA's concern is that utilizing public interest as a factor could lead to identification of watersheds based not on the impacts to or value of the watershed, but rather on the unpopularity of certain (legally authorized) activities that may be occurring in or near the watershed. This factor should be deleted from this section of the policy.
- The draft policy indicates that priority watersheds will be assessed on a 10-year cycle in most cases. See 65 Fed. Reg. at 8837. It is implicit, though never stated directly, that the first assessment will occur shortly after adoption of the final policy. The AMA is concerned that if this is the case, agencies may not have adequate data on which to base their initial prioritization decisions. It would be logical to allow for a period of data collection and analysis prior to initial prioritization (and associated decisionmaking).
- Part II.D.4 (65 Fed. Reg. at 8838) of the draft policy states that agencies will expand opportunities for dialogue with private landholders, and will work with private sector landholders to involve them in the watershed management process. The agencies should expand on how they will accomplish this dialogue, and what opportunities exist for early involvement by private landholders in or near federal watersheds.
- The last sentence of Part II.D.4 (65 Fed. Reg. at 8838) indicates that federally funded projects involving private cost-share partners should fully consider watershed management objectives for both public and private lands. As noted above, the AMA is deeply concerned about the impact the draft policy could have on private lands, a concern heightened by language such as this. In addition, we are unsure what is meant by "Federally funded projects involving private cost-share partners." What do the agencies contemplate in this respect? Who is likely to be a private cost-share partner, how is such cost sharing to be structured, and will it be voluntary?

Thank you for the opportunity to comment on the draft policy. Should you have any questions on these comments, please do not hesitate to call me at (602) 266-4416.

Sincerely,

Chuck Shipley

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Chuck Shipley

cc: AMA Water Quality Subcommittee