



February 3, 2006

Ms. Lisa Jones, Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street, N.W.
Washington, D.C. 20503

Submitted via Electronic Mail

**RE: Office of Management and Budget (OMB) Proposed Bulletin for
Good Guidance Practices**

Dear Lisa:

The National Mining Association (NMA) appreciates this opportunity to provide comments on the proposed Bulletin for Good Guidance Practices (Bulletin). NMA members support greater review of agency practices governing the development and use of guidance documents. NMA believes all agency guidance development should be fair and consistent, must include public notice and comment, and must be made easily accessible to the regulated public.

NMA is a trade association representing producers of most of America's coal, metals and industrial and agricultural minerals. Its membership also includes manufacturers of mining and mineral processing machinery and supplies, transporters, financial and engineering firms, and other businesses related to mining. The business of mining requires an extraordinary amount of long-range planning and upfront investment of substantial time and money. Accordingly, the ability to plan is directly related to the ability to predict with a fair degree of certainty the regulatory program requirements that will govern the mining operation. Inconsistent or unanticipated regulation can create substantial economic consequences.

NMA supports the goals of the OMB and believes the proposed Bulletin represents a necessary first step toward fostering a consistent, transparent approach to agency guidance development and implementation. Increasingly, agencies make or change policy by guidance rather than by rule and in so doing avoid the strict requirements of the Administrative

Procedures Act, the Paperwork Reduction Act, the Regulatory Flexibility Act, and other applicable statutes and executive orders. The result is that the regulated public loses a critical opportunity to provide the agency with valuable input and assistance; assistance that may steer the agency toward sound, workable regulatory approaches, or point to any unintended impacts or consequences.

Increasingly, the regulatory agencies rely on letters, Question and Answer documents and random website postings to communicate agency “policy.” NMA believes that in most cases, adherence to a more carefully crafted process for developing and disseminating such information would avoid costly mistakes and lead to better results. While we believe that the Bulletin is a good first step, NMA recommends that in order to truly address the area where most of the “misuse” occurs, the scope of the Bulletin must be expanded. The following comments provide NMA’s specific recommendations in this regard.

I. Definitions.

I (2) The Term “Guidance Document” Should Be Revised to Include Guidance Documents That May Not Be Made Available to the Public.

The term “guidance document” should not be limited to those that are available to the public. Of particular importance are those documents prepared by an agency for the purpose of instructing staff on the agency’s interpretation of an important court decision, or agency policy change as a result of a court decision. Typically, these communications occur via letters and/or memoranda that may or may not ultimately be made publicly available, yet, the impact on regulatory decision-making is no less dramatic than guidance that would be prepared and made available to the public.

NMA does not believe that, simply because a document is subject to the Freedom of Information Act (FOIA), that document is a “guidance document. While some agency documents subject to FOIA requests can be construed as “guidance documents”, there simply are too many documents – e.g., studies, contracts, routine correspondence – that are subject to release under FOIA that do not and should not rise to the level of being “guidance documents”. It is the nature of the document itself and the use to which the agency would put that document that determine whether or not the document is a “guidance document”.

I (3)(i) The Term “Significant Guidance Document” Should not be Based Upon an Economic Effect.

NMA recognizes the difficulty that comes with trying to distinguish the impact of a regulatory guidance document. Assigning an annual effect of \$100 million or more as a threshold for determining whether a guidance document is “significant” or not is troublesome. First, determining the dollar effect of “guidance” as opposed to a “rule” is nearly impossible. In the case of a rule where certain requirements or standards must be met or technologies updated, estimating the costs of such mandates can be reasonably approximated.

On the other hand, estimating the impact, in economic terms, of a guidance document that purportedly mandates nothing is difficult at best. In fact, NMA suggests that if it can be shown that a guidance document is reasonably likely to have such a material effect, then it has been demonstrated that the document in question is not “guidance” but a “rule” that must be subjected to notice and comment rulemaking procedures.

I (3)(iii) Definition of “Significant Guidance Document” should be expanded to Include Agency Interpretation of Relevant Court Decisions.

As NMA understands it, OMB’s intent in this subsection is to identify a category of agency-created policy documents that warrant some degree of “public process” before an agency implements or acts in reliance on the documents. That being the case, there remains a category of documents, *i.e.*, agency interpretations of court decisions and agency interpretations of statutory reporting programs, that has been overlooked. Proposed Section I (3) defining the term “significant guidance document” should be revised to include agency interpretations of relevant judicial decisions and agency guidance on data reporting requirements under programs such as the Toxics Release Inventory (TRI).

For example, the Environmental Protection Agency (EPA) posts letters and memoranda on its TRI website offering interpretations of court decisions such as *NMA v. Browner* and *Barrick Goldstrike v. EPA*, decisions meant to effectuate change in EPA’s TRI reporting program. NMA and its member companies believe such agency interpretations should be subject to notice and review requirements. With regard to agency interpretations of data collection requirements, EPA’s TRI program provides one good example. TRI reporting requirements result in significant regulatory and non-regulatory costs to industry. Agency “interpretations” of these regulatory requirements

should be captured within the scope of the Bulletin and subjected to a public notice and review process.

II. NMA Supports the Proposed Public Access and Feedback Proposals.

NMA supports the proposed public access and feedback proposals set forth in the Bulletin at Section II. All too often the regulated public must piece together an agency's current position based upon a number of guidance documents that may or may not be available to the regulated public. It is particularly important that agencies maintain a publicly available list of all current guidance documents with a link where that document may be accessed.

Furthermore, NMA suggests the Bulletin does not go far enough toward ensuring public notice is adequate. Mere posting of important information such as interpretation of regulatory policies on the various agency websites places an onerous burden of monitoring a plethora of websites on nearly a daily basis on regulated entities. For example, the U.S. Army Corps of Engineers operates regulatory programs out of forty different Corps districts, each with its own website. For mining companies operating nationally, the policies and decisions of many if not most of these districts may have potential impacts. For these reasons, NMA recommends that in addition to the requirement of website posting, agencies should be required to provide direct notification of newly issued significant guidance documents to all stakeholders an agency believes will be impacted. This concept should be reconsidered in the final Bulletin.

III. Notice and Public Comment Should Be Required for All Significant Guidance Documents.

Based upon comments regarding the difficulty in determining the economic impact of agency guidance documents, NMA recommends Section IV be revised to require public notice for all significant guidance documents. This assumes the definition of "significant" is revised to include agency interpretations of relevant court decisions and statutorily required data reporting requirements.

Conclusion.

NMA appreciates this opportunity to provide its thoughts on the proposed Bulletin. Please feel free to contact Karen Bennett at 202-463-3240 should you have any questions.

Sincerely,

A handwritten signature in black ink that reads "Karen Bennett". The signature is written in a cursive style with a large initial 'K'.

Director, Water Quality
National Mining Association