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April 13, 2007

Mr. Jim La Spina
Department of Ecology
P.O. Box 47600
Olympia, WA 98504-7600

RE: Comments on Ecology's Draft Industrial Stormwater General Permit

Dear Mr. La Spina:

The Northwest Mining Association (NWMA) is a 112 year old non-profit mining industry trade association based in Spokane, Washington. NWMA has 1,650 members residing in 33 states and 6 Canadian provinces. We serve as the state mining association for Washington State. Our members are actively involved in exploration, mineral development and mining operations throughout the United States, including several mines and projects in Washington State. Our membership represents every facet of the mining industry. Our members operate mines and conduct mineral development activities in Washington State and will be impacted by the proposed changes to the Industrial Stormwater General Permit. NWMA offers the following comments for Ecology's consideration:

- 1) The reformatting of an existing permit makes it very difficult for existing permittees to both follow and evaluate proposed changes. As you are aware, the changing of one word can change the meaning of a permit condition. The Fact Sheet for the draft permit is assumed to detail any change of substance, which may result in compliance actions by DOE. We would encourage DOE, during future permit renewals, to maintain the format of the existing permit, with the underlining of any new language in a draft renewal of the existing permit. This will allow the public a clear understanding of proposed changes as is directed by applicable procedural laws and rules.
- 2) The "SUMMARY OF PERMIT REPORT SUBMITTALS" is very helpful, but the title should be changed to "SUMMARY OF PERMIT REPORT AND PLAN SUBMITTALS". The SWPPP is a plan, not a report. In the past, EPA has presumed, on a federal level, some authority to magically transform the term "plan" into a "report" in a veiled attempt to change the legal status of a SWPPP. Neither federal nor state law allows an agency to change the plain meaning of the English language.
- 3) On page 1, it is not clear how these conditions apply or do not apply to existing permittees. For example, existing permittees have applied for and received permit coverage, but are the terms "Application for Coverage" (new permittees?) and "permit renewal" (General Condition G.8) by existing permittees considered by DOE to be the same thing? Further, the "Due Date(s)" are confusing to existing permittees. The "SWPPP Update" has a due date of "As revised". Once

the draft permit is finalized, there will be minor updates of SWPPP components for existing facilities and these new conditions will not be known until the permit is final, but there is no date or time interval allowed for those SWPPP updates to occur. We understand that “As revised” applies in an ongoing review and update of the SWPPP as a dynamic document in response to inspections, monitoring, or changed facility status, but the update of a SWPPP pursuant to new permit conditions is a different situation. Please clarify both this table and corresponding permit narrative.

4) We do not understand the exclusions provided at draft permit conditions S1.D.3. & 4. The Clean Water Act (CWA), at 33 U.S.C. 1323, specifically requires compliance by the federal government. Please explain, citing applicable provisions of federal and or state law, which exempts any legal entity being proposed for exclusion by DOE.

5) Draft permit condition S2.B.1. needs clarification per comment 3 above. Existing facilities will need time to update their SWPPPs, based upon final permit language, thus a certain amount of time will be necessary to update an existing SWPPP.

6) Draft permit condition S2.D. is confusing as it may or may not relate to existing facilities. It is not clear if the introductory sentence refers to just new permittees or are existing permittees required to complete a new application and new SEPA compliance?

7) The proposed new language at draft permit condition S3.A.2. is awkward, appears to serve no purpose, thus should be eliminated. For example, an “objective” should not be to “specify” something. The “objective” of the SWPPP should be to protect the Waters of the State and the word “specify” should, in all instances, be replaced with the word “identify”. Further, use of manual BMPs is presumed to be AKART, thus meeting state water quality standards. S3.A.2. should be deleted to avoid confusion.

8) Proposed draft permit language at condition S3.A.4.e. has no basis in either federal or state law. This is a novel and legally unwarranted concept. Nowhere in law is either a federal or state agency allowed to transfer their mandate to inform the “public” to the regulated private sector. The burden of informing the “public” is at the foundation of the existence of federal and state agencies. Not only does the proposed language attempt to shift the information duty to the private sector, which is the legal duty of the agencies, but allows the “public” onto a private site PLUS demands access by the “public” to “copying services”! The language in the existing permit at condition S9.A.3. must remain until specific new language in a law directs otherwise. The courts would certainly turn away this proposed permit condition as nothing more than a contrived agency convenience.

9) Proposed draft permit language at condition S3.B.2. speaks of the “potential to contribute any pollutants to stormwater” (emphasis added). The word “any” is an addition to the language in the existing permit and only serves to allow an unreasonable interpretation. What is “any” pollutant and how should this phrase be interpreted? The word “any” must be deleted, leaving the language as is in the existing permit.

10) On page 22 of the draft permit, the numbering has gone awry. The draft condition labeled iii.1 (Treatment BMPs) clearly treats “benchmark” values as mandatory numeric permit limits in clear contradiction to draft permit language at S5.A.1. The appropriate language in the existing permit, addressing “Treatment BMPs” on page 41, addresses the situation where “operational and source control BMPs are not adequate to reduce pollutants below a significant amount and maintain compliance with water quality standards”. The draft permit, without any justification at all as required for a Fact Sheet by the WAC rules, imposes a nebulous and non site-specific “benchmark” as a permit mandate. Benchmarks, as explained in proceeding comments, have absolutely no basis in reality when it comes to protecting instream standards and meeting the “reasonable” component of AKART. The existing permit language must remain unchanged.

11) On page 23 of the draft permit, at item 4.a., the reasonable nature of the existing permit language (page 41, item 4. of the existing permit for “Erosion and Sediment Control BMPs”) is eliminated in favor of language allowing for an unreasonable interpretation. Existing permit language rightfully addresses “reasonable potential for soil erosion of a significant amount”. It is not only unclear what “to eliminate or reduce the potential to reduce erosion and sediment transport” actually means, but this language will only tend to frustrate efforts by the regulated community to reduce erosion since it appears that no matter what actions are taken, the results will never be good enough. Not only that, given site-specific considerations there may not be any sediment concerns at all in the receiving water! The existing permit language must be maintained.

12) The draft permit language on page 25, item 4. (“Laboratory Documentation”) of the introductory sentence addresses “all parameters”. Those field parameters routinely conducted by site personnel (pH, turbidity, temperature) should be excluded. Further, it is not clear why a CAS number is necessary – this is not discussed in the Fact Sheet for the draft permit. In addition, why should the MDL and PQL be included in the laboratory reports as long as a permittee is required to use a state-certified lab using approved analytical procedures? These added paperwork burdens must be justified and explained in the Fact Sheet in order for the public to effectively comment. If it cannot be demonstrated why the existing permit language for recordkeeping is not adequate, that existing permit language must remain.

13) It is assumed that the draft permit language on page 26 at condition C.1. applies only to new permittees. Existing permittees have already informed DOE of site inactive and unstaffed status, thus the condition of notice “prior to the beginning” of this period cannot be met. If this is not DOE’s intent, the language must be clarified as to the effect on existing permittees.

14) Page 26, draft permit language at C.2.b., the permittee should be allowed to demonstrate that the precipitation falling on the site is outside this range, thus the permittee is not required to adjust the pH of precipitation. It is unreasonable not to recognize the pH of the precipitation itself.

15) Page 26, draft permit language at C.2.C., the mere “presence of the listed parameter” should not be the basis for suspending sampling. The sampled stormwater effluent may meet standards

and may even serve as dilution to the 303(d) parameter instream. In these situations, sampling reduction should be allowed.

16) Draft permit language on page 28 at S5.A.1. states that “Benchmarks...are not numeric permit limits” (emphasis in original), yet by application of General Condition G1. (page 50 of the draft permit) the benchmarks serve as enforceable “terms and conditions of this general permit”. DOE continues to follow the lead of EPA on the topic of “benchmarks”, utilizing in the draft permit many benchmarks from EPA’s draft 2006 Industrial Multi-Sector Stormwater General Permit (MSGP). EPA has provided absolutely no rational basis for the benchmarks proposed in the MSGP and DOE must not commit to federal benchmarks that have not been finalized. Major concerns with the use of benchmarks include:

- Benchmarks have absolutely no relationship with instream criteria, particularly in regards to metals. Benchmarks for metals are based upon nontoxic total concentrations, whereas most metal instream criteria are based upon dissolved metals.
- Benchmarks are assumed to protect instream uses, yet criteria were not developed for, and were never intended to address, episodic storm events. DOE must explicitly recognize this scientific shortcoming in the final permit. It does not appear this reality comes into play until a Level Four Corrective Action is triggered and this is far too late in the process for scientific reality to be considered.
- Certain benchmarks appear to be driven by analytical methods, which have absolutely nothing to do with meeting instream standards.
- Benchmarks ignore site-specific situations, thus DOE must provide a mechanism to allow a permittee to justify BMP performance on a site-specific level.

NWMA and the National Mining Association (NMA) filed substantive comments concerning EPA’s inappropriate use of benchmark values (NWMA comments page 5; NMA comments page 9). Those comments are attached to the email forwarding these comments and are incorporated by reference. We strongly encourage DOE to take a reasonable approach to the use of benchmarks, and not to ignore the site-specific nature of a given facility. Avoiding such pitfalls will keep permittees from becoming frustrated with an unworkable permit condition.

17) Page 39 of the draft permit, condition S7.A. on “Inspection Frequency”, should allow inactive and unstaffed sites to continue the quarterly frequency of the existing permit.

18) On page 41 of the draft permit, condition S8. addresses “Corrective Actions”. Aside from the need to address the glaring scientific error of applying laboratory-derived criteria (predominantly based upon tests of four days or longer) to episodic real-world storm events, a permittee should be allowed the opportunity to justify BMPs based upon site-specific conditions. Utilizing benchmarks derived across numerous industrial sectors will create inequitable impacts on certain sites when, in fact, a site is not a threat at all to instream beneficial uses. A site should not have to progress to Level Four before a permit opportunity is reached to address site-specific conditions.

19) On page 43 at item C., should the date be 2007 rather than 2004?

20) As a closing comment, this general permit has become quite unwieldy and difficult to both comment upon and comprehend. The draft permit and accompanying Fact Sheet is over 215 pages. The legislative report is over 215 pages. The stormwater manuals for western and eastern Washington are 926 and 715 pages respectively. Industrial operations are unquestionably the most highly regulated sources in the state and are easy targets for such focus. Given the advanced state of evolution of the industrial stormwater general permit, it is appropriate for DOE to conduct a realistic investigation of not only appropriate stormwater instream criteria, but to identify true stormwater sources of concern of all types, including natural inputs (with credit given to human activities such as fire suppression which reduce sediment transport potential), with corresponding percent contributions, in an effort appropriately focus future priorities.

Thank you for the opportunity to comment on the Draft Industrial Stormwater General Permit.

Sincerely,

A handwritten signature in cursive script that reads "Laura Skaer".

Laura Skaer
Executive Director