



*Our membership and services span the globe*

10 N Post St, Ste 220 | Spokane, WA 99201-0705

Phone: 509.624.1158 | Fax: 509.623.1241

Email: [nwma@nwma.org](mailto:nwma@nwma.org) | Web: [www.nwma.org](http://www.nwma.org)

February 16, 2006

Water Docket  
U.S. Environmental Protection Agency  
Mailcode: 4101T  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

**Attention Docket ID No. OW-2005-0007**

**Re: Proposed National Pollutant Discharge Elimination System (NPDES) General Permit for Stormwater Discharges From Industrial Activities, 70 Fed. Reg. 72116 (Dec. 1, 2005)**

The Northwest Mining Association (NWMA) is a 111 year old non-profit mining industry trade association based in Spokane, Washington. NWMA has 1,300 members residing in 31 states and 6 Canadian provinces. Our members are actively involved in exploration, mineral development and mining operations throughout the United States. Our membership represents every facet of the mining industry. Our members operate mines and conduct mineral development activities in states where the proposed general permit has direct applicability such as Idaho, Alaska and Arizona. In addition, NWMA members operate mines and conduct mineral development activities in many states (*e.g.*, Montana, Nevada, Utah, Washington) which administer the discharges through general permits, and future renewals of those state general permits will be influenced by this EPA action.

On January 25, 2006, NWMA and the entire Idaho congressional delegation (February 1, 2006) requested a 90-day extension because our members discovered that the changes proposed for the new MSGP were far more extensive than portrayed by EPA in the introduction to the new MSGP or the accompanying fact sheet. Our members also discovered that a detailed line-by-line and word-by-word comparison must be made between the existing MSGP and the proposed MSGP in order to determine the full impact of the changes proposed by EPA. As stated in our request for an additional 90-day extension, additional time is necessary in order to analyze and compare the new proposal with the old rule.

We are disappointed that EPA chose to deny our reasonable request for an additional 90- day extension to properly analyze and compare the significant changes proposed in the new rule. The effect of not providing sufficient time to analyze, compare and comment on the proposed changes greatly impairs the regulated community's and the public's ability to provide truly meaningful comment.

## **General**

### **Fact Sheet Issues**

The fact sheet supplied is significantly less helpful than those that accompanied MSGP 95 and 2000. Previous MSGP fact sheets have tracked, more or less, the sequence of provisions in the permit. The fact sheet presented for MSGP 2006, on the other hand, jumps around from subject to subject, in a manner that has little or no relation to the sequence of presentation of these issues in the permit. Worse, in many cases, the fact sheet explanations discuss the subject matter with no reference to the part of the permit in which the substance is presented. Finally, the Agency has again reordered the entire permit, making comparison of proposed language with MSGP 2000 language unnecessarily arduous and time-consuming.

The proposed MSGP fails to meet the regulatory requirements for a “fact sheet” found at 40 CFR 124.8 and 40 CFR 124.56. The regulations at 40 CFR 124.8(a) specifically require “A fact sheet for every...draft permit which the Director finds is the subject of wide-spread public interest...”(emphasis added) The original MSGP Fact Sheet, published in the Federal Register on September 29, 1995, contained over 300 pages. In addition, at least 5 amendments were made. Further, the MSGP 2000 Fact Sheet included over 30 pages in addition to referencing the past MSGP. Now, even greater confusion exists with addition of yet another partial Fact Sheet. The regulations require a fact sheet for the permit, not a partial Fact Sheet with references for up to 6 other areas that the regulated community must search to understand the intent of the permit. This is particularly inappropriate for new permittees having no experience with the stormwater permit program. EPA has no justification for this regulatory compliance and comment burden imposed upon the regulated community. Further, the regulations specifically require that a fact sheet contain any requirements of State certifications (40 CFR ↓124.56(d)). These required certifications are not included in the fact sheet. The regulated community has the right, as required by the regulations, to have A fact sheet containing all items required by the regulations. EPA must provide a single fact sheet for the permit explaining all applicable permit requirements. Until the regulatory requirements for fact sheets are met, EPA’s proposed MSGP is procedurally deficient.

Chapter 2 of the fact sheet, entitled “Changes from MSGP 2000”, contains “a detailed list of proposed changes from MSGP 2000”. It is interesting to note that the “detailed list” contains no reference to the fact that several of the benchmark monitoring values have been made significantly more stringent (47 times more stringent in case of selenium). A fact sheet must detail and justify such major changes. Further, and most disturbing of all, is an expansive and costly increase in requirements for inactive mine sites with no supporting justification in the fact sheet. In order to understand what the Agency is proposing in this reissuance, one must read, very carefully, every word of both documents and their MSGP 2000 counterparts. . The limited extension of the public comment period granted by EPA functionally eliminated the possibility of the necessary thorough review by a majority of the regulated community, including NWMA members.

### **Emphasis on Enforcement**

The Agency seems determined to use MSGP 2006 as a launch pad for enforcement. The term “violation” occurs 44 times in the body of the permit, compared to 23 times in MSGP 2000. The concept of controlling storm water discharge quality through the implementation of best management practices (“BMPs”) as set forth in previous MSGPs has embodied the recognition that the design, implementation and maintenance of BMPs is an iterative process, which specifically considers site-specific conditions. With MSGP 2006, the Agency proposes to turn that concept on its head by stating:

- “Failure to adequately design, implement or maintain appropriate BMPs is a violation of the permit.” (Fact Sheet, page 52), and
- “the initial BMP or SWPPP deficiency constitutes a violation of the Permit and the Clean Water Act (unless specifically otherwise stipulated)” (Permit at § 1.3).

Member companies have expressed concerns over what appears to be an “instant violation” approach will stifle the kind of innovation that is often key to designing effective stormwater controls at simple, let alone challenging, sites. This subject is covered in greater detail in the part-specific comments that follow.

### **Need for the New MSGP**

The proposed changes to the MSGP are, quite frankly, staggering. EPA provides absolutely no justification of the necessity for these changes. We are unaware of any findings that the MSGP 2000 was inadequate in protecting water resources and the permit should not be reissued as proposed unless the changes are explained and justified in the fact sheet. This lack of justification highlights our concerns above that these changes are made solely for enforcement convenience, with no corresponding additional protection of the environment.

### **Part-Specific Comments**

#### **Permit Cover Sheet**

On page 1 of the draft MSGP, coverage under the permit appears to be limited to “any operator”. EPA is treating BMPs as if they were effluent limitations. The CWA language (33 USC 1311(a)), regarding effluent limitations, states, “Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any **person** shall be unlawful.”(emphasis added) To the extent any “person” has jurisdiction over any site “associated with industrial activity” (40 CFR ↓122.26(s)(14)), the requirements of the ultimate MSGP will apply. It should also be noted that the law does not exempt federal agencies from the requirements of the CWA (33 USC ↓1323(a)).

#### **Part 1**

##### **1.3 Permit Compliance**

The permit language states:

...the initial BMP or SWPPP deficiency constitutes a violation of the Permit and the Clean Water Act (unless specifically otherwise stipulated)...

This represents a dramatic shift in storm water permitting philosophy. In past MSGPs, EPA has recognized, albeit perhaps tacitly, that storm water control through the use of BMPs is an iterative process. The following passages appear in the fact sheet for the final MSGP 2000.

The SWPPP requirements in today's final MSGP are intended to facilitate a process whereby the operator of the industrial facility thoroughly evaluates potential pollution sources at the site and selects and implements appropriate measures designed to prevent or control the discharge of pollutants in storm water runoff. The process involves the following four steps: (1) formation of a team of qualified plant personnel who will be responsible for preparing the plan and assisting the plant manager in its implementation; (2) assessment of potential storm water pollution sources; (3) selection and implementation of appropriate management practices and controls; and (4) periodic evaluation of the effectiveness of the plan to prevent storm water contamination. (65 Fed Reg, 64761)

The permit conditions applicable to these discharges are not numeric effluent limitations, but rather are flexible requirements for developing and implementing site specific plans to minimize and control pollutants in storm water discharges associated with industrial activity. (65 Fed Reg, 64759)

When "minimize/reduce" is used relative to SWPPP measures, EPA means to consider and implement BMPs that will result in an improvement over the baseline conditions as it relates to the levels of pollutants identified in storm water discharges with due consideration to economic feasibility and effectiveness. (65 Fed Reg, 64763)

EPA does not intend to require public comment on SWPPPs, nor require public hearings, because SWPPPs are intended to be modified as necessary to address changes at the facility or when periodic inspections indicate that a portion of the SWPPP is proving to be ineffective. Requirements for public comment and public hearings would delay needed modifications to, not to mention development of, the SWPPP, be burdensome and serve as disincentives to plan updates. (65 Fed Reg, 64783)

In the MSGP 2006 fact sheet, EPA directs the reader to the discussions of MSGP requirements in previous fact sheets:

**Supplemental Information**

This fact sheet explains and provides additional details on the topics covered in the MSGP. The actual language of the proposed MSGP 2006 appears after this fact sheet. Many provisions of the proposed MSGP 2006 originated with previous permits. Therefore, additional discussion on many MSGP requirements can be found in fact sheets for the 1995 and 2000 MSGPs. (Fact Sheet, page 3)

The MSGP 95 fact sheet contained the following passage:

Sources of BMP information include: "Sediment and Erosion Control: An Inventory of Current Practices—Draft," EPA, April 20, 1990; "Storm Water Management for Industrial Activities: Developing Pollution Prevention Plans and Best Management Practices," EPA, September, 1992, (EPA 832-R-92-006); "**Best Management Practices for Mining in Idaho,**" Idaho Department of Lands, November 1992; and

“Erosion & Sediment Control Handbook,” Goldman et al., McGraw-Hill Book Company, 1986. (60 Fed Reg 50892) (Emphasis added.)

In the introduction to the Idaho document, the concept of the “feedback loop” is introduced. This is a process through which BMPs are designed, implemented and checked for performance. If the performance is found lacking, there is a requirement that the operator improve existing or implement additional BMPs. (See “Best Management Practices for Mining in Idaho,” Idaho Department of Lands, November 1992, page 1.) Further, EPA’s summary guidance for “Developing Pollution Prevention Plans And Best Management Practices” for industrial activities provides the same “feedback loop” concept on page 2 (EPA 833-R-92-002).

Clearly, EPA’s approach in MSGPs 95 and 2000 contemplated that there would be a possibility that BMPs initially implemented might prove to be inadequate in that it allowed for (and required) periodic evaluation of their effectiveness. MSGP 2006, on the other hand, now specifies that any deficiency in either the SWPPP or BMPs is a violation of the permit. Gone are the concepts of flexibility and improvement. The permittee either gets it exactly right on the first pass or he/she is in violation. Permittees are no more prescient than are employees of the Agency in their ability to foresee every possible condition that could occur in the process of stormwater control. To expect that BMP-based controls should function perfectly from the start is totally unrealistic and MSGP 2006 must return to the recognition of the fact that the design, implementation and maintenance of BMPs are an imprecise and iterative process.

#### **1.4.2 Benchmarks**

In describing the derivation of benchmark values, EPA states:

The process that EPA followed in selecting the benchmark values for the 2006 MSGP is as follows: 1) First, if there is an EPA promulgated acute criterion then EPA selected that value for the benchmark; 2) If there is no EPA acute criterion, then EPA selected the chronic criterion as the benchmark value; 3) Finally, in the remaining few instances where there were neither EPA acute or chronic criteria available for a specific pollutant, then EPA selected the benchmark value based on data from runoff studies or technology-based standards. (Fact sheet, page 35)

In fact, the values for the arsenic, iron and selenium benchmarks are chronic values. Given the relatively short duration of storm events, the use of chronic values is highly inappropriate and should be abandoned. Further, EPA has an acute value for arsenic (340 µg/L), but chose not to use it.

Arsenic, copper, selenium and silver are more stringent than Idaho standards. Arsenic, cadmium, mercury and selenium are more stringent than Arizona standards. Arsenic and silver are more stringent than Alaska standards. The selenium chronic value of 5µg/L is 4 times more stringent than the cold water aquatic values in Idaho and Arizona, is 6.5 times more stringent than Arizona’s ephemeral stream standard, and is 47.7 times more stringent than the MSGP 2000 benchmark.

The proposed change in the turbidity value, from 5 NTU above background to 50 NTU absolute, references the Idaho water quality standards. The Idaho turbidity standard is reproduced below.

## **250. SURFACE WATER QUALITY CRITERIA FOR AQUATIC LIFE USE DESIGNATIONS.**

**01. General Criteria.** The following criteria apply to all aquatic life use designations. Surface waters are not to vary from the following characteristics due to human activities:

\*\*\*

**e.** Turbidity, below any applicable mixing zone set by the Department, shall not exceed background turbidity by more than fifty (50) NTU instantaneously or more than twenty-five (25) NTU for more than ten (10) consecutive days. (IDAPA § 58.01.02.250)

The proposed absolute value of 50 NTU is not justifiable.

Given the fact that Part 3.2.2.4 requires a significant amount of work to be done in the event that the average of benchmark monitoring results for the first four quarters of the permit exceeds one or more benchmark values, the values should be set at a more reasonable level. Under the current proposal, an operation could very well be discharging fully compliant water (with room to spare) and still be required to complete a full review and follow-up sampling. This permit condition magnifies the inappropriate nature of monitoring for benchmark values in terms of total recoverable metals whereas instream water quality criteria are based upon dissolved metals. EPA has failed to address this critical difference in analytical methodology. Indeed, the majority of any metal in a “first flush” sample may well be associated with nontoxic particles, yet EPA is equating the monitoring to the toxic dissolved forms on which instream criteria are based. Further, this “first flush” monitoring within the first 30 minutes of a discharge is completely contrary to the regulatory requirement of 40 CFR ↓122.48(b) where the monitoring “shall” be representative of the monitored activity. An actual stormwater discharge may occur over the course of days or weeks during spring snow melt yet the monitoring requirements of the MSGP may only represent a small fraction of the actual discharge water quality. This inappropriate and unscientific application, when coupled with the volume estimates required by the MSGP, will ultimately be used as a misrepresentation of the total loading from the stormwater outfall. This distortion of reality will be critical in areas addressed under a TMDL. At this point, one would think the process could not be any more unrepresentative of reality, yet the actual durations used by EPA to develop acute criteria are generally 96 hours and the chronic values are generally 1/10<sup>th</sup> the lifespan of the test organism. (Technical Support Document for Water Quality-based Toxics Control – EPA/505/2-90-001)” Water quality criteria were not developed to address episodic stormwater events. This is one more example of EPA’s attempt to pile on work which does nothing to enhance water quality.

### **1.43 Water Quality Standards**

The permit language states:

If at any time you or EPA determine(s) that your discharge causes or contributes to an exceedance of applicable water quality standards, you must take corrective actions and conduct follow-up monitoring. If you discover or are informed (**by an entity other than EPA**) of the exceedances you must take corrective action and conduct follow-up monitoring as stipulated in Parts 3.3 and 3.4; you must also report the exceedances(s) to EPA as stipulated in Part 3.4. (Emphasis added.)

While the requirement to take corrective action, conduct follow-up monitoring and report to EPA if there is an exceedance of an applicable water quality standard attributable to a facility's discharge makes sense, the provision that these actions can be triggered if the permittee is informed by "an entity other than EPA" is impractical, unworkable and potentially in conflict with mine safety regulations which prohibit untrained and unauthorized personnel at active mine sites. Only trained and authorized state or federal regulators are allowed at active mine sites. As such, they are the only entities that should be given the authority to report exceedances. The requirement should be limited to governmental entities only. EPA simply cannot abdicate its inspection and enforcement authorities to people who have no requirement to demonstrate either competence or independence.

### **1.52 Effective Date of Coverage**

This part sets a 30-day waiting period for authorization under the permit to provide time for the Services to review the NOIs and to provide an opportunity for public comment. EPA provides no historical reference demonstrating the need for such a delay. The Agency also states that it may delay authorization of coverage under the permit in response to public comment.

EPA notes that there were 3,656 facilities covered by MSGP 2000 in July 2005. The likelihood that the Services will actually review within 30 days all NOIs in the reissuance of this permit appears to be minimal. Further, the review would be unnecessary, given the screening process set forth in Appendix E.

With regard to public review, EPA notes at page 25 of the Fact Sheet that the 30-day period will not be a formal permit public notice period and that formal review is occurring now. Instead, the 30-day period is stated to be "in response to an expressed public desire to provide input on individual discharges." This provision would essentially void the concept of general permitting. The purpose of general permits is to allow facilities proposing to engage in a given activity with similarities across the population to be covered under a permit that is demonstrated to be protective of the resource in question. Comments on individual discharges have no place in the general permitting scheme.

EPA admits that the potential burden of dealing with these comments is so heavy that the Agency is unable to even commit to a process for review of the comments. It is easy to imagine a scenario where opponents of a given project or industry launch a campaign of comments designed specifically to delay permit coverage or, in the case of facilities currently covered by MSGP 2000, to create more work for the facility operator. The opportunities for abuse are endless. Further, the probability that EPA will receive useful comments from the "public" is minimal. Finally, the comments will need to be read, contemplated and filed. The staff cost associated with these activities will not be trivial and will consume taxpayers' dollars. EPA should use its resources on work that is likely to result in better water quality, not to placate the apparent desire among some faction of the public to create another opportunity for public comment.

This proposed public comment process will create an unrealistic and unnecessary burden on EPA with no measurable environmental benefit. It may even precipitate lawsuits if members of

activist groups sue EPA for its inability to consider and respond to public comments filed on general permit applications.

An additional problem is that the delay in authorization could cause an operator, currently covered under MSGP 2000, who submitted a timely NOI, to be without coverage if the delay period ran past the 120-day limit imposed by part 1.5.3.

The public's desire to provide comment on individual discharges does not justify the morass that this provision would create, both for EPA and permittees. This provision should be struck in its entirety.

## **Part 2**

### **2.1.5.3 Preventive Maintenance**

The proposed permit language is:

You must have a preventive maintenance program that includes regular inspecting, testing, maintaining and repairing of **all industrial equipment and systems** to avoid situations **that may result in leaks, spills and other releases**. These measures are in addition to specific BMP maintenance as required under Part 2.2 (Maintenance of BMPs). (Emphasis added.)

EPA should revert to the MSGP 2000 language below.

#### *4.2.7.2.1.3 Preventive Maintenance:*

You must have a preventive maintenance program which includes timely inspection and maintenance of **storm water management devices**, (*e.g.*, cleaning oil/water separators, catch basins) as well as inspecting, testing, maintaining and repairing facility equipment and systems to avoid breakdowns or failures **that may result in discharges of pollutants to surface waters**. (Emphasis added.)

The ultimate purpose of the preventive maintenance program is to prevent discharges of pollutants to waters of the U.S., and there may be many areas on a permitted facility where a leak, spill or release would pose no threat to surface water (*e.g.*, inside a building with secondary containment). Spills and releases are regulated under other programs. EPA has no authority under a Clean Water Act permit to require inspections of equipment inside a building with no potential to migrate into waters of the U.S.

The proposed program appears to duplicate and overlap with the spill prevention requirements in Section 301 of the Clean Water Act and the requirement for most facilities to develop a Spill Prevention Control and Countermeasure Plan (SPCC Plan.) The stormwater program and the required SWPP should be restricted to stormwater impacts. It does not need to replicate a SPCC Plan.

### **2.1.5.6 Employee Training**

As the title of this part indicates, the requirements contained herein refer to the training of employees regarding the SWPPP. However, the fact sheet also presents a requirement that does not appear in the body of the permit.

“When appropriate, contractor personnel also must be trained in relevant aspects of stormwater pollution prevention.” (Fact Sheet, page 54).

The permit language at 2.1.5.6 *Employee Training* makes no mention of contractors, nor should it.

## **2.2 Maintenance of BMPs**

The proposed permit language states:

You must maintain all BMPs identified in your SWPPP and implemented at your facility in effective operating condition at all times. Failure to do so is a violation of this permit.

The proposed language also requires that back-up measures be in place.

In the case of large structural BMPs, an extreme storm event could easily cause damage to the structure. For example, in the case of rip-rapped drainage ditches, the rip-rap could be damaged, which could in turn increase yield of suspended solids. The mere fact that the ditch was damaged would, under the proposed language, constitute a permit violation, regardless of the care exercised in design, construction and operation of the structure. Additionally, features of this sort are not amenable to duplication, due to spatial limitations, and so a back-up feature could not be installed.

The language in MSGP 2000 at part 4.3 below should be substituted for the proposed language. The new proposal is nothing more than an opportunity for enforcement action, as it would be, in many cases, impossible to comply.

### **4.3 Maintenance**

All BMPs you identify in your SWPPP must be maintained in effective operating condition. If site inspections required by Part 4.9 identify BMPs that are not operating effectively, maintenance must be performed before the next anticipated storm event, or as necessary to maintain the continued effectiveness of storm water controls. If maintenance prior to the next anticipated storm event is impracticable, maintenance must be scheduled and accomplished as soon as practicable. In the case of non-structural BMPs, the effectiveness of the BMP must be maintained by appropriate means (*e.g.*, spill response supplies available and personnel trained, *etc.*). (65 Fed Reg 64814)

## **2.3 Maintaining an Updated SWPPP**

The proposed language in this part would require a complete review of the SWPPP (and amendments as necessary) based upon, among other things, the discovery of a deficiency in a BMP or the occurrence of a spill anywhere at the facility.

The mere finding of a “deficiency” (the term is undefined and could therefore be almost any problem) in a BMP is not reasonable justification to trigger a SWPPP review. The existence of erosion in a swale or buildup of sediment in a detention basin apparently could both be considered “deficiencies,” but neither should trigger a SWPPP review.

The requirement that the SWPPP be reviewed and amended because someone spilled something on the ground is also an unreasonable trigger, in view of the fact that all spills (regardless of the substance or quantity) would require reporting (see comments on part 3.5.1).

Additionally, the proposed language states that “[u]nauthorized releases and discharges are subject to the reporting requirements of Part 3.5.2 of this permit.” Since there is no Part 3.5.2, we assume the Agency meant 3.5.1.

## **2.4 SWPPP Availability**

EPA considers the SWPP Plan to be a “report” under CWA Section 308(b). The CWA does not give EPA the authority to change the English language. Further, absolutely nothing in the law requires any member of the private sector to provide information directly to “citizens”. EPA states as much at 63 FR 52458 as follows: “The Clean Water Act grants EPA the authority to require the submission of information by the regulated community. It does not, however, require the regulated community to provide information to private citizens upon request.” The law has not changed since EPA made this correct statement of legal fact in 1998. EPA has a nondiscretionary duty to provide certain information to the public and they cannot push this duty off onto the regulated community.

## **2.5 Notification of Inadequacy**

This proposed provision is:

EPA may notify you at any time that your SWPPP, your BMPs or other components of your stormwater program do not meet one or more of the requirements of this permit. **This notification may be the result of comments on your SWPPP that EPA receives from the public.** The notification will identify specific provisions of this permit that are not being met, and may include required modifications to your stormwater program, stipulated deadlines, additional monitoring requirements and special reporting requirements. (Emphasis added.)

The idea that EPA would require modifications to the storm water program or impose additional monitoring requirements or special reporting requirements based on public comments on the SWPPP is unworkable, impractical and potentially in conflict with mine safety regulations. Member companies are very concerned that the “public” may interpret this concept as meaning they have a right of access to private property, even unaccompanied, which is completely counter to not only MSHA regulations, but also would involve private property trespass. EPA simply cannot abdicate its inspection and enforcement authorities to people who have no requirement to demonstrate either competence or independence. The highlighted sentence from the above excerpt must be struck.

## **Part 3**

### **3.1.3 Scope of Site Compliance Inspection**

The proposed revisions to the Site Compliance Inspection include a requirement that the inspection be conducted during a runoff event. In mining operations in the arid and semi-arid west, this creates a serious problem, as events producing runoff can be infrequent and short-lived. Outfalls at a given operation may be several miles apart, and intervening topography, as

well as facility locations often precludes quick access, requiring instead large, circuitous loops in order to visit all outfalls and BMPs.

The problem is significantly exacerbated if the operation in question is remote, inactive and unstaffed.

The provision requiring that site compliance inspections be conducted during a runoff event should be struck, as it is simply unworkable in many cases. It is also potentially dangerous in some settings (flash floods, etc.)

### **3.2.1 Quarterly Visual Monitoring of Discharges**

EPA proposes to eliminate the visual inspection waiver for inactive and unstaffed sites, unless the permittee certifies that there are no industrial materials or activities exposed to stormwater. The only way a permittee could comply with this provision would be to staff the unstaffed site or, in the alternative, install automatic monitoring equipment. See comments on part 3.2.2.5 below.

This proposal is absolutely unworkable. EPA should revert to the language of MSGP 2000 below.

#### **5.1.1.4 Inactive and Unstaffed Sites:**

When you are unable to conduct visual storm water examinations at an inactive and unstaffed site, you may exercise a waiver of the monitoring requirement as long as the facility remains inactive and unstaffed. If you exercise this waiver, you must maintain a certification with the Storm Water Pollution Prevention Plan stating that the site is inactive and unstaffed and that performing visual examinations during a qualifying event is not feasible. You must sign and certify the waiver in accordance with Part 9.7. (65 Fed Reg 64816)

### **3.2.2.5 Special Exemptions to Benchmark Monitoring**

EPA proposes to eliminate the benchmark sampling waiver for inactive and unstaffed sites, unless the permittee certifies that there are no industrial materials or activities exposed to stormwater. If this were the case at inactive mine sites, a permit would not be required. The only way a permittee could comply with this provision would be to staff the unstaffed site or, in the alternative, install automatic monitoring equipment.

Most inactive mining sites are located in remote areas with no reasonable access and few have telephone or electrical utility service. In these cases, the automatic sampling equipment would need to be sophisticated enough to: 1. determine whether the storm is a qualifying event, 2. determine when the flow starts and reaches a suitable depth for sampling, 3. collect field parameters, and 4. totalize the water discharged through the outfall in the event. Further, the system would need to be capable of informing the permittee that samples have been collected. In areas with no telephone service, this would require a satellite link. While the technology clearly exists to do all of this, it is not inexpensive. One could easily imagine a cost of \$15,000 per site, plus \$10,000 per outfall simply to purchase the equipment. Many permittees may lack the expertise to design and install such systems themselves, and would need to hire consulting

engineers for those tasks. The cost of such services could be in the range of \$25,000 to \$35,000 per site, more if the site has serious access issues. Finally, the remote system would need to be secured from animal damage, vandalism and extreme weather events.

When the system informs the permittee that a qualifying event has occurred, the permittee would then need to travel to the site to pick up, preserve and transport the samples to the lab. Depending on the distance from the office to the site, this could consume from several hours to several days.

This proposal is absolutely unworkable. EPA should revert to the language of MSGP 2000 below.

*5.1.2.3 Inactive and Unstaffed Sites.*

If you are unable to conduct benchmark monitoring at an inactive and unstaffed site, you may exercise a waiver of the monitoring requirement as long as the facility remains inactive and unstaffed. If you exercise this waiver, you must maintain a certification with your Storm Water Pollution Prevention Plan stating that the site is inactive and unstaffed and that performing benchmark monitoring during a qualifying storm event is not feasible. You must sign and certify the waiver in accordance with Part 9.7. (65 Fed Reg 64817)

### **3.3 Corrective Action**

The proposed language in this part would require a corrective action based upon: the discovery of “any deficiency:” any exceedance of an effluent limitation, water quality standard or requirement stipulated in Part 5, or a benchmark exceedance based on the average of four quarterly monitoring events.

The mere finding of a “deficiency” (the term is undefined and could therefore be almost any problem) in the SWPPP or a BMP is not reasonable justification to trigger a full SWPPP review. The existence of erosion in a swale or buildup of sediment in a detention basin apparently could both be considered “deficiencies,” but neither should trigger a SWPPP review.

In the analog to this part in MSGP 2000, the requirements were stringent (e.g., correct deficiencies as soon as possible, but within 14 days and document in SWPPP), but they were at least somewhat reasonable. In the proposed language, the requirements are simply unreasonable and impractical. They appear to be developed by EPA staff that has little or no real-world understanding of the on-the-ground realities of storm water management or experience with the implementation of a SWPPP. It is not necessary to review the **entire SWPPP** just because someone found “any deficiency.” In most cases, no review of the SWPPP is required. If a structural BMP is found damaged or in need of maintenance, common sense dictates that the proper thing to do is fix it and document the activity. EPA is piling on substantial recordkeeping requirements that add no value. Additionally, the Agency is demanding that the signatory requirements that previously applied to only a few reports now should be applied to virtually everything in writing. This adds to the time wasted, including the higher-priced time of the designated signatory person, but adds nothing to the goal of prevention of water quality standards exceedances. This also places an additional and unnecessary administrative burden on EPA which translates into a waste of taxpayer monies.

As was stated in our comments on Part 1.3, the concept that any deficiency or inadequacy in a SWPPP or BMP is a violation of the permit is simply wrong-headed, and runs totally counter to the reality that BMP-based controls are properly executed in an iterative manner. EPA states as much in section 3.19, “Stormwater Pollution Prevention Plan (SWPPP) Requirements” on page 49 of the fact sheet (reproduced in pertinent part below).

**BMPs should be a suite of stormwater controls that are effective at pollution prevention and reduction AND are also economically reasonable and appropriate in light of current industry practice for your type of facility. “Best” refers to cost-effective measures using controls appropriate for the situation that will result in the necessary pollutant reductions.** Prevention measures, such as keeping areas clean, storing materials inside, and properly maintaining equipment, will usually be sufficient. **EPA does not typically expect or recommend implementation of highly engineered, complex treatment systems for most industrial sectors or pollutants, although in some cases more advanced treatment may be necessary, such as to address water quality standards exceedances.** This would most likely be the case where a wasteload allocation in a total maximum daily load (TMDL) approved or established by EPA called for treatment of stormwater to address a particularly difficult water quality problem. EPA does not require the use of a registered professional engineer to prepare the SWPPP, but this may be independently required under State law and/or local ordinance. (Emphasis added.)

For large, complex facilities, ensuring that structural BMPs can withstand a storm event of any size without damage seems to be the only way for a permittee to ensure that the BMP in question is never found to be “deficient” (and therefore in violation of the permit). Over-engineering to that level would clearly NOT be “economically reasonable.” If EPA has an expectation that structural BMPs withstand major storm events, then it should specify which storm event should form the basis of the design. See, for example 40 CFR § 440.131.

### **3.5.1 Unauthorized Releases or Discharges Report**

The requirement that permittees report “any unauthorized release” is unworkable, and impractical and a complete waste of the time of both the permittee and whoever in the agency is tasked with reviewing and filing the reports, not to mention the hard-earned money of the taxpayers who will be required to pay for the EPA staff time.

Further, it is beyond EPA’s authority under the Clean Water Act to impose such a sweeping requirement. As written, this part would literally require the reporting of a spilled cup of coffee, since there is no limitation on the nature of the substance or the threshold amount that would require reporting, and the permit clearly does not authorize the spilling of coffee. We agree that spills of reportable quantities of hazardous substances and petroleum, which are already regulated under other programs, should continue to be reported. We also agree that it is proper to keep a log of significant spills of these substances that do not rise to the level of a reportable quantity (provided that the spills occur in areas where they might contribute pollutants to storm

water discharges). To go beyond that is simply piling on more recordkeeping and reporting requirements that add no value.

## **Part 4**

### **4.G.1 Covered Stormwater Discharges**

EPA has muddled the definitions and applicability for the metal mining sector in this proposal, blurring the distinction between active and inactive mines. MSGP 2000 recognized and stated requirements for three classes of metal mining facilities: active, temporarily inactive and inactive. MSGP 2006, on the other hand, apparently would distinguish among five classes: exploration and development sites, active sites, temporarily inactive sites, inactive sites, and sites undergoing reclamation. Further discussion is set forth below.

### **4.G.2 Industrial Activities Covered by Sector G**

The proposed language is:

NOTE: “metal mining” will connote any of the separate activities listed in Part G.2. Permittees under Sector G are primarily engaged in the following types of activities:  
G.2.1 exploring for metallic minerals (ores), developing mines, and the mining of ores;  
G.2.2 ore dressing and beneficiating, whether performed at collocated, dedicated mills, or at separate (i.e., custom) mills.  
G.2.3 reclamation of mining sites.

As was noted above, EPA appears to be blurring the distinction between active and inactive sites, and the provisions of this part add to the confusion. The use of the word “activities” in the introduction would suggest that the descriptions in the subparts refer to what takes place at an “**active** metal mining facility.” One could therefore read this language to suggest that “reclamation of mining sites” is a subset of “active mining facility,” although that is clearly not the case if mining and beneficiation operations have ceased. While concurrent reclamation takes place at most operating mines, suggesting that mines that have closed and are being reclaimed are still “active” is counterintuitive at best. In fact, EPA addressed this issue in the fact sheet for MSGP 95, as follows:

*b. Inactive Metal Mining Facilities*  
*(2) Description of Mining Activities.*

The storm water pollution prevention plan shall provide a narrative description of the mining and associated activities that took place at the site. The narrative description shall report the approximate dates of operation, total acreage within the mine site and/or processing site, an estimate of the total acreage disturbed, **and the activities (reclamation, etc.) that are currently taking place at the facility.** A general description of the mining site relative to major transportation routes and communities shall also be provided. (60 Fed Reg 50899) (Emphasis added.)

### **4.G.4 Definitions**

The definitions of “mining operation,” “exploration and development phase,” “active phase” and “reclamation phase” are superfluous and should be struck. The term “mining operation” occurs

twice, both in conjunction with “exploration and development phase.” The terms “active phase” and “reclamation phase” occur nowhere except in the definition of “mining operation.” We are certainly willing to work with EPA, along with other mining trade associations, to work out appropriate terminology.

#### **4.G.5 Clearing, Grading and Excavation Activities**

This part should be struck in its entirety, particularly in view of the fact that EPA has just proposed to exempt the oil and gas industry from stormwater permitting for the same type of activities (it should be noted that in most cases the disturbances associated with oil and gas drilling are far larger than those associated with mineral exploration drilling, since the equipment used is much larger and therefore requires wider roads and more spacious drill pads). (See 71 Fed Reg 894.)

#### **4.6 Stormwater Pollution Prevention Plan (SWPPP) Requirements**

For purposes of SWPPP preparation, MSGP 95 and 2000 differentiated between two classes of mining sites: active and temporarily inactive sites, and inactive sites. This split was logical. Active sites have numerous associated activities and materials with the potential to add pollutants to stormwater. Temporarily inactive sites have similar materials, but with fewer activities ongoing. Inactive sites, by and large, have substantially less of both, and the activities are substantially different. Therefore, EPA bifurcated the SWPPP requirements to reflect the differences. In the MSGP 2006 proposal, EPA now suggests that the SWPPP requirements should be the same for all mining sites, whether active, temporarily inactive or inactive. As will be discussed below, this change has major ramifications for permittees with inactive sites.

##### **4.G.6.4 Site Inspections**

The new requirement that inactive mining sites be inspected monthly (the fact sheet, at page 13, no. 21 says quarterly) is unduly onerous and unnecessary. In explaining why it was not necessary to inspect inactive mine sites **annually**, EPA made the following statement in 1991:

A minimum of an annual inspection or report of monitoring results is not required for storm water discharges associated with industrial activity from inactive mining operations where annual inspections are impracticable. Rather, permits for storm water discharges from inactive mining operations may require certification once every three years by a Registered Professional Engineer that the facility is in compliance with the permit, or provide for alternative requirements. This provision will provide additional flexibility to address inactive mine operations. Mining activities have a somewhat unique history of development and inactive mining sites can be dispersed diffusely in remote, hard to reach locations where employees may typically not be onsite to conduct site evaluations. In addition, the inactive nature of these sites may limit changes to potential for storm water discharges from the site to contain pollutants, thereby warranting less frequent inspections. (57 Fed Reg 11402)

EPA ultimately dropped the requirement that a Registered Professional Engineer inspect the inactive mining site. The argument set forth above is as valid in 2006 as it was in 1991. The Agency has presented no compelling evidence that justifies a move from triennial inspections to monthly ones especially in areas with infrequent precipitation.

The additional burden imposed by this proposal will be particularly serious for small exploration companies, who are likely to have claims in numerous historic mining districts, which could be hundreds of miles from their offices. The MSGP 2000 requirement for triennial inspections was relatively simple to comply with, but if a given company has, for example, claims in five different historic mining districts, complying with the monthly inspection requirement could easily consume 0.25 full-time employees. When a small company has five or fewer employees, this represents a significant burden. As with several other provisions discussed above, this requirement would result in the expenditure of a great deal of time and effort without any likelihood for demonstrable improvement in water quality. The fact is that most of the historic mining sites in the U.S. are ones for which there is no identifiable owner/operator, and these are currently beyond the reach of the permit.

The MSGP 2000 requirement at 6.G.6.2.5 should be retained.

#### **4.G.7.2 Analytic Monitoring for Discharges from Waste Rock and Overburden Piles at Active Sites, Inactive Sites, and Sites Undergoing Reclamation**

MSGP 2000 required analytic monitoring for discharges from waste rock and overburden piles at active mines only. EPA is proposing in MSGP 2006 to extend this requirement to inactive sites and “sites undergoing reclamation.”

The term “sites undergoing reclamation” is not defined. Depending on the jurisdiction, a site could be considered to be “undergoing reclamation” until the bond is released and the permit is terminated, at which point no stormwater discharge permit would be required. See, for example, Rules Governing Exploration and Surface Mining in Idaho:

##### **150. TERMINATION OF A PLAN.**

**01. Termination.** A reclamation plan shall terminate upon request of the operator, upon completion of all reclamation activity to the standards specified in the plan, and final inspection and approval by the director. Upon termination, the director will release the remaining bond, notify the operator, and any authority to operate under the plan shall terminate. (IDAPA 20.03.02.150.01)

This result would be nonsensical. Sites at which mining and beneficiation have ceased, and where the only work taking place is reclamation, are “inactive sites” and should be treated as such.

Additionally, the title of the part and the title of Table G-2 disagree as to the applicability of the sampling requirement. Table G-2 does not include “inactive sites,” while the title of the part does. We assume that the Agency’s intent is reflected in the title of part 4.G.7.2, rather than the heading of the table. If that is the case, we have an enormous problem with the requirement.

Inactive sites, by and large, have much less activity and fewer materials exposed to stormwater, and the activities are substantially different.

Moreover, if the site is both inactive and unstaffed, the proposal becomes totally unworkable. See comment on part 3.2.2.5 above.

The language below was in the fact sheet for MSGP 95 and is still valid.

EPA realizes that if a facility is inactive and unstaffed it may be difficult to collect storm water discharge samples when a qualifying event occurs. Today's final permit has been revised so that inactive, unstaffed facilities can exercise a waiver of the requirement to conduct quarterly chemical sampling. (60 Fed Reg 50901)

#### **4.G.7.3 Additional Analytic Monitoring Requirements for Discharges from Waste Rock and Overburden Piles**

This part specifies additional monitoring requirements for waste rock and overburden piles at active sites, inactive sites and sites undergoing reclamation. The analytes vary according to the type of ore being produced. The sampling must be completed according to the schedule set forth in part 3.2.2.1, which is the same schedule as is specified in part 4.G.7.2. For all subsectors other than the uranium, vanadium and vanadium group, the list of analytes is a subset of the analytes set forth in 4.G.7.2.

In a display of generosity, the Agency states that “[t]he initial sampling event for a pollutant parameter required in Table G-2 satisfies the requirement for the first sample of any pollutant measurement in Table G-3.” Since the sampling required by both parts will take place on precisely the same schedule, does EPA intend that permittees should sample twice for the G-3 parameters for the remaining three quarters?

We make the same comment for this provision as is set forth for parts 3.2.2.5 and 4.G.7.2 above, regarding inactive sites.

#### **Appendix B, B.1.B.1.1.4 False Statement**

EPA makes a subtle language change which, when compared to the language of MSGP 2000 (Section 9.1.2.1.4), appears to attempt to expand the enforcement provisions of the law, found at 33 USC ↓1319, to virtually any word contained with a permit or any word contained within any record or document maintained or submitted due to permit language. EPA must maintain the enforcement limitation language contained in MSGP 2000 which clearly limits enforcement to provisions specified in the CWA.

#### **Regulatory Flexibility Act Analysis**

More than 95% of our members are small entities as defined by the Small Business Administration. NWMA does not believe EPA's superficial analysis of the impacts of the proposal on small entities complies with the requirements of the Regulatory Flexibility Act (RFA) and the Small Business Regulatory Flexibility Act (SBREFA).

Congress passed the Regulatory Flexibility Act in 1980 to address the failure of federal government agencies to recognize differences in the scale and resources of regulated entities has adversely affected competition in the marketplace, discouraged innovation, restricted improvements and productivity, and discourage entrepreneurship. Congress also found that

treating all entities equally led to inefficient use of regulatory agency resources, enforcement problems, and actions that were inconsistent with legislative intent. Congress decided that agencies should be required to solicit comments from small entities, examine the impact of the proposed and existing rules on small entities, examine regulatory alternatives that achieve the same purposes while minimizing small business impacts, and review the continued need for existing rules.

The original RFA exempted an agency from these requirements if the agency certified that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. Note that this is the exception, not the rule. However, Congress found that many agencies simply ignored the RFA by relying on the certification of “no significant economic impact” in order to avoid a full regulatory flexibility analysis. Since agency compliance with the RFA was not judicially reviewable, agencies could not be held accountable for their non-compliance with the statute. Thus, recognizing widespread agency indifference, Congress amended the RFA by enacting SBREFA. SBREFA requires agencies to provide a statement of the factual basis for a certification of “no significant economic impact.” It is clear that Congress intended that the factual basis requirement would provide a record upon which a court may review the agency’s actions. Thus, an analysis is required in order to provide a factual basis.

EPA’s superficial analysis of the impacts of the proposed MSGP on small businesses does not provide a sufficient factual basis to reach the conclusion that this action will not have a significant economic impact on a substantial number of small entities. NWMA believes that this action will have a significant economic impact on our members who are small entities. However, because EPA failed to grant our reasonable request for a 90-day extension, time did not permit an in-depth analysis of the impacts on our members who are small entities. EPA must provide an adequate analysis of the impacts on small entities and a legally defensible factual basis for the conclusion that this action will not have a significant economic impact on a substantial number of small entities before proceeding with this new MSGP proposal.

**Conclusion:**

For the reasons set forth above, EPA should withdraw and substantially revise the new MSGP or revert back to the MSGP 2000 for those proposed changes that EPA has not justified in the fact sheet that accompanied the proposal. EPA must also comply with the requirements of the RFA before proceeding.

Sincerely,



Laura Skaer  
Executive Director

LS/kw

cc: Senator Larry Craig  
Senator Michael Crapo  
Representative C.L. "Butch" Otter  
Representative Mike Simpson  
Senator Ted Stevens  
Senator Lisa Murkowski  
Representative Don Young  
Governor Dirk Kempthorne  
Governor Frank Murkowski  
Michael Bogert, Regional Administrator, Region 10, EPA