



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)**

To Whom It May Concern:

The National Mining Association ("NMA") appreciates the opportunity to provide comments on the *Proposed National Pollutant Discharge Elimination System (NPDES) General Permit for Stormwater Discharges From Industrial Activities*, 70 Fed. Reg. 72116 (Dec. 1, 2005). NMA's members are included in the metal ore mining and coal industry sectors regulated by the proposed permit in Sectors G, H and J, and therefore are directly affected by EPA's proposed action. NMA's members operate mines and conduct mineral development activities in regions where the proposed general permit has direct applicability such as Alaska, Idaho, and New Mexico, including on Indian Country lands in New Mexico. In addition, NMA members operate mines and conduct mineral development activities in many states (e.g., Kentucky, Nevada, Wyoming, West Virginia) which administer the discharges through general permits, and future renewals of those state general permits will be affected by this EPA action. NMA participated in the public process on the earlier (1995 and 2000) versions of the proposed permit, and has been a party to litigation on storm water regulatory issues. See, e.g., *National Mining Ass'n v. EPA*, No. 95-3519 (8th Cir.), resolved by settlement following EPA's 1998 Federal Register, 63 Fed. Reg. 45,534 (Aug. 7, 1998), clarification.

NMA and Its Members

NMA is a national trade association that includes the producers of most of the nation's coal, metals, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and the engineering and consulting firms, financial institutions and other firms serving the mining industry.

The NMA membership includes corporations involved in all aspects of the mining industry including coal, uranium, metal and industrial mineral producers, mineral processors, equipment manufacturers, state associations, bulk transporters, engineering firms, consultants, financial institutions and other companies that supply goods and services to the mining industry. NMA's members produce energy, metals and minerals that are essential to economic prosperity and a better quality of life. The fundamental benefits of mining industry products to modern economic and social development and to environmental improvement are well known.

Equally important are the economic benefits that mining provides to the communities where it is located. These benefits are derived from employment, wages, economic activity due to purchases of goods and services, and from the payment of taxes, royalties and fees to local, state and national governments. The members of the NMA have pledged to conduct their activities in a manner that recognizes the needs of society and the needs for economic prosperity, national security, and a healthy environment. Accordingly, NMA is committed to integrating social, environmental, and economic principles in our mining operations from exploration through development, operation, reclamation, closure and post closure activities, and in operations associated with preparing our products for further use.

Summary of Comments

- EPA needs to recognize in the MSGP and Fact Sheet that most mining exploration and construction activities are exempt from NPDES permit requirements, either through operation of Clean Water Act § 402(l)(2) or the absence of stormwater discharges to waters of the United States.
- EPA's General Permit should contain proper guidance to clarify the interrelationship between storm water discharges covered by the storm water NPDES program and the "mine drainage" discharges subject to the 40 C.F.R. Part 440 effluent limitations, and diffuse nonpoint sources at mine sites which are not subject to regulation.
- The new proposed requirements for inactive mine sites are infeasible, and there is no record evidence to support changes from the 2000 MSGP.
- EPA's proposed revisions to benchmark monitoring values (especially for cadmium, copper, cyanide, selenium, and silver) and to the benchmark monitoring program are not reasonable and will not produce meaningful benchmark monitoring to evaluate the effectiveness of BMPs.
- The Sector G and J requirements for final stabilization impose unnecessary and potentially conflicting reclamation requirements on mining facilities, which are already subject to detailed site-specific reclamation and stabilization requirements from federal or state regulators.
- The conditions for a notice of termination in the proposed MSGP exceed EPA's authority under the Clean Water Act. If there are no longer discharges from a

facility, EPA must allow a notice of termination without additional requirements. EPA lacks statutory authority to regulate point sources in the absence of a discharge to waters of the U.S.

- The proposed deadlines for ensuring uninterrupted coverage under the new permit may be unworkable in some situations.
- The new proposed language requiring mandatory implementation of all of EPA's listed BMPs is not reasonable and inconsistent with the stated purpose of a SWPPP.
- Unless EPA makes changes to this proposal which are substantially in accord with these comments, EPA's estimates regarding the costs of compliance and economic impacts must be entirely reworked.

Detailed Comments

I. EPA Should Recognize That Many Mining Activities, Including Especially Exploration And Construction Activities, Are Exempt From Storm Water Permitting Requirements

EPA defines "mining operation" in the proposed MSGP (for Sectors G and J) as including the exploration phase and requires MSGP coverage for that initial phase of a "mining operation." The MSGP and the associated Fact Sheet provides important guidance to the regulated community and EPA personnel regarding the scope of the general permit program for storm water discharges. However, nowhere in the proposed MSGP or Fact Sheet does EPA analyze Clean Water Act section 402(*I*)(2) in the context of mining exploration activities. That provision exempts uncontaminated stormwater discharges associated with "mining operations" from NPDES permitting requirements –

The Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of stormwater runoff from mining operations . . . composed entirely of flows which are from conveyances or systems of conveyances . . . used for collecting and conveying participation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.

33 U.S.C. § 1342(*I*) (2). Thus, if stormwater does not come into contact with overburden, raw material, intermediate products, finished product, byproduct, or waste product at a mining exploration site (as is the case at the vast majority of exploration operations), the exploration activities are exempt from NPDES stormwater permitting requirements. EPA should recognize in the MSGP and Fact Sheet the applicability of the statutory exemption to qualifying stormwater

discharges from many mining activities, including especially mining exploration and mine site construction activities.

EPA has also defined “mining operation” to include mine “construction” (for Sector J) and mine “development” (for Sector G). EPA includes the “building of site access roads” in the definitions of “construction” and “development.” The section 402(l)(2) statutory exemption also applies here to stormwater discharges from the building of site access roads and other mine construction activities, where the stormwater does not come into contact with overburden, raw material, intermediate products, finished product, byproduct, or waste product. EPA should recognize in the MSGP and Fact Sheet the applicability of the exemption to qualifying stormwater discharges from mine construction sites, particularly site access roads.

Section 402(l)(2) also applies the statutory exemption to “oil and gas exploration, production, processing, or treatment operations or transmission facilities.” In the 2005 Energy Policy Act (Public Law 109-58, 119 Stat. 594, 694 (Aug. 8, 2005), Congress amended the Clean Water Act to define “oil and gas exploration, production, processing, or treatment operations or transmission facilities” to include “all field activities or operations associated with exploration, production, processing, or treatment operations, or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activities.” 33 U.S.C. § 502(24). In response to Congress filling the gap on the meaning of a section 402(l)(2) term, EPA appropriately has proposed revised NPDES regulations for the oil and gas industries, making clear that discharges of uncontaminated stormwater from activities and operations in § 502(24) are not subject to NPDES stormwater permitting, including discharges of sediment. 71 Fed. Reg. 894 (Jan. 6, 2006).

Congress has not defined “mining operations” in the Clean Water Act, thus leaving a gap for EPA. EPA appropriately has filled that gap in the MSGP by defining “mining operations” to include exploration, construction, and development, including road building – in essence, EPA has defined “mining operations” in the same way that Congress clarified the meaning of oil and gas operations in the Energy Policy Act. EPA therefore should provide the same recognition to the section 402(l)(2) statutory exemption for uncontaminated stormwater from “mining operations” as it has for oil and gas operations. Stormwater discharges of sediment from an oil or gas exploration or development operation that do not come into contact with overburden, raw material, intermediate products, finished product, byproduct, or waste product are no different from stormwater discharges of sediment from a mining exploration, construction, or development operation that also do not come into contact with the materials listed at section 402(l)(2) (because such materials are typically not generated at the exploration and construction phases). The plain reading of the statute does not treat the two industries differently, and neither should EPA in applying the stormwater permitting program to these industries.

Finally, statutory exemption aside, EPA must recognize that many mining projects, particularly exploration projects, do not discharge stormwater to waters of the U.S.,

and therefore would be exempt from NPDES permitting requirements for that further reason. See *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 504-05 (2nd Cir. 2005) (in the absence of a point source discharge, there is no obligation to seek or obtain an NPDES permit). As illustrated in the attached photos from a North American mining exploration project, exploration projects can occur in remote areas far removed from waters of the U.S., and can involve minimal subsurface disturbance and impact. Operations like these fall outside of EPA's NPDES permitting jurisdiction, either through the operation of section 402(l) (2) or the absence of a discharge to waters of the U.S., as required by Clean Water Act section 301. 33 U.S.C. § 1311.

II. EPA's General Permit Should Contain Proper Guidance To Clarify The Interrelationship Between Storm Water Discharges Covered By The Storm Water NPDES Program, "Mine Drainage" Discharges Subject To The Effluent Limitations Of 40 C.F.R. Part 440, And Diffuse NonPoint Source Flows Not Subject To NPDES Regulation.

When EPA issues general permits for storm water discharges, together with the explanatory Fact Sheet, the agency is effectively providing guidance to the regulated community and EPA (and state) regulators nationwide who are involved with administering the storm water program. In the case of storm water discharges at ore mining sites, there are issues which have been raised and addressed in the recent past, which should be properly referenced and addressed in this reissuance of the general permit. Specifically, in 1998, EPA issued a *Federal Register* clarification to address the issues raised by the original 1995 multi-sector general permit as it related to the ore mining sector. See 63 *Fed. Reg.* at 42,534 (Aug. 7, 1998) (attached). It is important that this clarification be referenced in the current renewal of the general permit, and that the central elements of the regulatory clarification be reflected appropriately in the agency's issuance of the new general permit for ore mining.

Under the 1998 clarification, a storm water "discharge associated with the disposal of waste rock and/or overburden would not be subject to regulation under the Part 440 regulations unless it: (1) drains naturally (or is intentionally diverted) to a point source; and (2) combines with "mine drainage" that is otherwise regulated under the Part 440 regulations." 63 *Fed. Reg.* at 42,543. EPA offered that clarification to resolve a pending lawsuit filed by the National Mining Association challenging the 1995 general permit. In explaining the reason for the 1978 interpretation, EPA stated in 1998:

Upon fuller review of the underlying [Part 440 rulemaking] record, EPA now believes that, in 1978-79, the Agency did not consider certain point source discharges of storm water associated with 'waste rock and overburden' to be subject to the Ore Mining and Dressing Guidelines. Specifically, EPA did not conduct a complete economic and technological assessment of diverting drainage flow from waste rock or overburden' outside the active mining area into

the active mining area. Therefore the Agency did not consider such discharges to be sources of mine drainage.

63 *Fed. Reg.* at 42,538. The 1998 clarification made it absolutely clear that the mere fact that storm water came in contact with waste rock and overburden did not automatically render it subject to the Part 440 guidelines. There are many other details regarding the 1998 clarification which we will not set forth here, and we do not seek that the agency in the general permit renewal repeat every detail from the 1998 clarification. However, it is important that the 1998 clarification be referenced and that statements made in the current renewal of the general permit be entirely consistent with that important clarification.

We note that EPA has correctly restated Table G-4 from the 1998 clarification in the proposed general permit. In particular, the phrasing in the note corresponding to Table G-4 is a correct restatement of the 1998 clarification. That note states, in part, as follows: “Discharges from overburden/waste rock and overburden/waste rock related areas are not subject to 40 C.F.R. Part 440 unless: (1) it drains naturally (or is intentionally diverted) to a point source; and (2) combines with mine drainage that is otherwise regulated under the Part 440 regulations.” One very important aspect of the foregoing correct recitation of the 1998 clarification is that it is phrased to create a general rule that discharges from overburden and waste rock areas are not subject to 40 C.F.R. Part 440, *unless* specified conditions are met.

In contrast, a separate clarifying note in the proposed multi-sector general permit (in Section G.3.1) is phrased in a manner likely to create confusion, as indicated by the following:

NOTE: *Discharges that come in contact with overburden or waste rock are subject to 40 C.F.R. Part 440, providing that the discharges drain to a point source (either naturally or as a result of intentional diversion) and they combine with “mine drainage” that is otherwise regulated under the Part 440 regulations. Discharges from overburden or waste rock can be covered under this permit if they are composed entirely of storm water, do not combine with other sources of mine drainage that are subject to 40 C.F.R. Part 440 and meet other eligibility criteria contained in Part 1.2.2.1. [Emphasis added.]*

The highlighted text could be misinterpreted to create a general rule that “[d]ischarges that come in contact with overburden waste rock are subject to 40 C.F.R. Part 440” Such a general rule would be contrary to the 1998 regulatory clarification as quoted above. Because this topic has been the source of substantial prior confusion between agency personnel and the regulated industry, these clarifying notes should not be phrased differently. The note which is set forth under Table G-4 is correctly phrased and corresponds directly with the 1998 *Federal Register* clarification which was the basis to resolve the prior litigation and dispute between National Mining Association and EPA in the past. Accordingly, EPA should

restate the note in Section G.3.1 by replacing it with the same language from the note in Table G-4, and add a citation to the 1998 *Federal Register* clarification.

In the 1998 clarification regarding the scope of the storm water program in the context of the multi-sector permit, EPA also reaffirmed an important clarification regarding nonpoint source of pollution associated with mine sites that are outside the scope of the entire NPDES permit program. Specifically, EPA stated that “discharges from waste rock and/or overburden piles would be outside the scope of the [Part 440] Guidelines if they consist ‘entirely of diffuse runoff which contacts overburden piles, which do not either normally flow to, or by design drain to a point source. Such diffuse runoff would not even be subject to the NPDES program if it was not added to waters of the United States through a discrete, confined, discernable conveyance’.” 63 *Fed. Reg.* at 42,538 (Aug. 7, 1998) (citing 44 *Fed. Reg.* 7953 (Feb. 8, 1997)). It is fundamental that all storm water runoff is not part of a point source discharge subject to the storm water NPDES program. Indeed, as one court has stated: “Surface mine sites are common nonpoint source pollution problem areas.” See 33 U.S.C. § 1314(f)(B) (authorizing the EPA to issue guidelines to address nonpoint sources of pollutants from, *inter alia*, “mining activities, including runoff and siltation from new, currently operating, and abandoned surface and underground mines”).

Accordingly, EPA should also recognize in the issuance of this general permit, as it did in the 1998 *Federal Register* clarification, that nonpoint sources of pollution at mine sites are not subject to the NPDES program.

III. The New MSGP Requirements For Inactive Mine Sites Are Infeasible, And There Is No Record Evidence To Support EPA’s Change from the 2000 MSGP

EPA is proposing substantial new requirements for inactive mine sites in the proposed MSGP, compared to the treatment of those sites in the 2000 MSGP. For example, inactive mine site inspections must be performed monthly (as opposed to quarterly under the 2000 MSGP), and EPA is proposing to require analytic benchmark monitoring at inactive mine sites, when no such monitoring was required from inactive sites in the 2000 MSGP. EPA has proposed a meaningless waiver for inactive site monitoring – available only if “there are no industrial materials or activities exposed to stormwater.” For inactive mine sites that would qualify for that waiver, those sites would not even need an NPDES permit, let alone an exemption from NPDES stormwater monitoring, because no regulated discharges would be occurring. See 33 U.S.C. § 1342(l)(2).

EPA has not identified a reasonable justification (or indeed, any justification) for dramatically expanding the regulatory requirements for these unstaffed inactive mine sites which are typically located in remote locations where access is often extremely difficult especially during winter months. Monthly inspections and sampling within 30 minutes of storm events is impractical, and likely impossible, in many cases. Compelling evidence on this issue points to a different approach than that advanced in the proposed MSGP. In 1994, EPA analyzed Clean Water Act

regulatory options for the approximately 400,000 inactive mine sites on federal lands. See *President Clinton's Clean Water Initiative*, EPA 800-R-94-001 (Feb. 1994).¹ The estimated number of more than 400,000 sites on federal lands did not include potentially many thousands of other inactive mine sites on privately owned and state government owned land. EPA recognized that inactive mine sites need to be addressed on a prioritized basis (rather than imposing uniform infeasible requirements on all inactive mines) and are not well suited to the current NPDES permitting program. EPA recommended that the Clean Water Act be amended to allow for "targeted controls" for the inactive mine sites that are actually threatening or impairing water quality concerns. Thus, EPA determined eleven years ago for inactive mine sites on federal lands that a targeted, phased, prioritized approach was needed to address stormwater discharges from inactive mine sites.

Although the legislative relief that EPA sought was not granted, it is not reasonable for EPA to arbitrarily increase the existing regulatory burden for inactive mines as proposed in the MSGP. Indeed, we strongly suspect that the federal government itself is not meeting existing general permit requirements for stormwater discharges from inactive mine facilities within its jurisdiction. The basic facts regarding these inactive mine sites have not changed materially over the past decade, except we know that some of the most significant problem sites have been addressed under federal, state and voluntary industry remediation efforts. EPA should keep the principles in mind that guided its 1994 analysis and not impose further undue burdens on all inactive mine sites as if they are active mining facilities. EPA has failed to explain why inactive sites should be subject to the same monitoring, inspection, and SWPPP requirements as a fully active mining operation, and EPA's prior record evidence and high level agency pronouncements support a different and more targeted strategy.

At the least, EPA should reinstate the meaningful waiver provisions for inactive mine sites from the 2000 MSGP and provide some recognition that (1) many facilities are unstaffed, and so it is impossible and infeasible to perform analytic

¹ EPA's 1994 report (at 118) stated, in part, as follows:

It is estimated that there are in the range of 400,000 or more inactive and abandoned mine sites (IAMSs) on Federal lands. The environmental damages posed by these suits can vary significantly. While many sites are relatively benign, releases from other sites result in significant environmental degradation, even decades after active operations have ceased. A major administrative challenge is to (1) prioritize these sites that cause environmental problems so that the United States can address them in a rational environmentally protective manner, and (2) effectively protect water resource quality by addressing these sites according to the prioritized order. Another major challenge is to target control measures so as to achieve the greatest improvement in environmental quality for the limited Federal resources that may be available. Although the estimates of total costs of mitigating water resource quality impacts from IAMs vary significantly, they range into the many tens of billions of dollars without such cost-effective, risk-based prioritization.

monitoring or visually monitor stormwater within 30 minutes of a storm event (for inactive sites in remote and mountainous locations, the operator cannot physically travel to the site in that time frame); (2) some inactive facilities are inaccessible for parts of the year, making visual and analytic monitoring impossible; and, use of automatic sampler technology is prohibitively expensive and not yet proven reliable. (See attached cost estimates). In addition, the MSGP requirement that the SWPPP be maintained “at the facility” is similarly not workable for an unstaffed and inactive facility. For such facilities, EPA should instead allow the SWPPP to be maintained by the owner or operator of the facility, wherever the owner or operator is located.

If EPA's goal is to determine whether inactive mine sites are causing water quality problems, there are alternatives to investigate water quality impact from inactive facilities on receiving waters. For example, EPA can require periodic sampling of up- and down-stream waters from inactive facility (and indeed, if the inactive mine facility has an ongoing NPDES discharge permit, it may already be conducting such monitoring).

Further, the MSGP requirements for benchmark monitoring were developed for active mine sites as a trade-off – runoff that comes into contact with overburden or waste rock at active mines and that discharges as a point source would not be considered mine drainage requiring an individual NPDES permit (and therefore would not be subject to the existing effluent limitations applied to mine drainage for active mines) and in exchange, active mining facilities would perform benchmark monitoring of such stormwater discharges. There has never been any attempt to apply effluent limitations to drainage or runoff from inactive mining facilities (indeed, the 40 C.F.R. Part 440 regulations expressly apply only to active mining sites), and so there is no equivalent rationale to require benchmark monitoring from inactive mine sites.

In sum, absent a reasonable and supported justification for treating all inactive mine sites equally and imposing infeasible monitoring and inspection requirements with meaningless waivers, EPA's regulation of inactive mine sites in the proposed MSGP is an arbitrary departure from the 2000 MSGP and should be abandoned.

IV. The Revised Benchmark Values, Especially For Cadmium, Copper, Cyanide, Selenium, and Silver, Are Not Reasonable

Because of newly available and more sensitive laboratory techniques, EPA proposes to revise the benchmark levels for cadmium, copper, cyanide, selenium, and silver in the proposed MSGP to reflect actual acute or chronic water quality criteria, as opposed to 3.18 times the method detection limits (MDL). See MSGP, Table G-2. EPA proposes to apply these revised values to an expanded and prescriptive benchmark monitoring program that includes mandatory BMP review and corrective action if monitoring results exceed the new values. EPA's proposed revisions are not reasonable and will not produce meaningful benchmark monitoring to evaluate the effectiveness of BMPs, particularly at mining facilities in areas with extensive naturally occurring metals in the soils and waterways. Moreover, EPA's benchmark

levels are far too stringent for the *practical* purposes of a benchmark monitoring program.

A. EPA's Historic Approach To Benchmark Monitoring In The MSGP

In 1995, EPA first established acute water quality criteria (or 3.18 times the MDL where the MDL was higher than water quality criteria) for benchmark values to use "as a standard of comparison for an individual permitted facility that wishes to qualify for the low concentration waiver to be relieved from monitoring in the fourth year of the permit." 60 Fed. Reg. 51076 (1995). EPA believed that the benchmark values selected in 1995 were reasonable for that particular purpose (to qualify for a waiver and avoid monitoring in the fourth year). *Id.* During the 1995 comment process on the MSGP, commenters pointed out that the benchmark values did not consider dilution of the discharge in the receiving water, did not take into account local conditions or background levels, and seemed to operate as effluent limitations. EPA rejected the comments, reasoning that the limited and non-prescriptive nature of the benchmark monitoring process supported its use of water quality criteria for benchmark monitoring:

EPA emphasizes that the pollutant benchmark concentrations are not storm water effluent limitations Facilities are not required to meet these concentrations as effluent limitations in their discharges. The benchmarks are designed to assist facility operators in determining if their pollution prevention plans are reducing pollutant concentrations to below levels of concern. *Given the purpose of these benchmarks/monitoring cut-off values, EPA does not believe that dilution or background concentrations of each pollutant need to be considered. The monitoring benchmark cutoff values are not effluent limitations. For this same reason, local conditions do not need to be considered.*
60 Fed. Reg. 51076 (1995) (emphasis added).

B. The Expanded Benchmark Monitoring Program In The 2006 MSGP

In the proposed MSGP, the purposes for the benchmark values have expanded considerably since 1995, and the values now operate much more like effluent limitations than "monitoring cut-off values." EPA has also abandoned relying solely on acute water quality criteria by selecting *chronic* values for arsenic, iron, and selenium. In the proposed MSGP, if benchmark values are exceeded, the permittee must review its SWPPP within 14 days and determine if the SWPPP satisfies Part 2 of the MSGP. If the permittee determines the SWPPP is adequate, it must document that determination and the justification. If the permittee determines that the SWPPP is inadequate, it must initiate various corrective action requirements. Thus, rather than simply exempting a permittee from future monitoring requirements as in the 1995 MSGP, EPA is now using the benchmark values to trigger an immediate mandatory SWPPP review and corrective action process. There are now much greater implications associated with the meaning and accuracy of the benchmark values, and EPA's rationale for using highly stringent acute and

chronic ambient water quality criteria to measure constituent levels in an industrial stormwater discharge is not reasonable.

EPA has expanded the purpose and use of benchmark values in the MSGP without providing any analysis or justification of how an exceedance of an acute water quality standard in a stormwater discharge is a reasonable indication of insufficient stormwater BMPs and a contribution to water quality problems in the receiving water. EPA is imposing far more stringent limits that trigger more stringent permit terms and conditions than when the concept of benchmark values were introduced in 1995, yet EPA has not provided a commensurate more detailed analysis of how those more stringent values actually achieve the purposes sought by the required SWPPP and BMP reviews.

EPA also needs to consider that, with respect to metal mining facilities in the arid western U.S., some or all of their storm water discharges to water features that EPA considers “waters of the U.S.” are, in fact, to ephemeral streams that do not support aquatic life and, in many instances, do not support vegetative life. The purposes of benchmark monitoring would not seem to be implicated at all with respect to discharges to such ephemeral streams. Accordingly, EPA should not require any benchmark monitoring for such discharges.

C. The More Stringent Proposed Benchmark Values In The 2006 MSGP

The unreasonable and arbitrary nature of EPA’s proposal is laid bare in the new benchmark values for cadmium, copper, selenium, and silver. EPA must recognize that these metals are naturally occurring in most areas where Sector G mining operations are located. Metal mines which after all produce mineral ore bearing substances such as copper and silver are by necessity located in areas with naturally high levels of metallic mineralization. Even with the most comprehensive BMPs, it is unlikely that stormwater carrying sediment from Sector G operations will meet EPA’s nationwide acute or chronic ambient water quality criteria for all those metals. The proposed level for selenium is especially inappropriate because EPA has proposed to eliminate the 0.005 mg/l chronic value in favor a tissue-based approach (see Fact Sheet at <http://www.epa.gov/waterscience/criteria/selenium/fs.htm>). The inclusion of antimony, beryllium, and nickel is unwarranted for most Sector G sites (some facilities may suggest other metals are unwarranted).

Notably, the proposed benchmark criteria are more stringent than some state water quality standards where such Sector G operations occur. 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. Additionally, given the relatively short duration of storm events, the use of chronic values is inappropriate.

These variances with state water quality standards are especially problematic because most state water quality standards for everything but arsenic, iron and mercury are expressed as the dissolved form. The dissolved form has traditionally been considered as an approximation of the concentration that may be available to aquatic life. The considerably more rigorous total recoverable form of analysis will grossly overestimate the bioavailability of metals in the water column. As such, the dissolved form of analysis should be specified. Thus, use of aquatic life water quality standards and the total recoverable form of analysis creates an onerous and meaningless trigger for the required SWPPP and BMP review because many, if not all, Sector G operations will exceed the new benchmark values and will be required to engage in a pointless perpetual review and recordkeeping exercises or risk being in violation of the permit.

EPA's selected analytic methods provide 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 proposed 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 likely ultimately misrepresent the total loading from the stormwater outfall.

If EPA wants to use benchmark values in the next MSGP to measure effectiveness of existing BMPs in order to trigger mandatory review and corrective action of those BMPs (as opposed to the more limited purpose of benchmark values in 1995), then it needs to perform a more detailed analysis of the proposed values to support that there is some correlation between the benchmark value in a stormwater discharge and a negative impact on water quality, *i.e.* EPA needs to consider the assimilative capacity of the receiving water, which is a reflection of local conditions, flows, and background constituent concentrations. If EPA is going to treat benchmark values more and more like effluent limitations, then it must also provide a more substantial regulatory analysis to support them, as required by the Clean Water Act.

D. The Proposed Analytic Methods To Perform Benchmark Monitoring

Further, with respect to the new values for cadmium, copper, cyanide, selenium, and silver, EPA bases the new values on newly available analytic methods that are highly sensitive (and much more expensive) and that have MDLs lower than EPA's water quality criteria. However, there are several approved test methods for each of the methods that vary widely in their MDLs, and EPA has not provided a reasonable basis for choosing the most sensitive and expensive option for the

revised benchmark values. Specifically, 40 CFR Part 136 sets forth EPA's "List of Approved Inorganic Test Procedures." That list specifies the following number of methods and range of MDLs for the metals at issue here (the MDLs were found on National Environmental Methods Index published by the U.S. Geological Survey):

- Cadmium – 3 EPA test methods, with MDLs ranging from **0.1 to 5** micrograms per liter – the proposed MSGP benchmark value is **2.1** micrograms per liter;
- Copper – 3 EPA test methods, with MDLs ranging from **1 to 20** micrograms per liter – the proposed MSGP benchmark value is **14** micrograms per liter;
- Cyanide – 3 EPA test methods, with MDLs ranging from **5 to 100** micrograms per liter – the proposed MSGP benchmark value is **22** micrograms per liter;
- Selenium – 2 EPA test methods, with MDLs ranging from **2 to 20** micrograms per liter – the proposed MSGP benchmark value is **5** micrograms per liter; and
- Silver – 3 EPA test methods, with MDLs ranging from **0.2 to 10** micrograms per liter – the proposed MSGP benchmark value is **3.8** micrograms per liter.

For each of these metals, there are EPA-approved laboratory methods with MDLs that exceed the proposed MSGP benchmark value. It appears that, in some cases, EPA selected the test methods with the lowest MDLs in order to utilize acute water quality criteria as the benchmark values. However, this selection is unreasonable because EPA has failed to analyze and explain why the most sensitive and stringent laboratory tests are needed for mere benchmark monitoring, nor has EPA explained how acute or chronic water quality criteria are an appropriate guide for benchmark values in the new and substantially expanded benchmark monitoring program in the proposed MSGP. Moreover, EPA's proposed benchmark levels are dramatically lower than the "practical quantitation limits" or PQLs which the agency has long recognized as appropriate for sampling these same constituents in water. As EPA has explained, "the MDL and [Limit of Detection] LOQ are single laboratory concepts, whereas the PQL is the lowest level that can be reliably achieved within specified limits of precision and accuracy during routine laboratory operating conditions. EPA uses a multiplier of 5 to 10 times the MDL as well as other factors to establish the PQL." 57 *Fed. Reg.* at 31,806 (July 17, 1992). EPA has explained further in a manner which confirms why levels no more stringent than PQLs ought to be imposed for this *practical* benchmark monitoring purpose:

EPA has demonstrated that measurements can be as low as the MDL, but has defined the concept of the PQL as the lowest level that can be *reliably achieved* within specified limits of precision and accuracy *during routine laboratory operating conditions* Thus, *the PQL provides an allowance* for the degree of measurement precision and accuracy that EPA estimates can be achieved across laboratories.

Id. (Emphasis added).

More to the point, the current PQLs set by EPA for measuring the constituents of concern here in water (specifically groundwater) are (in micrograms per liter) as follows: (1) cadmium – 40 or 50;² (2) copper – 60 or 200; (3) cyanide – 40; (4) selenium – 750 or 20; and (5) silver – 70. See 40 C.F.R. Part 264, Appendix IX (2005)(ground water monitoring list with PQLs). In sum, EPA has no basis for setting revised benchmark monitoring levels which are below these PQL levels. A *practical* benchmark monitoring system for stormwater samples should not require the use of laboratory testing methods which push the limits of state-of-the-art analytical testing practices.

E. Conclusions on Benchmark Monitoring

In sum, the proposed benchmark monitoring program must be entirely reconsidered and redesigned to reflect EPA's statements on the purposes of benchmark monitoring, which calls for reasonable benchmark values achieved through practical, reasonably available laboratory methods. The proposed MSGP's requirements are unreasonably stringent and in many cases unworkable. Because the levels for naturally occurring substances are so low, mine operators are likely to be forced into costly and futile processes involving repeated correction action reviews. NMA asks that EPA take the above comments into account and rework the benchmark monitoring program appropriately.

V. The Final Stabilization Requirements For Sectors G And J Facilities Are Unnecessary And Unwarranted

The proposed MSGP requires both temporary and final stabilization for Sectors G and J mining facilities, and defines "final stabilization" as achieving 70% vegetative cover (depending on level of background vegetation) or its equivalent. It appears that EPA is proposing the definition of "final stabilization" from the Construction General Permit, which may be appropriate for most construction activities, but it is not workable for Sectors G and J mining operations. In essence, the proposed MSGP is for the first time imposing reclamation requirements on mining facilities, which are unnecessary and unwarranted, as explained below.

Mining facilities are already required to comply with extensive state or federal reclamation requirements. These requirements are typically set on a site-specific basis taking into account applicable federal and state mine reclamation criteria. The "final stabilization" requirements in the proposed MSGP can conflict with U.S. Department of the Interior, Bureau of Land Management ("BLM"), U.S. Forest Service, and state standards. See 43 C.F.R. Subpart 3809; 36 C.F.R. Part 228. See *also* Nevada Administrative Code, NAC 519A.010 *et seq.* See generally J.M. McElfish *et al.*, *Hard Rock Mining, State Approaches to Environmental Protection* (Environmental Law Ins't 1996) (describing varying state design and performance standards, and closure and reclamation requirements). Further, regulatory land managers impose site-specific stabilization and reclamation standards, because

² One alternative PQL is set for cadmium at 1.0 microgram per liter, which is inappropriate for the practical purposes of benchmark monitoring, for all of the reasons set forth above.

conditions can vary widely at mining sites across the country. EPA should not impose different and potentially inconsistent requirements on mining facilities. Rather, the MSGP should require that operators comply with the requirements of the applicable reclamation permit after mining operations have ceased.

The 1999 report of the National Academy of Sciences, National Research Council (“NRC”), *Hardrock Mining on Federal Lands* (“NRC Report”) recommends against actions such as EPA’s proposal here. The NRC concluded –

Federal land management agencies’ regulatory standards for mining should continue to focus on the clear statement of management goals rather than on defining inflexible, technically prescriptive standards. *Simple “one-size-fits-all” solutions are impractical* because mining confronts too great an assortment of site-specific technical, environmental, and social conditions. . . . BLM and the Forest Service should continue to base their permitting decisions on the site-specific evaluation process provided by NEPA. The two land management agencies should continue to use comprehensive performance-based standards *rather than using rigid, technically prescriptive standards.*

NRC Report at 5 (emphasis added). The NRC Report also found: “The overall structure of federal and state laws and regulations that provide mining-related protection is complicated but generally effective. The structure reflects regulatory responses to geographical differences in mineral distribution among the states, as well as the diversity of site-specific environmental conditions. It also reflects unique and overlapping federal and state responsibilities.” *Id.* The NRC’s recommendation is consistent with section 101(f) of the Clean Water Act which provides that it “is the national policy that to the maximum extent possible the procedures utilized for implementing this Act shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.” 33 U.S.C. § 1251(f).

EPA’s proposal on final and temporary stabilization conflicts with the NRC’s findings and congressional policy expressed in the Clean Water Act, because it will likely conflict with many existing site-specific reclamation plans nationwide. It threatens to make a complicated but effective federal and state mine reclamation regulatory scheme more complicated and less effective. The state and federal land management agencies that regulate mining operations from cradle to grave should receive deference from EPA on what level of reclamation is necessary at individual mining sites. Moreover, the sequences of exploration, development, mining and reclamation are unique to the mining industry. Temporary and final site stabilization practices that may be appropriate for construction do not necessarily apply to each phase of the mining process. For example, where development drilling activities are to be followed by overburden stripping and mining, it makes no sense whatsoever to engage in final stabilization after such drilling. Accordingly, EPA should abandon the

proposed language on stabilization and instead require operators to comply with their existing reclamation permits.

VI. The Proposed Termination Of Coverage Conditions Are Contrary To Law

The proposed MSGP allows for submittal of a notice of termination in several situations, including when “you have ceased operations at the facility *and* there no longer are discharges of stormwater associated with industrial activity from the facility *and* you have already implemented necessary sediment and erosion controls . . .” (emphasis added). These conditions of termination represent inappropriate regulation of a point source in the absence of a discharge. If there “no longer are discharges of stormwater associated with industrial activity from the facility,” that condition alone is sufficient to trigger the availability of a notice of termination. Whether operations are ongoing or not is not relevant if the facility is not discharging pollutants to waters of the U.S.

The recent *Waterkeeper Alliance, Inc. v. EPA* decision (399 F.3d 486 (2nd Cir. 2005)) mandates that the conditions for termination be changed. In *Waterkeeper* (a nationally applicable decision on EPA’s NPDES permitting regulations for concentrated animal feeding operations), the Second Circuit interpreted the Clean Water Act as follows:

[U]nless there is a “discharge of a pollutant,” there is no violation of the Act, and point sources are, accordingly, neither statutorily obligated to comply with EPA regulations for point source dischargers, nor are they statutorily obligated to seek or obtain an NPDES permit. . . . Thus, in the absence of an actual addition of any pollutant to navigable waters from any point, there is no point source discharge, no statutory violation, no statutory obligation of point sources to comply with EPA regulations for point source discharges, and no statutory obligation of point sources to seek or obtain an NPDES permit

Waterkeeper, 399 F.3d at 504-05. This interpretation is not new. Other courts have held that the Clean Water Act gives EPA jurisdiction to regulate and control only actual discharges and not point sources themselves. See, e.g. *NRDC v. EPA*, 859 F.2d 156, 170 (D.C. Cir. 1988) (the Act “does not empower the agency to regulate point sources themselves; rather, EPA’s jurisdiction under the operative statute is limited to regulating the discharge of pollutants”).

As proposed, the MSGP violates the Clean Water Act by imposing conditions on permit termination that may exist in the absence of an actual discharge. EPA should allow for a notice of termination when there are no longer discharges of stormwater associated with industrial activity from a facility with no additional required terms or conditions.

VII. The Proposed Deadlines For NOI Submittal Are Unworkable

The proposed deadlines for ensuring uninterrupted coverage under the new permit may be unworkable in some situations. As we understand it, if you are already authorized to discharge under the 2000 MSGP then your authorization is automatically extended for up to 120 days provided you submit a complete NOI no later than 90 days after the effective date of the new permit. Submission of a complete NOI requires both an updated SWPPP and implementation of the new SWPPP, pursuant to the terms of the new permit. Particularly for sites that are not year round accessible, this timeframe does not allow enough time to first assess what changes may be necessary in accordance with the newly issued permit, revise and implement the new SWPPP, all within 90 days of issuance of the new permit. Furthermore, the timeframe may result in penalties for applicants submitting NOIs on the 90th day should EPA fail to post on the website promptly.

EPA should consider revising this requirement such that coverage is triggered when the agency receives a complete NOI not upon EPA posting the NOI on a website. In addition, consideration should be given to allowing existing operations to submit the NOI prior to updating the SWPPP or, at a minimum, prior to implementing the revised SWPPP. Another approach might be to require NOI submission alone within 30 days of effective date of the new permit, followed by an updated SWPPP within 60 days of the effective date and providing an additional 3-6 months for implementing the changes required by the new SWPPP. This approach provides for assessing what changes are required by the new permit along with prompt notice of intent to continue coverage while providing a reasonable timeframe for implementing the changes. The additional time for implementation becomes particularly important at remote sites that are not easily accessible or perhaps become inaccessible during certain seasons.

VIII. The New Proposed Mandatory Language For Stormwater Controls Is Unreasonable And Contradicts The Stated Purposes Of A SWPPP

At section 2.1.5 of the proposed MSGP, EPA states that permittees “**must** implement all of the following types of BMPs to prevent and control pollutants in your stormwater discharges, unless you demonstrate that such controls are not relevant to your discharge” (emphasis in original). The proposal is a radical departure from the 2000 MSGP language and contradicts EPA’s stated purpose for SWPPPs. EPA should reinstate the more flexible and common sense approach from the 2000 MSGP.

The 2000 MSGP stated (at 4.2.7.2) that EPA’s list of BMPs “must be **considered** for implementation” (emphasis added), and permittees must include explanations in their SWPPPs if any of EPA’s BMPs are not appropriate for a facility. The proposed MSGP states at section 2 that SWPPPs must include BMPs that are “economically reasonable and appropriate in light of industry practices,” and that SWPPPs must “describe and ensure implementation of practices” used to control stormwater discharges from a particular facility. Imposing *mandatory* implementation of *all* of

EPA's BMPs, unless permittees can satisfy EPA's new, vague test for "relevance," is not a reasonable approach when compared to the longstanding site-specific and flexible approach EPA has taken with regard to BMP selection and implementation (and continues to articulate in section 2 of the proposed permit).

IX. EPA Has Grossly Underestimated Compliance Costs

If EPA does not substantially adhere to the views presented in the comments, we must inform you that the various compliance cost projections associated with the proposed MSGP will be woefully inadequate and clearly erroneous. The increased costs on a per-facility basis would be enormous. The gross compliance costs – assuming full compliance by all facilities subject to regulation (including inactive mines) – would be staggering. These deficiencies would extend to the general cost estimates in the Fact Sheet (at p. 65). Further, these deficiencies refute EPA's determination that the "proposed MSGP is not a significant regulatory action" under Executive Order 12866, as well as EPA's unsupported conclusion that "this action will not have a significant economic impact on a substantial number of small entities." Fact Sheet at 70. The mining industry, including especially the mineral exploration sector, has numerous small business entities.

The estimated increased cost for the new analytical benchmark monitoring cost of approximately \$126 per year per facility is ludicrous and baseless for Sector G facilities. See Fact Sheet at p. 65. This is apparently based on cost estimates for measuring "TSS, a relatively inexpensive laboratory test." *Id.* However, as explained above, the new proposed ultra-low benchmark values for selenium, cadmium, copper, cyanide, and silver will impose thousands of dollars of costs per mine facility, and those costs will increase when the initial flawed data results subject operators to repeated testing requirements, as explained above. Analytical and sampling costs and related transaction costs alone associated with such testing can be expected to easily exceed \$27,000 per facility, which is the EPA's "high end" estimate of the total costs of compliance with the general permit on a per-facility basis.

Nor do we see any indication that EPA has assessed the increased costs of inspection and benchmark monitoring requirements at innumerable remote unstaffed, inactive mine sites. The travel and site mobilization costs for unstaffed and remote inactive mine sites will be much higher than for active mine facilities. (See cost estimates, attached). Indeed, the only way to comply with the requirement to sample within 30 minutes of storm events would be to essentially station staff at inactive mines waiting for it to rain. Beyond this, the new site stabilization costs, if adopted, would impose major new costs as companies would be forced to try to meet these unwarranted and infeasible requirements.

This proposal is not a mere renewal of the MSGP. It dramatically expands regulatory burdens, and if EPA proceeds with the proposed approach, entire new cost compliance assessments must be carried out and reviewed by the Office of Management and Budget.

X. Additional Concerns

Part 1 Coverage.

Part 1.2.4.2: NMA supports the clarification in this subpart of covering construction at mining sites under the MSGP rather than a separate construction permit, subject to the recognition noted above that most mine construction activities are exempt from regulation. This clarification is important because it will eliminate the unworkable bifurcated permitting approach created under the 2000 version of the MSGP. This clarification recognizes that mining is unique from other industrial activities because all phases of mining (with the possible exception of some reclamation activities) are generally associated with land clearing and excavation activities. There is no clear distinction between the types of stormwater discharges that may be generated from the different phases of mining. All of the phases are therefore appropriately addressed under one permit.

Part 1.2.4.10: NMA requests that this provision be deleted as it is inconsistent with EPA's longstanding policy that anti-degradation policies are an essential part of each state's surface water quality standards. Consequently, compliance with anti-degradation policies is already addressed under other parts of the MSGP (see, for example, Part 1.4.3).

Part 1.2.4.6: NMA requests EPA revise the proposed 2006 MSGP retaining the language in the 2000 MSGP (see Part 1.2.3.6.7) which clarifies that Endangered Species Act ("ESA") provisions in the MSGP do not apply to state-issued permits.

Part 1.4.3: This section should be revised to provide that a permittee may demonstrate that a waterbody is attaining applicable water quality standards and therefore, no BMP upgrades are necessary.

Part 1.5.2: This section should be revised such that coverage stems from receipt of a completed application.

Part 1.8.1: The language in this subpart is too broad and should be appropriately narrowed to state specific circumstances that warrant requiring a discharger to obtain coverage under an alternative permit, e.g. the authority should be limited to repeat violations or another objective reason for requiring alternative permit coverage.

Part 2 Stormwater Pollution Prevention Plan (SWPPP).

Part 2: The requirement to "eliminate or reduce all pollutants in your discharge" should be revised to reflect that BMPs should be selected and implemented with a goal of "reducing" pollutants in stormwater discharges, consistent with requirements of the 2000 MSGP. Indeed, all pollutants are eliminated, then presumably no permit would be required.

Additionally, the requirement that BMPs be designed to meet “any more stringent measures necessary to meet the water quality standards provisions of Parts 1.4.3 and 1.4.4” should be removed. The references to the water quality standard provisions in Parts 1.4.3 and 1.4.4 is unnecessary as the issue is already addressed in the referenced sections.

The first bullet in Part 2 should be revised as follows to clarify that potential sources of pollution must be associated with industrial activity to be subject to the permitting obligations in the permit:

Identify all potential sources of pollution associated with industrial activity that may reasonably be expected to affect the quality of stormwater discharges from your facility.

Part 2.1.2: The requirement to identify locations and sources of run-on from adjacent properties and an evaluation of how the quality of the stormwater run-on impacts the facility’s discharges creates a difficult permit obligation. This section must be clarified taking into consideration EPA’s authority to require an evaluation of non-point sources from adjacent properties.

Part 2.1.3.1: The requirement to identify applicable water quality standards for the receiving waters is problematic, especially given that most water quality standards applicable to surface waters are based on default criteria that do not account for unique conditions posed during stormwater runoff events.

Part 2.1.4: The requirement to identify each area at the facility where industrial materials or activities are exposed to stormwater should be limited to areas within the actual capture area of a permitted outfall. This requirement should not extend to zero-discharge areas at the site (i.e., areas/basins that the permittee identifies as non-discharging). These areas are not subject to the permit requirements to identify exposed materials or activities.

Part 2.1.4.4: This subpart requires a certification that all outfalls have been tested or evaluated for the presence of non-stormwater. However, several provisions in this subpart refer to “testing” but omit reference to the alternative of “evaluating” for the presence of non-stormwater. These provisions should be revised to ensure that both alternatives (i.e., testing or evaluating) are referenced.

Part 2.1.4.5: The statement that allowable non-stormwater discharges are subject to all of the provisions of the permit, including benchmarks and monitoring requirements should be clarified. How would monitoring be conducted for such discharges when the monitoring provisions require monitoring to occur within the first 30-60 minutes after a qualifying storm event? Additionally, how are the benchmarks applicable to non-stormwater discharges, when they are allegedly appropriate for determining the effectiveness of stormwater BMPs.

Part 2.1.5: It is unclear what is meant by the language that the permittee must take all reasonable steps to control or address the quality of discharges from the

site that may not originate at the facility. Does this require treatment or application of BMPs for discharges from other locations or quality related to background? This language should be removed or appropriately revised and explained.

Part 2.1.5.3: The proposed permit language should be revised consistent with the 2000 MSGP at Part 4.2.7.2.1. The 2000 language is limited to requiring a “preventative maintenance program” for “storm water management devices . . . that may result in discharges of pollutants to surface waters.” The 2006 language goes too far.

Part 2.1.5.5: NMA questions the change from the 2000 MSGP, which gave the permittee the flexibility to select routine inspection frequencies on a site-specific basis, to mandate routine inspections on a monthly basis unless the permittee justifies a lesser frequency. NMA is unaware of the existence of any evidence to suggest that the current inspection requirements are not working.

EPA should expand the waiver for inspection frequency to at least 120 days to take seasonal, remote mining activities into account. Some active mining operations (particularly in the exploration phase) are completely inaccessible during the winter season, making even a monthly inspection requirement infeasible. EPA should allow greater flexibility in the inspection requirements for seasonal operations to recognize the long winter seasons in many sections of the United States where mining occurs.

Part 2.1.5.11: The current permit requires that tracking or blowing of raw, final or waste materials from areas of no exposure to exposed areas must be minimized. The draft 2006 MSGP requires that the “introduction” of these materials to exposed areas must be minimized. This seems much broader, and could be very problematic at a mining site. EPA should either return to the language in the 2000 MSGP (see Part 4.2.7.2.3) or clarify that the language in the 2006 MSGP has the same meaning as the language in the 2000 MSGP.

Part 2.1.5.12: The language of this section is overly broad and inconsistent with a flexible and iterative BMP approach and should be deleted. As written, the language could be interpreted as requiring implementation of multiple layers of BMPs at a particular location as long as they are economically reasonable and appropriate and necessary to eliminate or reduce pollutants in stormwater discharges.

Part 2.1.7: EPA should allow for greater flexibility in the signatory requirements for inspection reports (weekly, bi-weekly, monthly) in the 2006 MSGP. It is burdensome and unreasonable to require the responsible corporate officer or the individual in charge of the overall operation to sign inspection reports. Those individuals are typically not performing the actual inspections. It would be more appropriate and efficient to have the inspections reports signed by the employee who performs the inspections and who is experienced and qualified in storm water control measures and BMPs. Just as EPA does not require the Deputy Assistant

Administrator for Water to sign every issuance related to federal water regulation, it should not require upper level corporate officers or managers to sign routine inspection reports.

Part 2.2: The provision that creates an automatic permit violation if all BMPs identified in the SWPPP have not been maintained in effective operating condition at all times must be revised to provide some degree of flexibility, e.g. grace period. NMA requests that EPA clarify that a potential violation is present only if an identified problem with a BMP is not addressed within the timeframes required in the permit. Indeed, the 2000 MSGP captures this notion at Part 4.3.

Part 2.2 also requires that if a permittee discovers a BMP problem and can't repair it before the next storm event, the permittee must have "back-up measures" in place to ensure that storm water quality is not diminished. Such a requirement would be especially difficult to implement for large structural controls, such as containment impoundments. NMA requests that this language be deleted as the provision will be too difficult to implement.

Part 2.3: The language in this subpart would require a review and amendment of the SWPPP for deficiencies in BMPs identified during routine inspections or compliance evaluations or for spills or leaks anywhere at the facility. This language should be removed. It is inappropriate to require a review and amendment of the SWPPP based simply on the discovery of a deficiency in a BMP. A deficiency in a BMP could be as simple as a break or erosion in a berm or similar structure. It is likewise inappropriate to require a review and amendment of the SWPPP based on a spill or leak anywhere in the facility. This should only be required for significant spill or leaks (see Part 2.1.4.3) that actually occur in drainage areas for stormwater conveyances or outfalls.

Part 2.5: The second sentence in Part 2.5 states that notification from EPA "may be the result of comments on your SWPPP that EPA receives from the public." While it may be appropriate for the public to point out a potential SWPPP flaw, EPA cannot abdicate its responsibility to make an independent assessment of the supposed defect. The second sentence in Part 2.5 should be deleted.

Part 3 Compliance Evaluations, Monitoring, Corrective Action, Reporting, and Record Keeping.

Part 3.1.3: Part 3.1.3 implies that stormwater BMPs must be observed during active operation (i.e., during a stormwater runoff event) for purposes of the comprehensive site compliance evaluation. This requirement is entirely unworkable especially for mining operations located in the arid west. The likelihood of storm events occurring during comprehensive evaluations is remote. Additionally, it is often dangerous to travel and observe BMPs during storm events at mining operations. The requirement to observe BMPs during active operation should be removed from the permit.

Part 3.2.2.1: NMA supports the recognition that in arid climates, analytical monitoring can be distributed during seasons when precipitation actually occurs.

Part 3.2.3.1: Although the MSGP states that discharges currently or previously covered by another permit are not authorized, this requirement is unclear with regard to coal mining facilities. In the case of coal mining facilities, effluent limits on coal pile runoff are established in 40 CFR Part 434 as NPDES limitations and therefore, should not be monitored or reported through the MSGP. This section needs to explicitly state, "If your facility has discharges of stormwater runoff from coal storage piles, you must comply with limitations and monitoring requirements of Table 3-2 for all discharges containing the coal pile runoff, regardless of your facility's sector of industrial activity, with the exception that this does not apply to Sector H facilities."

Part 3.2.7: NMA objects to the language in Part 3.2.7 to the extent that it allows EPA to require any additional sampling it so desires. As with some of the provisions noted above, there is no limit on this authority, and no threshold that must be satisfied before requiring the additional monitoring. The permit language should be revised to only allow for additional monitoring if there is evidence suggesting that the facility's stormwater discharges are causing or contributing to water quality standard exceedances in the receiving water.

Part 3.3: The requirement to perform certain "corrective actions" for the discovery of any "deficiency" is onerous and unclear in its intended scope. It is also inappropriate to require corrective actions following any benchmark exceedance, especially in light of the comments set forth above regarding the disconnect between the proposed benchmarks levels and water quality standards. The concepts in Part 3.3 are already sufficiently addressed in other parts of the 2006 MSGP, including Part 2.2, Part 2.3, and the general SWPPP content requirements. Part 3.3 therefore should be removed in its entirety.

Part 3.5.1: EPA should clarify that reporting of unauthorized releases or discharges is limited to those likely to affect stormwater discharges. Reporting of releases already is addressed in EPA's standard permit conditions (40 C.F.R. § 122.44). This language should be removed from the final version of the 2006 MSGP.

Sector G

Part G.1.3: NMA supports the extension of the MSGP to stormwater discharges from exploration and development of metal mining facilities, subject to the recognition noted above that most exploration activities are exempt from regulation. This clarification is important because it will eliminate the unworkable bifurcated permitting approach created under the 2000 version of the MSGP. This clarification recognizes that mining is unique from other industrial activities because all phases of mining (with the possible exception of some reclamation activities) are generally associated with land clearing and excavation activities. There is no clear distinction between the types of stormwater discharges that may be generated from the

different phases of mining. All of the phases are therefore appropriately addressed under one permit.

Parts G.1.4 & G.2.3: NMA supports the clarification that the MSGP extends to reclamation activities at metal mining facilities.

Part G.4.2: NMA supports the change in the phase “exploration and construction” to “exploration and development.” However, the word “financial,” should be removed from the first sentence of this subpart because exploration activities are focused on general viability of a site, not just financial viability.

Part G.4.4: The definition of the reclamation phase should be consistent with EPA’s 2001 definition, e.g. in terms of returning the land to an appropriate post-mining land use in order to meet applicable mined land reclamation requirements. See 66 Fed. Reg. 1676 (Jan. 9, 2001).

Part G.7.2: The language in Part G.7.2 providing that EPA may notify a permittee that additional monitoring is required to accurately characterize the quality and quantity of pollutants discharged from waste rock and overburden piles should be removed or appropriately limited. The proposed language must be revised to provide criteria for when EPA is justified in requiring additional monitoring beyond the monitoring specified in the permit.

Part G.8: The reference to “potential to cause or contribute to violations of state water quality standards” has historically been a permit eligibility requirement, and is now being used as a provision for exiting the permit. The provision is inappropriate and should be deleted.

Sector J

NMA members, J.R. Simplot and P4 Production, LLC, prepared detailed comments addressing Sector J requirements. NMA supports these statements with respect to the inappropriateness of applying Sector G requirements to Sector J activities, scope of permit coverage, and cost impacts.

We look forward to reviewing these serious concerns further with you in the very near future. If you have questions regarding any aspect of these comments, please contact me at 202-463-3240.

Respectfully submitted,



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