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U.S. Environmental Protection Agency – 4203M  
1200 Pennsylvania Ave N.W.  
Washington, DC 20460

**Re: Proposed Multi-Sector General Permit, Docket ID No. EPA-HQ-OW-2012-0803**

Dear Mr. Weiss,

The National Mining Association (NMA) is pleased to have the opportunity on Thursday, February 5th to meet with the U.S. Environmental Protection Agency (EPA or Agency) and discuss the Clean Water Act (CWA) multi-sector general permit (MSGP) to ensure the Agency incorporates appropriate and defensible technology-based effluent limitations (TBELs) for stormwater discharges associated with mining operations and stormwater discharges associated with construction activity. As NMA has discussed with EPA in prior correspondence and in-person meetings, our members have significant concerns with the newly added non-numeric TBELs in sections 8.G.4, 8.H.4 and 8.J.4 of the proposed 2013 MSGP. Specifically, the TBELs proposed by EPA in sections 8.G.4, 8.H.4 and 8.J.4 of the MSGP incorrectly incorporate the non-numeric TBELs from the Construction & Development Effluent Limitation Guidelines (C&D ELG), 40 C.F.R. Part 450, through the 2012 Construction General Permit (CGP), and inappropriately apply them to stormwater discharges associated with clearing, grading and excavation, as well as exploration activities, at mine sites. As discussed in greater detail below, this issue involves a complicated interplay between multiple technology-based ELGs, EPA's industrial stormwater regulations, multiple EPA-issued National Pollutant Discharge Elimination System (NPDES) permits, and EPA's NPDES permitting regulations.

This problem is the result of the definitions found in sections 8.G.3, 8.H.3 and 8.J.3 of both the existing 2008 MSGP and the proposed 2013 MSGP, which are contrary to both EPA's industrial stormwater regulations and the ELGs for the mining point source categories. See 40 C.F.R. § 122.26(b)(14)(iii); 40 C.F.R. Parts 434, 436, 440. That this occurred is not surprising; clearing, grading and excavation activities occur at both mine sites and construction sites, and 40 C.F.R. § 122.26(b)(14)(iii) has not been clearly reconciled with (b)(14)(x) and (b)(15). As a result of the confusion caused by the incorrect definitions, EPA has arbitrarily incorporated the TBELs from the

C&D ELG into 8.G.4, 8.H.4 and 8.J.4 for stormwater discharges associated with mining operations. Because the scope of the C&D ELG did not include the mining industry and EPA's Office of Science and Technology did not consider the applicable statutory factors like economic achievability and technical feasibility as applied to the mining industry or mine sites, EPA cannot now apply the TBELs in the C&D ELG to mining operations.

Fortunately, there does not appear to be a larger policy disagreement between EPA and NMA on how to address stormwater discharges associated with mining operations that are regulated under the CWA, and there is a straightforward drafting solution to this issue. Specifically, and as discussed in more detail below, NMA requests that EPA revise the definitions in sections 8.G.3, 8.H.3 and 8.J.3 of the proposed 2013 MSGP.<sup>1</sup> These revised definitions are in accord with the ELGs and EPA's industrial stormwater regulations, including the delineated scope of mining operations found in the Standard Industrial Classification (SIC) System and North American Industry Classification System (NAICS). As a result of the revised definitions, all stormwater discharges associated with mining operations regulated under the CWA will be subject to technology-based effluent limitations from either the applicable ELGs or established on a permit-by-permit basis by the permitting authority based on its best professional judgment.

## **I. Background**

When EPA implemented CWA § 402(p) and created the industrial stormwater program, the Agency identified categories of facilities considered to be engaging in industrial activity. See 40 C.F.R. § 122.26(b)(14). Stormwater discharges associated with industrial activity are required to obtain an NPDES permit. See CWA § 402(p)(2)(B); 40 C.F.R. § 122.26(a)(1)(ii). To assist in identifying the facilities engaged in industrial activity, EPA based the categorization, in part, on the SIC and NAICS systems. See 40 C.F.R. § 122.26(b)(14)(ii), (iii), (vi), (viii), and (xi); 55 Fed. Reg. 47,990, 48010 (Nov. 16, 1990) (SIC and NAICS codes "are commonly used and accepted and would provide definitions of facilities involved in industrial activity [and are a] generally used and understood form of classification"). Facilities classified by SIC Codes 10-14 and NAICS Code 21 are identified by EPA as engaged in "mining operations," and the associated stormwater discharges are regulated pursuant to 40 C.F.R. § 122.26(b)(14)(iii). However, for facilities engaged in "construction activity," classified by

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<sup>1</sup> NMA's proposed definitions section, found in Section IV (pgs. 12-13) of this document, includes new definitions for "mining operations" and "reclamation activities," deletes the definitions for "exploration phase," "construction phase," "reclamation phase," and "final stabilization," and maintains the definitions for "active phase," "active mining facility," "inactive mining facility," and "temporarily inactive mining facility."

SIC Codes 15-17 and NAICS Code 236 (Construction of Buildings) and 237 (Heavy and Civil Engineering Construction), the associated stormwater discharges are regulated pursuant to 40 C.F.R. § 122.26(b)(14)(x), (15).

For stormwater discharges associated with both “mining operations” and “construction activity,” the permitting authority must promulgate, and the permittee must comply with, TBELs. See CWA § 402(p)(3)(A). There are three ways for the EPA to establish TBELs in the MSGP: (1) “application of EPA-promulgated effluent limitations developed under [CWA § 304] to discharges by category,” i.e., ELGs; (2) “on a case-by-case basis under [CWA § 402(a)(1)]...to the extent that EPA-promulgated [ELGs] are inapplicable,” otherwise known as on a best-professional judgment (BPJ) basis; and (3) a combination of (1) and (2). See 40 C.F.R. § 125.3(a), (c). Whichever way the TBELs are established, EPA must give consideration to the relevant statutory factors. See CWA § 304(b); 40 C.F.R. § 125.3(d); *see also*, *Weyerhaeuser Company v. Costle*, 590 F.2d 1011, 1020, 1045 (D.C. Cir. 1978)(CWA § 304 “establishes the minimum...criteria that EPA must use in developing...industry-specific [technology based effluent] limitations”). Specifically, EPA must consider “the total cost of application of technology in relation to the effluent reduction benefits” or the “cost of achieving such effluent reductions.” CWA §§ 304(b)(1)(B), (2)(B); *see also*, *American Iron and Steel v. EPA*, 526 F.2d 1027, 1050 (3rd Cir.1975)(“Congress clearly intended that the Administrator consider costs on a class or category basis”); *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 129 (1977) (“EPA may determine the economic achievability of an option on the basis of the overall effect of the rule on the industry's financial health”). Further, the Agency must consider “the age of the equipment and facilities involved, the processes employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impacts (including energy requirements), and such other factors as the [EPA] deems appropriate.” CWA §§ 304(b)(1)(B), (2)(B).

The EPA has long established ELGs for facilities engaged in mining operations (Mining ELGs). See 40 C.F.R. Parts 434 (Coal Mining), 436 (Mineral Mining), and 440 (Ore Mining). The Mining ELGs, in part, address stormwater discharges associated with mining operations; *see e.g.*, 40 C.F.R. Part 440, Subpart M (Gold Placer Mining); 40 C.F.R. Part 436, Subpart D (Industrial Sand Mining). For all other stormwater discharges associated with mining operations that are regulated under the CWA, where there is no applicable Mining ELG, the permitting authority must establish TBELs on a BPJ basis, as EPA correctly did in the 2008 MSGP. In contrast to the Mining ELGs, EPA only recently established TBELs for stormwater discharges associated with construction activity. In 2009, EPA finalized the C&D ELG, which established non-numeric TBELs for stormwater discharges from construction sites. See 74 Fed. Reg. 62,996 (Dec. 1, 2009).

## II. The Definitions in the Proposed MSGP are Contrary to the CWA, EPA Regulations, and OSM Regulations

NMA attributes EPA's erroneous application of the effluent limitations in the C&D ELG to stormwater discharges associated with mining operations to a series of incremental missteps. EPA's regulations require the Office of Water, when it establishes permit conditions, to "assure compliance with all applicable requirements of [the] CWA and regulations," and an "applicable requirement" is "a statutory or regulatory requirement...which takes effect prior to the issuance of the permit." 40 C.F.R. § 122.43(a), (b)(1). Further, "reissued permits" shall incorporate each of the applicable requirements referenced in [§ 122.44], which include "effluent limitations and standards promulgated under section 301 of the CWA," like those in the C&D ELG. See 40 C.F.R. § 122.44(a)(1). The definitions in the MSGP at sections 8.G.3, 8.H.3 and 8.J.3 include activities such as "exploration," "land disturbance," "building roads," and "removal of overburden" as "exploration" and "construction" activity, outside the scope of "mining operations." The C&D ELG applies to stormwater discharges associated with construction activity. See 40 C.F.R. § 450.10. As a result of this interplay, EPA applied the effluent limitations in the C&D ELG to stormwater discharges associated with "construction activity" and "exploration" as those terms are defined in the MSGP. However, the definitions are not in accord with the CWA, EPA's industrial stormwater regulations, the Mining ELGs, or the Office of Surface Mining Reclamation and Enforcement's (OSM) regulations.

### A. The Proposed Definitions Conflict With the CWA and EPA's Stormwater Regulations

The definitions in section 8.G.3, 8.H.3 and 8.J.3 conflict with EPA's stormwater regulations at 40 C.F.R. § 122.26(b)(14)(iii), which define the scope of stormwater discharges associated with mining operations. EPA's regulations rely on the SIC and NAICS system to categorize stormwater discharges associated with industrial activity. See 40 C.F.R. § 122.26(b)(14)(ii), (iii), (vi), (viii), and (xi); 55 Fed. Reg. 47,990, 48010 (Nov. 16, 1990); see also, *Decker v. Northwest Environmental Defense Center*, 133 S.Ct. 1326, 1332 (2013) (industrial categories in EPA's stormwater regulation are defined in accordance with SIC Codes); *Ecological Rights Foundation v. Pacific Gas and Elec. Co.*, 713 F.3d 502, 512 (9th Cir. 2013) (SIC codes determine the scope of categories of industrial stormwater under 40 C.F.R. §122.26(b)(14)(ii)-(iii),(iv),(viii),(xi)).<sup>2</sup>

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<sup>2</sup> See also, Brief for the United State as Amicus Curiae, 2012 WL 3864278 (U.S. Supreme Court), \*6, fn. 2 ("The [Phase I] regulation incorporates by reference the enumerated Standard Industrial Classification (SIC) codes."); \*24 ("[t]o identify the categories of 'facilities' engaged in 'industrial activity,' EPA's regulation...incorporates by reference Standard Industrial Classification (SIC) codes").

The proposed MSGP itself makes clear that the definitions in 8.G.3, 8.H.3 and 8.J.3 “are not intended to supersede the definitions...established by 40 CFR 122.26(b)(14)(iii).” Further, the proposed MSGP recognizes the role of the SIC and NAICS system in the industrial stormwater program; the sector specific TBELs for categories of industrial stormwater discharges are identified by SIC Codes. See MSGP at 8.G.1, 8.H.1, 8.J.1; Table D-1 of Appendix D of the proposed MSGP.<sup>3</sup>

The activities of “clearing,” “grading,” “excavation,” “exploration,” “land disturbance,” “building roads,” and “removal of overburden and waste rock” are all activities that EPA in the proposed MSGP mistakenly excluded from the scope of “mining operations.” For example, EPA’s proposed definition of “construction activity” in the MSGP includes the “removal of overburden,” meaning the proposed MSGP excludes from the scope of “mining operations” those stormwater discharges that come into contact with “overburden.” However, both CWA § 402(l)(2) and 40 C.F.R. § 122.26(b)(14)(iii) explicitly *include* “overburden” in the statutory and regulatory NPDES exemption for stormwater discharges associated with mining operations, meaning that if stormwater contacts overburden it is associated with mining operations, and requires NPDES permit authorization. Congress and the EPA both clearly expected that stormwater which comes into contact with overburden would be classified as stormwater discharges associated with mining operations. Additionally, all of the activities listed above are specifically identified as part of the mining industry in SIC Codes 10-14 and NAICS Code 21. See *also*, Appendix N of the proposed MSGP. For example, in SIC Code 10, in the major group explanation, included within the scope of mining operations is “developing mines,” and “exploring for...minerals.”<sup>4</sup> Mining operations also include activities that involve clearing, grading, and excavating, and those activities are fully reflected within the scope of SIC Codes 10-14 and NAICS Code 21 for the mining industry as integral parts of the mining operations. The mining SIC and NAICS codes were designed in the context of operating mines, where there are many phases of mining, from “exploration” to “removal of overburden” to “reclamation,” including the associated “clearing, grading and excavation” activity.

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<sup>3</sup> This is also in accord with EPA’s actions following the Phase I stormwater regulation, 55 Fed. Reg. 47,990, where EPA established the Baseline General Industrial Stormwater Permit, which included industry-specific information, best management practices (BMPs) and monitoring data *as defined by the SIC Codes*. See 65 Fed. Reg. 64,746, 64,747 (Oct. 30, 2000) (emphasis added).

<sup>4</sup> See *also, e.g.*, SIC 1081 (Metal Mining Services) (“removal of overburden,” “mine exploration and development”); SIC 1241 (Coal Mining Services) (“overburden removal”); SIC 14 (Mining and Quarrying of Nonmetallic Minerals) (“developing mines,” “exploring for...minerals”); NAICS 212 (Mining) (“[t]he term mining is used in the broad sense,” “mine site development”).

## B. The Proposed Definitions Conflict With the Development of the Mining ELGs

The proposed definitions in the MSGP also conflict with EPA's development of the Mining ELGs. Specifically, when EPA was developing the ELGs for the Ore Mining Point Source Category, the Agency broadly interpreted the term "mine." For example, in the context of developing the ELGs, the Agency declared:

"A mine is an area of land upon which or under which minerals or metal ores are extracted from natural deposits in the earth by any means or methods. A mine includes the total area upon which such activities occur or where such activities disturb the natural land surface. A mine shall also include land affected by such ancillary operations which disturb the natural land surface, and *any adjacent land the use of which is incidental to such activities; all lands affected by the construction of new roads or the improvements or use of existing roads to gain access to the site of such activities* and for haulage and excavations, workings, impoundments, dams, ventilation shafts, drainage tunnels, entryways, refuse banks, dumps, stockpiles, *overburden piles*, spoil banks, culmbanks, tailings, holes or depressions, repair areas, storage areas *and other areas upon which are site structures, facilities, or other property or materials resulting from or incident to such activities.*" Development Document for Interim Final and Proposed Effluent Limitations Guidelines and New Source Performance Standards for the Ore Mining and Dressing Industry, Point Source Category Vol. 1, U.S. Environmental Protection Agency (Oct. 1975), at 142 (emphasis added).

Additionally, the Agency utilized the SIC and NAICS codes to delineate the scope of mining operations considered as part of the ELG rulemakings. For example, in the context of the ELGs for the Ore Mining Point Source Category, EPA examined and assessed the various subcategories of SIC Code 10, which "includes establishments primarily engaged in mining, developing mines, or exploring for metallic minerals," and in the development document addressed issues such as "drilling and blasting necessary to remove consolidated overburden."<sup>5</sup> Similarly, the "applicability" section of 40 C.F.R. Part 434 for the Coal Mining Point Source Category expressly states that it applies to "discharges from any coal mine at which the extraction of coal is taking place *or is planned to be undertaken* and to coal preparation plants and associated areas." 40 C.F.R. § 434.10.

It is important to note that stormwater discharges associated with mining operations *not within the "active mine area"* are outside the scope of the Mining ELGs,

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<sup>5</sup> Development Document for Interim Final and Proposed Effluent Limitations Guidelines and New Source Performance Standards for the Ore Mining and Dressing Industry, Point Source Category Vol. 1, U.S. Environmental Protection Agency (Oct. 1975), at 32.

meaning the effluent limitations in the Mining ELGs do not apply to those discharges. See 63 Fed. Reg. 42,534, 42,538 (Aug. 7, 1998). However, those discharges outside the “active mine area” still fall under SIC Codes 10-14 and NAICS Code 21, discussed above, and are part of “mining operations.” Those stormwater discharges, if regulated, are still subject to TBELs, but it is up to the permitting authority to establish the effluent limitations in an NPDES permit on a BPJ basis, like EPA did in the 2008 MSGP. See 63 Fed. Reg. at 42,538. All stormwater discharges from mine sites regulated under the CWA are subject to TBELs based on either the Mining ELGs, if the discharge is from the active mine area, or established on a BPJ basis if the discharge is outside the active mine area, which is the structure designed by EPA in the NPDES permitting regulations at 40 C.F.R. § 125.3(c).

### C. The Proposed Definitions Conflict With OSM’s Regulations Under SMCRA

EPA’s narrow proposed definition of “mining operations” also conflicts with OSM’s Surface Mining Control and Reclamation Act (SMCRA) implementing regulations. Specifically, 30 C.F.R. § 700.5 codifies what constitutes a “surface coal mining operation” for purposes of regulation, inspection, and enforcement under SMCRA. In relevant part, 30 C.F.R. § 700.5 states:

*Surface coal mining operations mean—*

(a) Activities conducted on the surface of lands in connection with a surface coal mine or, subject to the requirements of section 516 of the Act, surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. Such activities include excavation for the purpose of obtaining coal, including such common methods as contour, strip, auger, mountain top removal, box cut, open pit, and area mining; the use of explosives and blasting; in situ distillation or retorting; leaching or other chemical or physical processing; and the cleaning, concentrating, or other processing or preparation of coal. Such activities also include the loading of coal for interstate commerce at or near the mine site...; and

(b) The areas upon which the activities described in paragraph (a) of this definition occur or where such activities disturb the natural land surface. These areas shall also include any adjacent land the use of which is incidental to any such activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of those activities and for haulage and excavation, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas, and other areas upon which are sited

structures, facilities, or other property or material on the surface, resulting from or incident to those activities.

Surface coal mining and reclamation operations means surface coal mining operations and all activities necessary or incidental to the reclamation of such operations. This term includes the term surface coal mining operations.

In multiple contexts, therefore, EPA and OSM, as well as state mining and environmental agencies, treat the types of activities at issue as integral parts of the mining process. To depart from these established boundaries in the context of the MSGP creates needless and unsupported confusion. In light of the need for consistency in permitting and field operations, it is particularly important for EPA to use an analogous definition in the MSGP.

### **III. The C&D ELG Does Not Address Clearing, Grading or Excavation Associated with Mining Operations**

During the C&D ELG rulemaking, NMA submitted comments on the 2008 proposed rule in part based on NMA's concern regarding unintended consequences from any final regulation. See attached NMA comments, Feb. 2009, Dec., 2010, Jan. 2010, as well as NMA CGP Feb. 2003 comments; see *also*, Docket ID No. EPA-HQ-OW-2008-0465. NMA noted that it understood "that it is not EPA's intent through this new construction ELG rulemaking to regulate the mining industry sectors. However, due [to language in the 2008 proposed C&D ELG], there are ambiguities about the scope of this rule that may have unintended and harmful impacts on mining activities, which already are regulated comprehensively under the [CWA]." NMA Feb., 2009 Comments on C&D ELGs at 1. NMA sought confirmation from EPA during the rulemaking; however, not only did the EPA not provide confirmation of NMA's understanding of the C&D ELG, it did not respond to *any* of NMA's comments as part of the final rule, in the preamble or in the associated response to comment document. See *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393-94 (D.C.Cir.1973), *cert. denied*, 417 U.S. 921 (1974) (agencies must respond to comments that are material to issues raised in a rulemaking proceeding). When EPA promulgated the 2012 Construction General Permit (CGP), which incorporated the effluent limitations from the C&D ELG into the permit for stormwater discharges associated with construction activity, NMA submitted similar comments to the Agency. See NMA July, 2011 CGP Comments, see *also*, Docket ID No. EPA-HQ-OW-2012-0782. NMA was concerned that EPA would incorrectly apply the effluent limitations in the C&D ELG to mining operations, notwithstanding its prior expressed position and the clear focus of the C&D ELG on construction sites. Again, EPA failed to provide a response to NMA's specific inquiry on the applicability of the C&D ELG to stormwater discharges associated with mining operations, and in the

proposed 2013 MSGP EPA is doing exactly what NMA has been concerned the Agency might do since 2008.

EPA cannot apply the effluent limitations in the C&D ELG to stormwater discharges associated with clearing, grading and excavation activity at mine sites, as the scope of the C&D ELG did not include the mining industry and EPA's Office of Science and Technology did not consider the applicable statutory factors like economic achievability and technical feasibility as applied to the mining industry or mine sites. NMA has examined the C&D ELG, NAICS Codes 236 and 237, the associated development documents, federal register notices and other supporting documents to the C&D ELG, as instructed by the EPA's NPDES Permit Writer's Manual for applying ELGs into NPDES permits. See U.S. EPA, NPDES Permit Writers Manual, EPA-833-K-10-001 (Sept. 2010), at 5-23-5-26. As discussed below, the C&D ELG and its administrative record clearly demonstrate that EPA was not addressing mine sites, mining operations, the mining industry, or any associated clearing, grading, or excavation activity in the rulemaking.

The focus of the C&D ELG has always been on clearing, grading and excavation activity at construction sites, and since the beginning of the C&D ELG rulemaking effort EPA has been clear that the scope of the regulation "would address storm water runoff *from construction sites*." 64 Fed. Reg. 15,158 (Mar. 30, 1999) (emphasis added). In the final C&D ELG in 2009, EPA stated, "[a]ll *construction sites* will be required to meet the series of non-numeric effluent limitations [which are the TBELs at issue in the proposed MGSP]." 74 Fed. Reg. at 62,997. (emphasis added). The regulated entities within the scope of the C&D ELG fall under NAICS Codes 236 and 237, which focus on residential and nonresidential building construction and utility and transportation construction. See 74 Fed. Reg. at 62,996, 63,003-04, 63,030-31; see also, Economic Analysis of Final Effluent Limitation Guidelines and Standards for the Construction and Development Industry (Economic Analysis), at 1-3 (November 23, 2009). EPA did not include any entities that fall under SIC Codes 10-14 and NAICS Code 21 for mining operations as part of the rulemaking.<sup>6</sup> Further, the C&D ELG explicitly states that it only applies to

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<sup>6</sup> EPA did mention NAICS Code 238 in the development documents, specifically 238910 (Site Preparation Contractors), which includes "[e]stablishments primarily engaged in...[e]arth moving and land clearing for all types of sites (e.g...mining)." Economic Analysis at 1-5. However, EPA made clear that the "establishments included under NAICS 238910...are expected to be involved in land disturbance. However, since the establishments in this sector are not expected to be the NPDES permittees *this sector was therefore excluded from this regulatory analysis*." *Id.* (emphasis added); see also, *id.* at 3-2, 3-3 (facilities within NAICS Code 238 are not "within the scope of the final C&D rule" and they "will not be directly affected by the final regulation").

stormwater discharges associated with construction activity as defined in 40 C.F.R. § 122.26(b)(14)(x), (b)(15). See 40 C.F.R. § 450.10; 74 Fed. Reg. at 63,057. As discussed above, mining operations include clearing, grading and excavation activity on mine sites, and stormwater discharges associated with mining operations are regulated pursuant to 40 C.F.R. § 122.26(b)(14)(iii) and any applicable Mining ELGs.

Additionally, EPA did not consider any of the statutory factors required by CWA §§ 304(b)(1)(B), (2)(B) for the mining industry when it established the C&D ELG. For example, there was no economic evaluation or consideration of the cost of the effluent limitations to the mining industry. See *generally*, Economic Analysis. EPA never requested any financial or technical information from the mining industry despite the fact that, in accordance with CWA § 304(b)(2), “EPA determines the economic achievability on the basis of the total cost to the subcategory and *the overall effect of the rule on the industry’s financial health*” (emphasis added). Development Document for Final Effluent Guidelines and Standards for the Construction & Development Category (Development Document) (Nov. 2009), at 2-3. The fact that EPA did not consider the costs of implementing the TBELs at mine sites or the impact of the C&D ELG on the mining industry is evident from the preamble’s description of the economic analysis. For example, EPA described the impacted industry as having “a comparatively large number of firms, the majority of which are small, that operate on many sites, which are temporary and widely dispersed over a broad geographic area,” and stated that “for the construction industry, the permitted activity is a temporary project rather than ongoing operations at a permanent facility,” and that the “industry [is]...characterized by many small firms with a relatively high turnover and low barriers to entry.” 74 Fed. Reg. at 63,031, 63,035-36. These are clearly not descriptions of the mining industry. Further, when EPA performed its economic analysis, it developed model projects to examine the firm-level and industry-level impacts of the C&D ELG. Of the 14,688 model projects that EPA developed, none were mine sites or mining operations. See 74 Fed Reg. 62,996; see *also*, Economic Analysis at 6-1.

Additionally, EPA never examined the technical feasibility of the TBELs for mining operations, i.e., the “facilities involved, the processes employed, the engineering aspects of the application of various types of control techniques.” CWA §§ 304(b)(1)(B), (2)(B). Rather, the C&D ELG included effluent limitations that EPA determined “are the required controls necessary to minimize, control or prohibit discharges of pollutants *from construction sites*.” 74 Fed Reg. at 63,016 (emphasis added). It has been EPA’s position that “while many of the land disturbing operations and subsequent stabilization (sic) measures at mining sites are similar to practices and activities at construction sites, the Agency notes *possible differences between the two classes of activities*.” 57 Fed. Reg. 41,236, 41,274-75 (Sept. 9, 1992) (emphasis added). Therefore, for example, when establishing TBELs for ore mining operations, EPA stated that the “establishment

of ELGs [for mining operations]...require[s] a sound understanding and knowledge of the ore mining and dressing industry, the mining techniques and milling processes involved, the mineralogy of the ore deposits, water use, waste water generation and characteristics, and the capabilities of existing control treatment technologies.”<sup>7</sup> By contrast, in the C&D ELG, EPA never examined the mining industry or considered such issues as the size of mine sites; the unique nature of mining operations, including the engineering and water management issues that differ from the construction industry; the existing mining requirements under both the CWA and other state and federal statutes that are inapplicable to the construction industry, including the requirement that mine sites be reclaimed pursuant to applicable state and federal mining laws;<sup>8</sup> or that, as a technical matter, mining operations cannot comply with “typical” erosion and sediment controls concerning the installation of stormwater controls prior to initial disturbances, perimeter controls, maintenance deadlines, 50’ natural buffer requirements, sediment track-out, soil or sediment stockpiles, storm drain inlets, sediment basins, minimizing soil compaction, visual assessment of discharges, or site stabilization.<sup>9</sup> EPA cannot simply establish TBELs for a particular industry and then turn around and apply those same TBELs to a different industry without giving notice, providing an opportunity to comment, justifying the application based on the relevant statutory factors, and providing a reasoned explanation for the Agency’s decision when it conflicts with prior Agency interpretation of existing EPA regulations.

#### **IV. Proposed Solution**

EPA historically recognized that stormwater discharges associated with clearing, grading and excavation activities on mine sites are discharges associated with mining operations, as demonstrated by its development of the ELGs and the implementation of the industrial stormwater program. In the 2000 MSGP, EPA in part changed course and, over NMA’s objections, required mine sites to obtain separate NPDES permit coverage under the CGP for clearing, grading and excavation activities on mine sites. In 2008, EPA changed course again, and permitted stormwater discharges associated with

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<sup>7</sup> Development Document for Interim Final and Proposed Effluent Limitations Guidelines and New Source Performance Standards for the Ore Mining and Dressing Industry, Point Source Category Vol. 1, U.S. Environmental Protection Agency, Oct. 1975 at 13.

<sup>8</sup> For example, “exploratory areas,” such as access roads, are often included in federal and state mine plans and reclamation plans; therefore, treating those areas the same as “construction sites” and including requirements from the C&D ELG, such as final site stabilization, may be infeasible for mining operations.

<sup>9</sup> For example, there is difficulty treating so-called “exploration phase” and “construction phase” of mining as “not part of ‘mining operations,’” when clearing, grading and excavation occurs during nearly all stages of mining operations, and when typical construction stabilization requirements, including those in the C&D ELG, would therefore be required for areas that are intended to be immediately mined.

clearing, grading and excavation activities associated with mining operations under the MSGP. In doing so, however, EPA arbitrarily determined that the Agency “considers exploration and construction to be distinct from ‘mining operations’,” as those terms are defined in the MSGP. See 2008 MSGP Fact Sheet at 125. As such, while the 2008 MSGP continued to incorrectly categorize activity on mine sites, all regulated stormwater discharges from mine sites could be permitted under one NPDES permit and EPA appropriately tailored the “construction” requirements in the MSGP for clearing, grading and excavation activities on mine sites to the unique characteristics of the mining industry, thereby eliminating any *practical implications* of the incorrect definitions in sections 8.G.3, 8.H.3 and 8.J.3. After the C&D ELG, however, given EPA’s apparent interpretation of its applicability, the incorrect definitions in the MSGP now have a significant practical impact, as EPA is incorporating the TBELs in the C&D ELG to any “clearing, grading and excavation” activity, even activity at mine sites associated with mining operations, [40 C.F.R. § 122.26(b)(14)(iii), SIC Codes 10-14 and NAICS Code 21], not construction activity [40 C.F.R. § 122.26(b)(14)(x), (b)(15), SIC Codes 15-17 and NAICS Codes 23, 236-37].

As discussed above, the definitions in the proposed MSGP are contrary to the CWA, EPA’s stormwater regulations, which incorporate the SIC and NAICS codes, and EPA’s Mining ELGs. Further, any effort by the EPA to apply the C&D ELG to clearing, grading and excavation activity associated with mining operations would be arbitrary and capricious and otherwise not in accordance with the requirements of the CWA. The solution to this problem is for EPA to revise the definitions in sections 8.G.3, 8.H.3 and 8.J.3; specifically, EPA should delete the current definitions, and instead include the following definitions:

*Mining operations* - Includes exploration, the construction of access roads, the development of support services at mine sites, the removal of overburden and waste rock to expose mineable minerals, extraction and removal or recovery of ore, and reclamation activities. Includes all active and temporarily inactive mining facilities.

*Reclamation Activities* - Activities undertaken in compliance with applicable mined land reclamation requirements intended to return the land to an appropriate post-mining land use in order to meet applicable Federal and State reclamation requirements.

*Active mining facility* - A place where work or other activity related to the extraction, removal, or recovery of coal, minerals, or metal ore is being conducted. For surface mines, this definition does not include any land where grading has returned the earth to a desired contour and reclamation has begun. This definition is derived from the definitions of “active mining area” found at 40 C.F.R. 440.132(a) and 40 C.F.R. 434.11(b).

*Inactive mining facility* - A site or portion of a site where mining and/or milling occurred in the past but is not an active facility as defined above, and where the inactive portion is not covered by an active mining permit issued by the applicable State or Federal agency. An inactive mining facility has an identifiable owner /operator. Sites where mining claims are being maintained prior to disturbances associated with the extraction, beneficiation, or processing of mined materials and sites where minimal activities are undertaken for the sole purpose of maintaining a mining claim are not considered either active or inactive mining facilities and do not require an NPDES industrial stormwater permit.

*Temporarily inactive mining facility* - A site or portion of a site where mining and/or milling occurred in the past but currently are not being actively undertaken, and the facility is covered by an active mining permit issued by the applicable State or Federal agency.

This revision to the definitions is in accord with the CWA, the Mining ELGs, the C&D ELG, and EPA's stormwater regulations. In addition, all references to provisions in the 2012 CGP should be deleted, and all references to the current proposed phases should be removed from the corresponding mining sectors. The result of these revisions is that regulated stormwater discharges associated with mining operations will be subject to either the TBELs in the Mining ELGs or the TBELs established by the EPA in the MSGP on a BPJ-basis. When developing the TBELs for any stormwater discharges associated with mining operations on a BPJ basis, NMA suggests that EPA use the effluent limitations developed for the 2008 MSGP as the basis for the reissued MSGP, and only make changes where it is necessary to achieve proper stormwater management, taking into account the technical feasibility and economic achievability to the mining industry as required by the CWA and EPA's implementing regulations.<sup>10</sup>

Sincerely,



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<sup>10</sup> See 40 C.F.R. §§ 301, 304(b); 40 C.F.R. §§ 122.44, 125.1, 125.3(c)-(d).

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