



# **Responsiveness Summary**

**For**

**Public Comments Received**

**On the**

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

SPDES MULTI-SECTOR GENERAL PERMIT

FOR STORMWATER DISCHARGES ASSOCIATED WITH

**INDUSTRIAL ACTIVITY**

Permit No. GP-0-12-001

Issued Pursuant to Article 17, Titles 7, 8 and Article 70  
of the Environmental Conservation Law

September 2012

## **Background**

The Clean Water Act provides that stormwater discharges associated with industrial activity from a point source (including discharges through a municipal separate storm sewer system) to waters of the United States are unlawful, unless authorized by a National Pollutant Discharge Elimination System (NPDES) permit. In New York, EPA has approved the State program which is enacted through the administration of the State Pollutant Discharge Elimination System (SPDES) program.

The SPDES Multi-Sector General Permit (MSGP) for Stormwater Discharges Associated with Industrial Activity, GP-0-12-001, issued pursuant to Article 17, Titles 7, 8 and Article 70 of the ECL, will replace the current SPDES MSGP for Stormwater Discharges Associated with Industrial Activity, GP-0-11-009. GP-0-12-001 becomes effective on October 1, 2012. An owner or operator may obtain coverage under this new general permit by submitting a Notice of Intent (“NOI”) to the Department.

## **Introduction**

The New York State Department of Environmental Conservation has prepared this responsiveness summary to address the comments that were received on the draft SPDES Multi-Sector General Permit for Stormwater Discharges Associated With Industrial Activity, GP-0-12-001.

The draft general permit was published for public review and comment in the Environmental Notice Bulletin (ENB) on March 28, 2012 with comments being due by April 30, 2012.

The responsiveness summary generally addresses all comments received, with the exception of comments dealing with editorial or formatting changes. The comments have been organized to follow the format of the draft general permit with general comments addressed at the end of the responsiveness summary. Frequently raised issues are summarized and presented as one set of comments.

## **Part I - Coverage Under This General Permit**

### **Part I.A. Permit Area**

**Comment I-1: Waters of the US** NYSDEC Part I.A.: NYSDEC has proposed in the draft permit changing references from "waters of the US" to "surface waters of the state." Region 2 believes this may be problematic as it is not clear whether the state phrase covers the same jurisdictional waters. NYSDEC regulations seem to exclude streams which are not "continuous flowing natural streams" as the term "waters of the US" can include intermittent streams as well as those diverted into storm sewers or extended culverts. Also, the state phrase does not seem to include all federal wetlands across the state. Please explain how the state phrase is analogous to the federal phrase or change the phrase to "waters of the US."

***Response I-1: The Department elected to utilize the term “surface waters of the state” to be consistent with terms used in the Environmental Conservation Law and 6NYCRR 750. However, to avoid potentially excluding coverage under the MSGP for discharges to certain water bodies covered under the federal program, the final MSGP includes a clarification that for the purposes of the MSGP, the definition of “surface waters of the state” includes “waters of the US”.***

**Comment I-2: Owners vs. Operators** The MSGP should not purport to exempt the owner of a facility from responsibility if the owner is not also the operator. Owners are ultimately responsible for what their industrial operator tenants do on their property; they profit from the industrial activity by collecting rents, and are often in the best position to finance necessary structural changes on their sites.

***Response I-2: The MSGP does not exempt any person or entity from liability. The MSGP (Part V.O) states, “nothing in this permit shall be construed to preclude the institution of any legal action or relieve the owner or operator from any responsibilities, liabilities or penalties established pursuant to any applicable State Law or regulation under authority preserved by section 510 of the Clean Water act. No condition of this permit shall release the owner or operator from any responsibility or requirements under other environmental statutes or regulations.” The Department maintains its full suite of enforcement options should there be a violation of the MSGP, ECL or associated regulations. “Owner or operator” is a common term used in SPDES permitting and is defined at 6 NYCRR 750-1.2(a)(60). 6 NYCRR 750-1.6(a) states “when a facility or activity is owned by one person but is operated by another person, it is the operator’s duty to obtain a permit.” The operator has control over the activities conducted at the site and would be in the best position to select, install, implement and maintain BMPs intended to minimize the***

*discharge of pollutant. The Department does not dictate who is the responsible party under the MSGP based on financial involvement.*

## **Part I.B. Permit Conditions & Limitations**

**Comment I-3: Technology Based Effluent Limitations (TBELs)** The MSGP must include numeric and/or non-numeric (i.e., narrative) technology-based effluent limitations ("TBELs") that represent the Best Available Technology Economically Achievable ("BAT") for toxic pollutants and best control technology currently achievable ("BCT") for conventional pollutants and otherwise include requirements that ensure that discharges of storm water associated with industrial activity will achieve BAT and BCT.

Part III, Section A of the Draft MSGP states that Stormwater Pollution Prevention Plans (SWPPPs) "shall be prepared in accordance with ... the factors outlined in 40 CFR 125.3(d)(2) or (3) as appropriate." Those sections provide the factors to be considered by permit writers in setting case-by-case BAT and BCT limits. While the reference to technology-based limitations is a good start, it is the MSGP itself, and not merely the SWPPP, which should contain the TBELs, consistent with federal court decisions. As a result of those decisions, in 2008 EPA restructured its MSGP accordingly (see 2008 EPA MSGP Fact sheet)

**Recommendation No.1:** DEC should include a general provision in the MSGP specifically requiring permittees to reduce or prevent the discharge of pollutants in storm water discharges and authorized non-storm water discharges by developing and implementing BMPs that constitute compliance with BAT/BCT. We suggest the following language, which is drawn from California's MSGP:

Permittees shall reduce or prevent pollutants in storm water discharges and authorized non-stormwater discharges through controls that meet BAT for toxic and non-conventional pollutants and BCT for conventional pollutants. The failure to implement facility-specific measures and controls that are necessary to achieve compliance with BAT/BCT and to meet applicable water quality standards is a violation of this permit.

Other similar language, such as "Measures and controls shall be selected to achieve BAT/BCT and compliance with WQSs" (which we have seen in other states' MSGPs) should also be added to the discussion of the SWPPP in the Permit.

If the word minimize or a similar term is used, as EPA's MSGP does frequently, include a definition (as EPA does) that defines "minimize" as "reduce and/or eliminate to the extent achievable using control measures (including best management practices) that are technologically available and economically achievable in light of best industry practice (i.e., meet BAT/BCT)." See MSGP § 2 and Fact Sheet at p. 33 (§ VI.A).

Recommendation No.2: The MSGP should set forth and require certain "minimum BMPs" (as California calls them) or "Control Measures" as (EPA calls them) that all facilities must comply with, such as:

- "Cover all stored industrial materials that can be readily mobilized by contact with storm water"
- "Divert storm water or authorized non-storm water flows from non-industrial areas (such as employee parking) from contact with industrial areas of the facility"
- "You must minimize the exposure of manufacturing, processing, and material storage areas (including loading and unloading, storage, disposal, cleaning, maintenance, and fueling operations) to rain, snow, snowmelt, and runoff by either locating these industrial materials and activities inside or protecting them with storm resistant coverings..."

Recommendation 3: DEC can look to EPA's MSGP for examples of the kinds of TBELs that can be included in the Permit. (See MSGP § 2.1 )

In addition, Connecticut's MSGP (which is referred to as the "General Permit for the Discharge of Stormwater Associated with Industrial Activity"), effective October 1, 2011, contains similar requirements in Section S(b), entitled "Control measures."

***Response I-3:*** *The final MSGP contains effluent limits that correspond to required levels of technology-based control (BPT, BCT, BAT). The draft and final MSGP incorporates effluent limitations in the sector-specific requirements of Part VIII, where an effluent limitation guideline or NSPS applies. As stated in EPA's MSGP fact sheet, "Because of the nature of stormwater discharges, it is infeasible to use numeric effluent limits to demonstrate the appropriate levels of control. In such situations, the CWA authorizes EPA to include non-numeric effluent limits." The MSGP (Part I.B.1) has been revised to include the non-numeric effluent limits as contained in EPA's 2008 MSGP (Part 2) as suggested in Recommendation 3. Among other things, these limitations require that owners or operators minimize exposure of manufacturing, processing and material storage areas and manage runoff to minimize pollutants in runoff as suggested in Recommendation 2. In addition, the MSGP (Part III.C – SWPPP Contents) has been revised to specify the documentation that the SWPPP must contain to demonstrate compliance with the effluent limitations set forth in Part I.B.1 and Part VIII. Several of the non-numeric effluent limits require facilities to "minimize" various types of pollutant discharges. As suggested in Recommendation 2, the final MSGP (Part I.B.1) clarifies that for the technology based limits contained in Part I.B.1 and VIII,*

*the term “minimize” means to reduce and/or eliminate to the extent achievable using control measures (including best management practices) that are technologically available and economically achievable (BAT) and practicable (BPT) in light of best industry practice. EPA has determined that the technology-based numeric and non-numeric effluent limits incorporated into their 2008 MSGP, taken as a whole, constitute BPT for all pollutants, BCT for conventional pollutants, and BAT for toxic and nonconventional pollutants that may be discharged in industrial stormwater. New York State’s version of the MSGP contains the numeric and nonnumeric effluent limits found in EPA’s version and therefore meets the required level of technology-based control.*

*With regard to Recommendation 1, Commenter suggests that the MSGP contain language that failure to meet applicable water quality standards is a violation of the MSGP. The Department expects that compliance with the MSGP will provide the control necessary to meet water quality standards as required by 6 NYCRR 750-1.3(f) and 6 NYCRR 750-2.1(b). 6 NYCRR 750-1.3(f) prohibits discharges and does not allow for the issuance of a SPDES permit “when the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States.” 6 NYCRR 750-2.1(b) states “[u]pon issuance of a SPDES permit, a determination has been made on the basis of a submitted application, plans, or other available information, that compliance with the specified permit provisions will reasonably protect classified water use and assure compliance with applicable water quality standards.” Furthermore, the MSGP (Part I.B.2) states, “It shall be a violation of the Environmental Conservation Law (ECL) for any discharge authorized by this permit to either cause or contribute to water quality standards as contained in Parts 700-705 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York, including but not limited to....” DEC has the authority to enforce ECL §17-0501 (“It shall be unlawful for any person, directly or indirectly, to throw, drain, run or otherwise discharge into such waters organic or inorganic matter that shall cause or contribute to a condition in contravention of the standards adopted by the department pursuant to section 17-0301”). The final MSGP added Part I.B.4 which states that if there is evidence indicating that despite compliance with the terms and conditions of the permit, it is demonstrated that stormwater discharges are causing or contributing to a violation of water quality standards or the Department determines that a modification of the permit is necessary to prevent a violation of water quality standards, the authorized discharges will no longer be eligible for coverage under the MSGP.*

**Comment I-4: Numerical Limitations - Objectivity** The MSGP lacks numeric or, at a minimum, objective, requirements that would provide certainty to permittees, DEP, and environmentalists, and would lessen oversight burdens on DEC staff. Numeric limits in permits improve the simplicity, transparency, and fairness of the permitting, compliance and enforcement processes. Permits with numeric limits can be short and simple and compliance review is straightforward, thus taking very little staff time. This compares favorably with the current long and subjective BMP-based permits that are very staff intensive to evaluate compliance with. Further, numerics also provide a safe harbor and certainty to the dischargers - either they are in compliance or they are not. Thus, numerics are the most protective of water quality, simplest to administer, and most fair to dischargers.

While the MSGP incorporates EPA's numeric ELGs, DEC need not stop there; the Department can and should incorporate additional numeric TBELs in to the MSGP, as other states have. At least for the most common pollutants typically found in industrial stormwater (such as TSS, oil & grease, etc), the MSGP should include numeric effluent limitations based on statistical analysis of the past performance of the "best of best" performers, i.e., top 95-99% (or at least initially the top 80%) after editing out those not using best technology. Treatment systems that can achieve these limits include hydrodynamic devices, biofilters, detention basins, media filters, wetland basins, grassy swales, among others. EPA has used the percentile approach when developing numeric effluent limitation guidelines. Refer to the International Stormwater BMP database ([www.bmpdatabase.org](http://www.bmpdatabase.org)) in this process. Base other numeric limits on specific technical studies demonstrating that certain technologies are technologically and economically feasible for certain pollutants for certain industries (i.e., copper, lead, and zinc at boatyards). Have the action levels convert to effluent limitations if they are missed twice consecutively, as New Jersey DEP proposed. At a bare minimum, include a limitation of 15 mg/l (or better) for oil water separators as NJ DEP has already done.

***Response I-4: The MSGP incorporates EPA's numeric effluent limitation guidelines (ELG). In addition to EPA's ELGs, the MSGP includes numeric limits for PCBs and Mercury, both of which parameters were previously listed as benchmarks in GP-0-06-002 and GP-0-11-009. The draft and final MSGP incorporates a mercury limit of 50 ng/L, which is more stringent than the Mercury benchmark contained in EPA's 2008 MSGP. This change was made to conform to NYSDEC Program Policy (DOW 1.3.10-Mercury – SPDES Permitting, Multiple Discharge Variance and Water Quality Monitoring). The draft and final MSGP also includes numeric limits for PCBs to conform to NYSDEC's permitting procedures.***

***In drafting conditions for the MSGP, DEC must also be mindful that it is a general permit and must comply with the appropriate regulations.***

**Comment I-5: Anti-Degradation** The Draft MSGP makes no mention of anti-degradation. The MSGP must require discharges to comply with federal and state anti-degradation requirements including a prohibition of new discharges to Tier 3 waters, a review component for discharges to Tier 2 waters, and additional requirements where appropriate to prevent the degradation of high quality waters. See 40 CFR 131.12(a), see, e.g., EPA's MSGP §§ 1.1.4.8; 2.2.3. Specifically, the Permit should make specific reference to New York's Antidegradation Policy, by stating something like the following (taken from an EPA permit for an MS4 in Alaska):

Discharge Compliance with Anti-Degradation Policy. The permittee is not authorized to discharge stormwater that does not comply with New York's anti-degradation policy for water quality standards. New York's anti-degradation policy can be obtained from the New York State Department of Environmental Conservation.

In addition, the MSGP should include an appendix identifying the watersheds that are associated with New York's Tier 3 and Tier 2 waters. Discharges into any Tier 3 water should be required to obtain an individual permit, rather than coverage under the MSGP, so as to ensure no degradation of those waters. Further, if discharges to Tier 2 "high quality" waters are to be authorized by the MSGP, then the Permit must include anti-degradation procedural requirements that provide a mechanism (with public participation) for state certification of the need for the discharge, including a determination that authorization of the discharge is necessary for "economic and social development." 40 C.F.R. § 131.12(a)(2).

***Response I-5: Under the Department's Water Quality Anti-Degradation Policy (Organization and Delegation Memorandum 85-40, September 9, 1985), water quality based effluent limitations derived for SPDES permits provide for the protection and maintenance of attained higher uses above those included in standards currently assigned to waters receiving the effluent discharge. Variations in numerical water quality criteria that are not significant and do not interfere with the attained higher use are permitted.***

***The Department expects that compliance with the terms and conditions of the permit will control discharges necessary to meet applicable water quality standards. The permit requires compliance with Water Quality standards and therefore, is in compliance with ECL §17-0501 and New York State law. The MSGP also includes specific requirements for TMDL watersheds and 303(d) segments. If there is evidence indicating that the stormwater discharges authorized by this general permit are causing or are contributing to an excursion above an applicable water quality standard, the MSGP (Part I.B.3 )***

*provides that the owner or operator must take appropriate corrective action and notify the Department of corrective actions taken. The Department may require the owner or operator to conduct follow-up monitoring or provide additional information, may require the owner or operator to include and implement appropriate controls in the SWPPP to correct the problem, may require the owner/or operator to obtain an individual permit, and/or may take appropriate enforcement action.*

*Pursuant to 6 NYCRR 750-1.21(e), the Department may also require any discharger authorized to discharge in accordance with a general permit to apply for and obtain an individual SPDES permit or apply for authorization to discharge in accordance with another general permit*

*NYSDEC staff have concluded that discharges from facilities authorized and in compliance with the MSGP will not result in significant variations from water quality criteria. Such discharges are subject to all of the best management practice requirements of the permit, by their nature are dilute stormwater discharges, and occur during wet weather when stream flows are higher.*

## **Part I. C – Eligibility**

**Comment I-6** The applicability of non-sewage composting (i.e. yard waste, source separated organics, etc.) should be addressed in the MSGP. Are these operations subject to the MSGP?

***Response I-6** The preferred method of management of stormwater runoff from compost facilities is to divert clean water away from the composting area and contain the leachate without a discharge to surface waters. The MSGP cannot authorize the discharge of leachate. Therefore, discharge of compost leachate would require an individual SPDES permit.*

## **Part I.D – Activities Which Are Ineligible For Coverage Under This General Permit**

*No comments received for this section.*

## Part I.E – How To Obtain Authorization Under This General Permit

**Comment I-7: Public Comment on NOI's** DEC should (1) post registrations on its website as some other states and EPA do; and (2) provide the public with a sufficient opportunity to review and provide meaningful public comment on registrations and SWPPPs- in particular, a 30-day comment period if the SWPPP is available electronically and a URL is included in the NOI and a 60-day comment period if the SWPPP is not posted electronically. See EPA's MSGP Table 1-2. Under EPA's MSGP and in Connecticut (and perhaps in other states as well), the permits do not allow for public hearings on NOIs, but do provide for public notice, an opportunity for the public to review NOIs and SWPPPs prior to the granting of permit coverage, and an opportunity for the public to submit comments to the permitting agency at this juncture. This is the bare minimum that must be afforded, consistent with the CWA's public participation requirements. DEC should not and must not grant a facility coverage under the MSGP until after the comment period has closed.

***Response I-7: The ECL does not require DEC to make NOIs available for public comment because the NOI is neither a permit application nor the functional equivalent of a permit application. Moreover, federal regulations applicable to New York's SPDES program expressly provide that a general permit issued by a State may specify that a discharger is authorized to discharge "after a waiting period specified in the general permit." In the interest of the public's right to know, the Department is considering posting the NOIs or other relevant information on the stormwater interactive map.***

**Comment I-8: Public Participation and Self-Regulation.** The MSGP's current authorization process violates the CWA's public participation requirements and constitutes impermissible self-regulation. The proposed MSGP does not provide for any public notice of or public comment on Notices of Intent or Termination (abbreviated by DEC as "NOIs" or "NOITs"). Further, the MSGP does not even require that applicants receive a communication from DEC that they are covered by the MSGP before they can begin discharging. Instead, the MSGP states that permit coverage is automatically granted, by default, 30 days after the NOI has been submitted, so long as DEC has not notified the applicant that it is not covered. This backwards process is wholly inadequate and patently illegal to the extent that it allows dischargers to obtain permit coverage in the absence of (i) any review or other processing by DEC, and (ii) any notice to the public or any opportunity for the public to submit comments or otherwise participate in the discharge authorization process. Furthermore, without a formal authorization by DEC, the MSGP may improperly limit judicial review of the default authorizations provided by the Permit.

If the MSGP were sufficiently prescriptive in its terms and conditions, then individualized review of permit coverage determinations would, perhaps, be less necessary. But, as it stands, the MSGP grants facilities tremendous flexibility in designing and implementing best management practices (BMPs) through their SWPPPs, and simultaneously lacks review by the Department and/or the public of the SWPPP or NOI not only does the MSGP not allow for public hearings on NOIs, it also fails to allow for public comment, or even for a formal action by DEC to confirm an applicant's authorization to discharge.

***Response I-8: The MSGP is issued pursuant to Articles 17 and 70 of the Environmental Conservation Law (ECL), as New York has an approved SPDES program. Therefore, public participation is conducted pursuant to the Environmental Conservation Law. The MSGP itself was subject to public notice, and comments were received on the MSGP. The ECL does not require DEC to make NOIs available for public comment because the NOI is neither a permit application nor the functional equivalent of a permit application. Moreover, federal regulations applicable to New York's SPDES program expressly provide that a general permit issued by a State may specify that a discharger is authorized to discharge "after a waiting period specified in the general permit." 40 CFR § 122.28(b)(2)(iv); see 40 CFR 123.25(a)(11). These regulations, not the case law cited by commenter, are controlling authority relevant here.***

***Commenter's reliance on NRDC, et al. v. NYSDEC, 35 Misc. 3d 652 (Westchester County Supreme Court January 10, 2012), Environmental Defense Center, Inc. v. EPA, 344 F.3d 832 (9<sup>th</sup> Cir. 2003), and Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486 (2<sup>nd</sup> Cir. 2005) is misplaced. NRDC and EDC are both decisions related to the MS4 program. NRDC is currently the subject of an appeal and is therefore not final. DEC has considered the non-binding federal authorities cited by commenter, but finds a decision that commenter omitted to cite to be more persuasive. See Texas Independent Producers and Royalty Owners Association, et al. v. EPA, 410 F.3d 964 (7<sup>th</sup> Cir. 2005) (holding that the Clean Water Act does not require permitting authorities to provide opportunities to comment or request a hearing on individual NOIs and SWPPPs relating to stormwater from construction activities). Commenter also cites a 2004 guidance memo from EPA, but it carries less weight than regulations issued pursuant to formal notice-and-comment rulemaking, which remain effective. But commenter then acknowledges that that guidance does not fully address the EDC decision. Even if the EDC decision was controlling, which it is not, the federal regulations that the panel considered in EDC have not changed and remain effective.***

*Commenter suggests that the MSGP “may” frustrate judicial review of the MSGP. DEC disagrees; ECL § 17-0909 provides that a person aggrieved by a final order or determination of the Commissioner or the Department is subject to judicial review under article 78 of the Civil Practice Law and Rules. To the extent that commenter asserts that each authorization to discharge pursuant to submission of a complete NOI is subject to individualized judicial review; this is incorrect. The general permit is the final order of the Department that authorizes covered entities to discharge pursuant to its terms. Commenter also alleges that authorization under the MSGP may occur by default within the 30 day window, but before DEC processes the NOI. As stated above, the process in the MSGP is fully compliant with 40 CFR § 122.28(b)(2)(iv); see 40 CFR 123.25(a)(11).*

## **Part I.F – Deadlines for Notification**

*No comments received for this section*

## **Part II – Special Conditions**

### **Part II.A – New Stormwater Discharges**

*No comments received for this section.*

### **Part II.B – Releases of Hazardous Substances or Petroleum**

*No comments received for this section.*

### **Part II.C – Impaired Waters (303 (D) and TMDL)**

**Comment II-1:** - The MSGP should not authorize new discharges that will add a pollutant of concern (POC) to an impaired water body. 40 CFR 122.4(i) prohibits the issuance of a NPDES permit that would add a POC to an impaired water body unless certain conditions set forth in the regulation are met. *(The permit does not allow for facilities to discharge POC to impaired waters unless they meet certain criteria. See Part 1.C).* DEC should follow EPA's lead and include a provision similar to the following, which is drawn from § 1.1.4.7 of EPA's MSGP:

1.1.4.7 New Discharges to Water Quality Impaired Waters. If you are a new discharger you are not eligible for coverage under this permit to discharge to an "impaired water", as defined in Appendix A unless you:

- a. prevent all exposure to stormwater of the pollutant(s) for which the water body is impaired, and retain documentation of procedures taken to prevent exposure onsite with your SWPPP; or *(Currently included in permit, see Part 1.C.1.a)*
- b. document that the pollutant(s) for which the water body is impaired is not present at your site, and retain documentation of this finding with your SWPPP; or *(Currently included in permit, see Part 1.C.1.b)*
- c. in advance of submitting your NOI, provide to the [DEC] data to support a showing that the discharge is not expected to cause or contribute to an exceedance of a water quality standard, and retain such data onsite with your SWPPP. To do this, you must provide data and other technical information to [DEC] sufficient to demonstrate: *(Currently included in permit, see Part 1.C.1.c)*
  - i. For discharges to waters without an EPA approved or established TMDL, that the discharge of the pollutant for which the water is impaired will meet instream water quality criteria at the point of discharge to the water body; or
  - ii. For discharges to waters with an EPA approved or established TMDL, that there are sufficient remaining wasteload allocations in an EPA approved or established TMDL to allow your discharge and that existing dischargers to the water body are subject to compliance schedules designed to bring the water body into attainment with water quality standards.

You are eligible under Part 1.1.4.7.c if you receive an affirmative determination from [DEC] that your discharge will not contribute to the existing impairment, in which case you must maintain such determination onsite with your SWPPP...

***Response II-1: The MSGP requirements for impaired waters have been clarified. The language that dischargers in impaired waters must “show a discharge is not expected to cause or contribute to an exceedance of a water quality standard” has been clarified to require dischargers to impaired waters “provide additional information in the SWPPP to minimize the pollutant of concern causing the impairment as specified in Part III.F.4 - Additional SWPPP Requirements for Stormwater Discharges to Impaired Waters. Part III.F.4 has been added to the permit. This section specifies that in addition to the basic SWPPP requirements, facilities discharging a pollutant of concern to impaired waters must identify the receiving water that is impaired, the pollutant of concern causing the impairment, identify the activities and areas where that pollutant could be exposed to stormwater and identify best management practices targeted to the POC to minimize the potential for discharge to surface waters of the State. Minimize is defined in the permit to mean reduce and/or eliminate to the maximum extent achievable using control measures (including best management practices) that are technologically available and economically practicable and achievable in the light of best industry practice. The Department believes that compliance with the benchmarks and numeric limits are protective of water quality. To ensure that dischargers to impaired waters are at or below the benchmarks and numeric limits, the MSGP has been modified (Part IV.B.1.g) to require quarterly sampling for dischargers to impaired waters. Part IV.B.1.g(6)(d) requires owners/operators to submit a Corrective Action Form that provides a summary for actions taken or planned to reduce the discharge to levels below the benchmarks or numeric limits prior to the next quarterly monitoring. The Department believes that these additional requirements would provide the protection necessary for impaired waters that would allow these facilities to be covered under the General Permit rather than excluding them from eligibility or requiring complex site specific calculations to demonstrate that their discharge will not exceed water quality standards. DEC staff believes that the enhanced SWPPP requirements and testing for compliance with the benchmarks and corrective actions would be sufficient to demonstrate that they will not cause or contribute to violations of water quality standards.***

**Comment II-2: The draft MSGP (Part II.C.1) stated,**

“Discharges to an impaired waterbody that is included on the 303(d) list or in a watershed for which a TMDL has been developed are not eligible for coverage under this permit if the cause of impairment is a pollutant of concern included in the benchmarks and/or effluent limitations to which the facility is subject unless the facility:

- a. Prevents all exposure to stormwater of the pollutant(s) for which the waterbody is impaired,
- b. Documents that the pollutant for which the waterbody is impaired is not present on-site, or
- c. Provides data to support a determination that the discharge is not expected to cause or contribute to an exceedance of a water quality standard. This data must be maintained with the SWPPP.”<sup>1</sup>

---

<sup>1</sup> See *id.*, at 12.

For discharges to NYC Watershed TMDL waters, these requirements appear to be in conflict with the permit's benchmark monitoring cutoff concentration for phosphorus in industrial sectors A, C, L, and U, all of which permit discharges of 2mg/L, and the numeric effluent limitation for phosphorus of 105 mg/L (daily maximum) and 35 mg/L (30-day average) in industrial sector C for existing and new discharges with phosphate fertilizer manufacturing runoff.. Phosphorus discharges in NYC Watershed TMDL waters should be prohibited at any level to comply with Part II.C.1. It is unreasonable for a numeric effluent limitation for phosphorus to be scaled 50 times higher than a benchmark concentration, especially in a phosphorus-impaired TMDL basin. Condition c. above should not be applicable to phosphorus in NYC Watershed TMDL basins because any addition of phosphorus will contribute to an exceedance of a water quality standard.

***Response II-2: The MSGP requirements for impaired waters have been clarified. Discharges to an impaired waterbody that is included on the 303(d) list or in a watershed for which a TMDL has been developed are not eligible for coverage under this permit if the cause of impairment is a pollutant of concern (POC) included in the benchmarks and/or effluent limitations to which the facility is subject unless the facility prevents all exposure of stormwater of the pollutant(s) for which the waterbody is impaired; Documents that the pollutant for which the waterbody is impaired is not present on-site; or, provides additional information in the SWPPP to minimize the pollutant of concern such that the benchmarks and numeric limits are met. The Department believes that compliance with the benchmarks and numeric limits are protective of water quality. To ensure that dischargers to impaired waters are at or below the benchmarks and numeric limits, the MSGP has been modified (Part IV.B.1.g) to require quarterly sampling for dischargers to impaired waters. Part IV.B.1.g requires owners/operators to notify Department with a summary for actions taken or planned to reduce the discharge to levels below the benchmarks or numeric limits. In the case cited in this comment, the discharge would need to be at or below the benchmark to be eligible for coverage. Facilities that cannot meet the benchmark values would fail to maintain the eligibility requirements of Part II.C.***

Comment II-3: The MSGP should require that all permittees discharging into an impaired waterbody, with or without a TMDL, must monitor for any pollutants of concern (i.e., for the pollutant causing the impairment). See EPA's MSGP § 6.2.4. Connecticut's general permit for discharges of stormwater associated with industrial activity also has this requirement. Without such a requirement it may be impossible to know whether the discharge is causing or contributing to a violation of water quality standards.

***Response II-3: The final MSGP contains clarifications for impaired waters (Part II.C).***

## **Part III – Stormwater Pollution Prevention Plans**

### **Part III.A – Stormwater Pollution Prevention Plan Requirements**

**Comment III-1:** SWPPP Requirements - The MSGP should make clear that the BMPs documented in the SWPPP must be those that are installed and implemented to achieve the effluent limits in the other referenced sections. See EPA’s MSGP § 5.1.4.1. This is important to reinforce the fundamental point that control measures are not just any measures selected by the permittee regardless of their effectiveness, but they must meet certain standards.

***Response III-1:*** *The final MSGP has been updated to include technology based effluent limits (TBEL) to be consistent with EPA’s MSGP. The final MSGP has been reorganized to specifically identify technology based effluent limits (both numeric & non-numeric) and clarifies that the SWPPP must contain the documentation necessary to demonstrate compliance with those effluent limits. The MSGP (Part I.B.1) has been rewritten to include the technology based effluent limits as contained in EPA’s 2008 MSGP (Part 2). In addition, the MSGP (Part III.C – SWPPP Contents) has been revised to specify the documentation that the SWPPP must contain to demonstrate compliance with the effluent limitations set forth in Part I.B.1 and Part VIII. Several of the non-numeric effluent limits require facilities to “minimize” various types of pollutant discharges. The final MSGP (Part I.B.1) clarifies that for the technology based limits contained in Part I.B.1 and VIII, the term “minimize” means to reduce and/or eliminate to the extent achievable using control measures (including best management practices) that are technologically available and economically achievable (BAT) and practicable (BPT) in light of best industry practice.*

### **Part III.B – Deadlines For Preparation and Compliance**

*No comments received for this section.*

## Part III.C – Contents of the SWPPP

**Comment III-2:** The MSGP should have a provision comparable to EPA's MSGP §5.1.5 on Schedules and Procedures."

***Response III-2:*** *Part III.C.7 contains the SWPPP contents needed to comply with the limitations contained in Part I.B.1.a and includes similar provisions contained in the referenced section of EPA's 2008 MSGP*

**Comment III-3:** DEC should follow California's lead and have a SWPPP checklist identifying the page number in the SWPPP where a requirement is located and citing reference documents. See Calif MSGP 2005 § VII.3.a & Attachment 6.

***Response III-3:*** *The Department will consider developing a SWPPP checklist to be used as a tool to aid compliance.*

**Comment III-4:** The draft MSGP (Part III C. 2. i) requires a site map that identifies the location of sensitive areas (e.g. impaired waters; listed threatened & endangered species or their critical habitat; historic properties, etc) – Is the level of detail provided by publicly available sources sufficient for locating these areas?

***Response III-4:*** *While there are many tools, such as NYSDEC Environmental Resource Mapper (<http://www.dec.ny.gov/ismaps/ERM/viewer.htm>) and the GIS online resources available at: <http://nysparks.state.ny.us/shpo/>, that will assist with identification of these areas, this information is not always available for every site. Smaller tributaries and wetlands may not appear on those sites. The owner or operator is responsible for completing the necessary site evaluations.*

**Comment III-5:** The proposed MSGP (Part III.C.2.i) requires the SWPPP to include a written description of the location of sensitive areas but does not specify any type of distance (e.g., radius from the facility) within which such areas must be included. This should be clarified.

***Response III-5:*** *This requirement applies to sensitive areas within the "action area". Action area has been defined to mean all areas to be affected directly or indirectly by the stormwater discharges, allowable non-stormwater discharges,*

*and stormwater discharge-related activities and not merely the immediate area involved in these discharges and activities.*

**Comment III-6:** The SWPPP's site map should also include the following:

- Size in acres;
- Locations of all potential pollutant sources;
- Locations of all stormwater inlets and outfalls;
- Run-on locations (if any);
- MS4 systems discharged to; and
- Locations and descriptions of non-SW discharges. (R.Super)
- 

**Response III-6:** *The final MSGP (Part III.C.6) requires the site map to include: locations of potential pollutant sources identified under Part III.C.3 of the MSGP and where significant materials are exposed to precipitation; location of all stormwater outfalls; locations and descriptions of non-stormwater discharges; and, location and source of runoff from adjacent property containing significant quantities of pollutants of concern to the facility. DEC believes these requirements are sufficient.*

**Comment III-7:** NYSDEC Part III.C.6: NYSDEC should add the following items to the "Site Map" requirements: the size of property in acres; the location and extent of significant structures and impervious surfaces; locations of all receiving waters that are impaired and, if so, whether the waters have TMDLs established for them; locations of all stormwater conveyances including ditches, pipes, and swales; locations of all stormwater monitoring points; and municipal separate storm sewer systems, including the locations where the permittee discharges to them. Please add the following to the list of requirements: transfer areas for substances in bulk.

**Response III-7:** *The final MSGP (Part III.C.6 – Site Map Requirements) has been updated to include the noted items.*

**Comment III-8:** The draft MSGP (Part III. C.7.c) states, "Test, maintain and repair of all industrial equipment and systems - An effective preventative maintenance program of all industrial equipment and systems will prevent unnecessary exposure of pollutants. The SWPPP must describe a preventative maintenance program that includes timely inspection, maintenance and repairs." The use of "all industrial equipment" extends beyond the breadth of the MSGP conditions. This language should be revised to industrial equipment and systems that are exposed to stormwater.

***Response III-8:*** *The final MSGP (Part III.C.7.c) has been updated to read as follows, “An effective preventative maintenance program of all industrial equipment and systems that are exposed to stormwater will prevent unnecessary exposure of pollutants.”*

**Comment III-9:** The draft MSGP (Part III. C.7.d (2)) states, “The SWPPP must evaluate available alternatives to chemicals used at the facility. The owner or operator should consider replacing a chemical with a less toxic alternative whenever possible.” This language should be revised to chemicals that are exposed to stormwater.

***Response III-9:*** *The final MSGP (Part I.B.1.a.2.a) includes a non-numeric effluent limitation that requires owners or operators to minimize the exposure of manufacturing, processing and material storage areas and minimize exposure of chemicals by replacing with a less toxic alternative, if practicable. Part III.C.7.d(2) has been revised to clarify that the SWPPP must document considerations of alternative of chemicals exposed to stormwater.*

**Comment III-10:** The draft MSGP (Part III C. 7. d. (2)) states, “The purpose of the SWPPP is to provide a written description of measures taken to prevent materials from entering stormwater. Chemicals used at a facility must be used, stored, and disposed of in accordance with local, state, and federal regulations.” It is not appropriate for a SPDES permit to force a facility to evaluate all chemicals used onsite. For facilities engaged in chemical processing, this task has the potential to be incredibly time-consuming and prohibitively costly. This requirement, if at all appropriate, should be included in the sector-specific requirements.

***Response III-10:*** *The final MSGP (Part I.B.1.a.2.a) includes a non-numeric effluent limitation that requires owners or operators to minimize the exposure of manufacturing, processing and material storage areas and minimize exposure of chemicals by replacing with a less toxic alternative, if practicable. Part III.C.7.d(2) has been revised to clarify that the SWPPP must document considerations of alternative of chemicals exposed to stormwater.*

**Comment III-11:** The draft MSGP (Part III C.7. f (1)) requires that the SWPPP must include a certification that all outfalls have been tested or evaluated for non-stormwater discharges prior to gaining coverage. Do facilities currently covered under the SPDES

MSGP permit program have to sample existing and permitted outfalls for non-stormwater parameters in order to retain permit coverage? Please clarify.

***Response III-11:*** *In order to continue coverage under the final MSGP, applicants are required to update their SWPPP prior to submitting a new NOI. Discharge Certification is a requirement of the SWPPP, therefore facilities should certify that all discharges have been evaluated for the presence of non-stormwater discharges. This evaluation should have been done as part of the dry weather inspection requirements of the interim permit and can be used to satisfy this requirement.*

**Comment III-12:** The draft MSGP (Part III C. 7.i) requires stabilization of exposed soils and containment of runoff using structural and non-structural control measures to minimize on-site erosion and sedimentation and the discharge of pollutants and requires controls be design in accordance with the New York State Standards and Specifications for Erosion and Sediment Control (2005). These standards provide design specifications for temporary measures only. Both temporary and permanent measures may be needed to limit erosion.

***Response III-12:*** *The New York Standards and Specifications for Erosion and Sediment Control (2005) provides design specifications for both temporary and permanent erosion and sediment controls.*

**Comment III-13:** The draft MSGP (Part III.C.7.j.(2)) states “Structural [stormwater control] measures should be placed on upland soils, avoiding wetlands and floodplains, if possible.” The MSGP should delete “if possible” and should *require* placement of stormwater management practices to be sited outside wetlands and their buffers as well as stream buffers. The permit should also require infiltration practices wherever practicable.

***Response III-13:*** *The MSGP does not supersede the need for other permits. Placement of structural measures in wetlands and floodplains would typically require other permits intended to protect these features.*

**Comment III-14:** The draft MSGP (Part III.C.10) states, “Monitoring and Sampling Data - The SWPPP must include: a) A summary of existing stormwater discharge sampling data taken at the facility, and g) A summary of all stormwater sampling data collected during the term of this permit” What is the difference between a and g? Does this mean the SWPPP has to be updated annually as opposed to keeping DMRs and data on file?

***Response III-14:*** *Part III.C.10.a refers sampling data new dischargers have collected prior to coverage under the MSGP. Part III.C.10.g refers to sampling data collected after gaining coverage under the MSGP. Owners/operators should be reviewing the data to determine the overall effectiveness of their programs. The summary of the data is required as part of the comprehensive site compliance inspection/evaluation. The SWPPP must contain all reports and documentation related to compliance.*

### **Part III.D – Signature and Stormwater Pollution Prevention Plan Availability**

**Comment III-15:** The MSGP should clearly and consistently require that the SWPPP and all associated documentation be "retained on site at all times."

***Response III-15:*** *The MSGP (Part III.D.1) contains the permit availability requirements as follows: "The SWPPP shall be signed in accordance with Part V.H. and retained on-site at the facility covered by this permit in accordance with Parts III.C.11 and IV.E. For inactive facilities, the plan may be kept at the nearest office of the owner or operator. Failure to keep a copy of the SWPPP as specified above is a violation of the permit." The Department believes that the permit language is clear and reasonable.*

**Comment III-16:** The SWPPP should provide: 1) a requirement to keep all related inspection, monitoring, and certification documentation with the SWPPP (ideally, in an appendix) and to make available in the same fashion as SWPPP. See EPA's MSGP § 5.4; and, 2) a requirement to keep a copy of the permit with the SWPPP. (R. Super)

***Response III-16:*** *The MSGP requires that the SWPPP contain a copy of the permit and all related inspection, monitoring and certification documentation. Part III.D.2 contains the SWPPP availability requirements. Part III.C. 11 requires the owner or operator to maintain a copy of the permit, NOI authorization letter and all NOIs (including modifications) with the SWPPP. Part III.C.12 requires that the SWPPP contain all documentation resulting from inspections. Part III.C.10 requires that the SWPPP contain documentation relating to monitoring and sampling data.*

**Comment III-17:** **Ongoing Public Availability of SWPPPs.** The General Permit fails to ensure the public availability of SWPPPs and all other records required to be retained by permittees. In addition to reviewing SWPPPs in the context of permitting, the public has an interest in ongoing access to SWPPPs, which may change over time, in order to monitor compliance. Because SWPPPs are an integral part of the SPDES permit documentation, a permittee's current SWPPP must be available to the public at all times. While the current MSGP requires permittees to provide their SWPPPs to the public upon

request, we believe that compliance with this requirement will be inconsistent at best. We understand that DEC has assisted the public in obtaining SWPPPs, but the Permit does not say that DEC will necessarily do this. The MSGP should provide that SWPPPs be made immediately available to members of public and, if the SWPPP is not provided within 14 days of the request, DEC shall "call in" the SWPPP in order to provide a copy to the requesting member of the public. DEC should suggest, if not require, that permittees post their SWPPP online and provide the URL on their NOIs, as EPA does. See EPA's MSGP § 5.3.

***Response III-17: The MSGP requires the SWPPP to be publicly available and requires that in order to be considered complete; the NOI must contain information on how the public can access the SWPPP (on-line or physical location). Non-compliance would be a violation of the MSGP. Specifically, Part III.D.2.b of the MSGP states:***

***The owner or operator must furnish a copy of the SWPPP to the Department, local agency approving stormwater management plans, or the owner of a municipal separate storm sewer receiving discharge from the site upon request. Also, in the interest of the public's right to know, the owner or operator must make a copy of the SWPPP available to the public within 14 days of receipt of a written request. The owner or operator shall identify on the NOI the location (URL # or physical location) and contact information to allow public access to the SWPPP. The NOI will be considered incomplete if this information is not provided. (Note: A facility may withhold justifiable portions of the SWPPP from public review that contain trade secrets, confidential commercial information or critical infrastructure information in accordance with 6 NYCRR 616.7).***

**Comment III-18:** The draft MSGP (Part III.D.2.b) requires that the *owner or operator* furnish a copy of the SWPPP to the Department, local agency approving stormwater management plans, or the owner of a *municipal separate storm sewer* receiving discharge from the site upon request." Permittees should be required to submit a copy of the SWPPP to the municipal operator, in addition to the Department and the local approving agency, so that all entities are timely noticed that it is available for review.

***Response III-18: The NOI provides the notice that the SWPPP has been developed. The new NOI form developed for the final MSGP requires information on the location of the SWPPP and how copies can be obtained. The Department will make available information regarding covered entities, their location and information on how the SWPPP can be obtained.***

## **Part III. E – Keeping SWPPPs Current**

*No comments received for this part*

## **Part III.F – Special Stormwater Pollution Prevention Plan Requirements**

**Comment III-19:** The draft MSGP (Part III F. 3) provides additional SWPPP requirements for secondary containment waters. Subpart D. Discharge Screening requires that the owner or operator develop additional screening methods as part of the overall BMP plan and appears to specify the use of volatile gas meters – Use of a volatile gas meter is an excessive requirement. A sheen is visible at very low concentrations, significantly lower than what a volatile gas meter will detect. Owning and maintaining a volatile gas meter is expensive and requires a knowledgeable individual. This requirement is financially burdensome on small businesses and is unnecessary for the reasons stated above.

***Response III-19: The MSGP (Part III.F.3.d) requires that the owner or operator develop screening methods as part of the overall BMP plan. The use of volatile gas meters is used as an example on how to screen for contamination. The owner or operator is allowed to use other methods for screening for contamination.***

## **Part IV – Monitoring, Reporting, and Retention of Records**

**Comment IV-1: Part IV Frequency of Sampling and Analysis** The MSGP's monitoring requirements are insufficient with respect to their frequency. In particular, laboratory analysis of only one sample per year is far too infrequent. All NPDES permits must contain monitoring sufficient to determine whether effluent limitations and water quality standards are being attained. "The effectiveness of the permitting process is heavily dependent on permit holder compliance with the CWA's monitoring and reporting requirements. See 33 U.S.C. § 1318." *Piney Run Pres. Ass'n v. County Comm'rs*, 268 F.3d 255, 266 (4th Cir. 2001). One analyzed sample per year is not likely to provide accurate results due to variability. For that reason and others, NPDES permits typically require the submission of DMRs monthly and many stormwater general permits require quarterly sampling and analysis (e.g., EPA's MSGP and Washington State). Although some permits allow certain permittees to suspend sampling, it is only the permittees who have demonstrated that they are meeting benchmarks that can suspend sampling; those who exceed benchmarks must continue to sample quarterly for the full permit term. We are not aware of any industrial general permits that require even the most polluting dischargers to analyze as few as one sample per year and five during the permit term.

The MSGP should require all facilities to conduct quarterly laboratory analysis of samples for comparison with benchmark levels. Since the MSGP already requires quarterly sampling and visual inspection, it is not a significantly greater burden to require that three more samples per year be analyzed after they have already been collected and visually analyzed. In the alternative, those dischargers who have demonstrated that they are meeting the benchmarks for at least two consecutive years can be allowed to move to annual sampling, as long as they continue to meet benchmarks. Those who have frequent exceedances and those who exceed the benchmarks by significant margins should be required to sample quarterly until the exceedances have been eliminated, and a record of compliance has been established before allowing them to move to annual analysis of samples. Otherwise, facilities that are required to take corrective action will not know, and DEC and the public will not know, whether the corrective action has been effective in reducing pollution until a significant amount of time has elapsed. We recognize that the Draft MSGP contains improvements in this regard as compared to the previous MSGP. Those improvements should be retained and strengthened in the final MSGP.

***Response IV-1: The final MSGP requires multiple inspections and monitoring such as comprehensive annual inspection, quarterly visual monitoring of the discharges from the facility, annual dry weather monitoring and sampling (annual or quarterly for impaired waters). The MSGP (Part I.A.2.c & Part III.C.7.b) requires routine inspections (minimum quarterly) of all areas of the facility where industrial materials or activities are exposed to stormwater. In***

*addition to the routine inspections, there are also additional inspection requirements contained within Part VIII (routine weekly or monthly inspections of specified areas at Sectors A, C, D, G, J, L, M, O, Q, R, S, V & AA, weekly inspection of erosion controls for Sectors I, J, L, etc..) All of these provide the facility with the opportunity to detect problems and obligation to take corrective action in accordance with Part III.E2. The Department believes the inspection requirements specified in the MSGP provides a reasonable balance between the need for environmental protection and the burden of the requirements on affected businesses.*

## **Part IV.A – Comprehensive Site Compliance Inspection & Evaluation**

**Comment IV-2:** The draft MSGP (Part IV.A – Comprehensive Site Compliance Inspection & Evaluation) states that “The *owner or operator* shall conduct facility inspections (site compliance inspection) at least once a year. The inspections must be done by *qualified personnel* who may be either facility employees or outside consultants hired by the facility.” Inspections should occur more frequently than once a year. We recommend that inspections be conducted quarterly, as provided for visual monitoring in Part IV.B.1.a., and that they be conducted by an independent consultant or the Department rather than a paid employee of the facility.

**Response IV-2:** *The comprehensive site compliance inspection and evaluation is done in conjunction with other monitoring and oversight. The permit requires quarterly visual monitoring of the discharges from the facility, annual dry weather monitoring and sampling (annual or quarterly for impaired waters). There are also additional inspection requirements contained within Part VIII (ESC for mining, landfills, etc...) All of these provide the facility with the opportunity to detect problems and obligation to take corrective action. The Department believes this provides a reasonable balance between the need for environmental protection and the burden of the requirements on affected businesses.*

**Comment IV-3:** The draft MSGP (Part IV.A.1) requires the comprehensive compliance inspection and evaluation to include all areas where industrial materials or activities are exposed to stormwater, as identified in Part III.C.3., and areas where spills and leaks have occurred within the past three years. If spills or leaks have occurred; the facility should be required to test existing soils and/or waters for contamination in addition to conducting visual observation, rather than relying solely on visual observation to detect potentially invisible contaminants.

***Response IV-3:*** *The MSGP (Part III.C.7.d.(4)) specifies spill prevention and response procedures. Measures for cleaning up spills or leaks must be consistent with applicable petroleum bulk storage, chemical bulk storage or hazardous waste management regulations at 6 NYCRR Parts 595-599, 612-614 and 370-373. The spill response procedures listed in these regulations specify the clean up procedures and any follow up to ensure the contamination was adequately removed. The inspection of these areas is to ensure that additional spills have not occurred; they are not intended to replace the clean up procedures associated with the spill incident.*

**Comment IV-4:** NYSDEC Part IV A.2.d: NYSDEC should include in this section "Any previously unidentified discharges of pollutants from the site" as is included in the EPA 2008 MSGP at Section 4.1.2.

***Response IV-4:*** *The discussion of the major observations that must be noted in the compliance inspection & evaluation report (Part IV.A.2.d (2)) has been updated in the proposed final MSGP to add “the location of any previously unidentified discharges of pollutants from the site”.*

## **Part IV.B – Monitoring Requirements**

**Comment IV-5:** Part IV B 1 a. (2) and p. 33 Part IV B 1 c (2) - Why are “snowmelt samples” included in these two sections? If the intent is that snowmelt samples are not appropriate samples for quarterly visual monitoring and benchmark sample, then this needs to be explicitly stated.

***Response IV-5:*** *Snowmelt samples are allowed for compliance sampling. The exceptions noted in Part IV.B.1.a.2 and IV.B.1.c.2 are for the requirement that the sample must be collected from a qualifying storm. The final MSGP clarifies this point by moving the exception for snowmelt samples to the discussion of how and when to sample (Part IV.B.2.b(1)).*

**Comment IV-6:** The draft MSGP (Part IV.B.1.c.(1)) states, “If a facility falls within a sector(s) required to conduct *benchmark monitoring*, monitoring must be performed annually during the calendar year.” As with inspections, benchmark monitoring should be performed more frequently than once a year—at least quarterly, as with visual monitoring—to timely identify and remediate changes, including discharge composition or concentration.

***Response IV-6:*** *The benchmark monitoring requirement represents a portion of the facility oversight. The final MSGP requires multiple inspections and monitoring such as comprehensive annual inspection, quarterly visual monitoring of the discharges from the facility, annual dry weather monitoring and sampling (annual or quarterly for impaired waters. There are also additional inspection requirements contained within Part VIII (routine inspections of industrial areas, ESC for mining, landfills and Blue book requires weekly inspections etc...) All of these provide the facility with the opportunity to detect problems and obligation to take corrective action. The Department believes this provides a reasonable balance between the need for environmental protection and the burden of the requirements on affected businesses.*

**Comment IV-7:** The draft MSGP (Part IV.B.1.c.(5)) states, “The *benchmark* concentrations do not constitute direct *effluent limitations*. Therefore, a *benchmark* exceedance is not a permit violation in and of itself.” What is the purpose of benchmark monitoring if exceedance of the benchmark concentrations listed in Part VIII do not result in a permit violation? The MSGP should be revised to omit this sentence and convert benchmark concentrations to numeric effluent limitations. Exceeding benchmark concentrations should immediately result in a violation of the MSGP to ensure that proper corrective action is taken to protect water quality.

***Response IV-7:*** *Benchmarks are guidelines to determine the effectiveness of a facility’s SWPPP and BMPs. If a facility exceeds a benchmark, it signals to them that their BMPs are not effective or working correctly for that particular parameter and additional actions (as specified in Part IV.B.1.c.6) are necessary to reduce the pollutant levels in the discharge. While exceedance of the benchmark is not a permit violation in and of itself, failure to take the corrective actions specified in Part IV.B.1.c.6 which includes a follow up sample to ensure that the corrective actions were effective would be a violation of the permit. Part III.E requires that the SWPPP be modified whenever it is*

*found to be ineffective or is not achieving the goals of the permit and specifies the time frames for completion of the corrective actions.*

**Comment IV-8:** The corrective and follow-up actions for benchmark monitoring (Part IV. B.1.c (6) (d)) requires that the owner or operator “collect an additional sample to determine the effectiveness of corrective actions. Facilities with an exceedance of a benchmark cutoff concentration in a calendar year must collect a stormwater sample at the outfall where the exceedance occurred during the first six months of the following calendar year (January 1 to June 30), and complete analysis for the pollutant(s) that exceeded the benchmark cutoff concentration. This sample collection and analysis is in addition to the sample collection required in Part IV.B.1.c (1) for the calendar year. The sample may not be collected during the same storm event as the benchmark sample collected to satisfy Part IV.B.1.c (1).” This requirement does not seem warranted. If the facility evaluates and remedies the exceedances as outlined in Part IV. B.1.c (6) (a and b), the need to collect an additional sample should not be required. Documentation of the remedy should be provided as part of the routine annual sampling conducted the following year. This goal can be accomplished without requiring an increased cost for additional, redundant sampling.

**Response IV-8:** *The corrective and follow up actions contained in Part IV.B.1.c(6)(d) were added to determine the effectiveness of the corrective action(s) taken to address the exceedance of the benchmark parameter. The intent of this additional sampling is to document that the corrective actions taken in response to the exceedance were effective in reducing the pollutant discharge levels. The increased sampling puts the responsibility on the owner/operator to demonstrate that their actions were effective. The Department does not believe that this additional sample requirement creates an unreasonable regulatory burden.*

**Comment IV-9:** Corrective Action to Respond to Exceedances of Benchmarks: The General Permit should have an escalating response based on the frequency and severity of exceedances. Any single exceedance of an action level for any pollutant should trigger some response by the permittee, and multiple or repeated exceedances should trigger greater response action. An exceedance of action levels indicates that control measures are not meeting technology requirements and/or water quality standards are likely being violated. The permit should not, and cannot, allow discharges that exceed these levels to continue unaddressed. To implement this kind of tiered approach, we suggest that DEC adopt a three-tier response requirement, similar to that in Washington state's industrial permit, where one exceedance triggers operational changes, a second exceedance triggers

structural changes, and a third exceedance triggers an examination and implementation of treatment options. Any exceedances should be immediately reported to DEC. As discussed above, re-sampling and laboratory analysis after corrective action is taken should occur immediately and certainly within three months (if analysis is not quarterly for all facilities).

***Response IV-9: The benchmark cut-off concentrations are considered to be action levels and any exceedance does trigger the need for some response. The owner/operator is required to evaluate the facility for potential sources and any sources of contamination must be addressed by implementation of non-structural or structural BMPs to prevent a recurrence and collect a follow up sample to ensure that the corrective actions were effective. If the corrective actions are not effective, the facility must continue to implement additional BMPs. The suggestion that one exceedance triggers operational changes, a second triggers structural change, and a third triggers an examination and implementation of treatment options may be appropriate in some instances. However, this is too prescriptive. Such an approach might not be suitable to correct all benchmark exceedances.***

**Comment IV-10:** The MSGP (Part IV B 1. c 6 (d)) requires facilities collect an additional sample if a discharge exceeds a cut-off concentration of one or more parameters. If the concentration of a benchmark constituent collected as an additional benchmark sample, described in this section, is below the cut-off concentration, then the facility should not have to re-analyze for this constituent alone. There is no justification for a second sample of the specified constituent outside of a penalty for the initial exceedance.

***Response IV-10: If there is a discharge that exceeds a cut-off concentration for one or more benchmark parameters, the owner and operator must implement corrective actions to identify the cause of the exceedance and reduce the level of that pollutant in the discharge. In addition, the owner or operator must collect and analyze a sample for the pollutant(s) that exceeded the benchmark cutoff concentration within the first six months of the following calendar year. This sample is needed to determine the effectiveness of the corrective action implemented by the facility. It does not replace the need for the compliance sample for the following year. The Department does not believe that this additional sample requirement creates an unreasonable regulatory burden.***

**Comment IV-11:** Part IV B 1. c 6 (d) (iii) - “Continued exceedance of benchmark monitoring cut-off concentrations may identify facilities that would be more appropriately covered under an individual SPDES permit.” The path for moving a permittee from the general permit program to an individual permit needs to be more clearly defined. There are facilities that are appropriately permitted under the MSGP program but are a) chronic offenders who don’t want to spend the money for necessary improvements or b) facilities and owner/operators that are working hard to come into compliance but have many obstacles to overcome. Neither of the facilities I describe is appropriate for the individual permit program and other actions should be taken to get the facility into compliance.

**Response IV-11:** 6NYCRR 750-1.21(e) describes the cases where an individual SPDES permit or authorization to discharge in accordance with another general permit may be required.

**Comment IV-12:** T

The corrective and follow-up actions contained in Part IV. B.1.c (6) (d)(iv) states that the owner or operator may petition the Department’s MSGP permit coordinator to reduce the frequency of sampling to annual if the exceedances of the benchmark are attributable solely to the presence of that pollutant in the natural background. What is the procedure to petition DEC regarding naturally occurring exceedances like Iron?

**Response IV-12:** Natural background pollutants include those substances that are naturally occurring in soils or groundwater. Natural background pollutants do not include legacy pollutants from earlier activity on your site or pollutants in run-on from neighboring sources that are not naturally occurring. If the concentration of the pollutant exceeds the benchmark but is less than or equal to the natural background, you should submit the DMR for the additional sampling indicating that you are claiming a waiver from the additional sampling. A completed Corrective Action Sampling Waiver form should be attached to the DMR. You should indicate that the cause of the exceedance was due to natural background and include information supporting why you believe that the exceedance of the benchmark is attributed to the natural background pollutant levels. The Corrective Action Sampling Waiver form is being developed and will be available on the Department’s website.

**Comment IV-13:** The MSGP (Part IV.B.1.c.6.(d).(iv)) states that the *owner or operator* may petition the *Department's* MSGP permit coordinator to reduce the frequency of sampling to annual if the exceedances of the benchmark are attributable solely to the presence of that *pollutant* in the *natural background*. This section needs to be expanded to explain what information needs to be included in said petition or if the required information would be developed during consultation with the Department.

***Response IV-13:*** *The Department is developing a waiver form to be used to obtain relief from the additional sampling requirements for benchmark exceedances that are due to natural back ground.*

**Comment IV-14:** The MSGP (Part IV.B.2.b.(1)) states, "A minimum of one grab sample must be taken from the *stormwater discharge associated with industrial activity* resulting from a storm event with at least 0.1 inch of precipitation (defined as a "measurable" event), providing the interval from the preceding measurable storm is at least 72 hours." Sampling procedure should require a replicate sample and a field blank or control sample in addition to the single grab sample for accuracy of analysis.

***Response IV-14:*** *The MSGP (Part IV.B.2.b.(2)) requires monitoring and analysis of samples to be conducted according to test procedures approved under 40 CFR Part 136, or equivalent. 40 CFR Part 136 specifies the quality assurance and quality controls for accuracy and reproducibility in laboratory analysis. 40 CFR Part 136 states "a field reagent blank prepared from reagent water and carried through the sampling and handling protocol can serve as a check on such contamination."*

**Comment IV-15:** Effluent Limit Monitoring for pH is problematic due to the 15 min holding time limit for the sample. Often a lab is > 15 min away. Suggest the agency consider allowing field pH results ( non ELAP certified lab).

***Response IV-15:*** *Pursuant to 6NYCRR 750-2.5(d), any laboratory test or sample analysis required by a SPDES permit for which the State Commissioner of Health issues certificates of approval pursuant to section 502 of the Public Health Law must be conducted by a laboratory that has been issued a certificate of approval. The New York State Department of Health (NYSDOH) is the governing authority for this regulation. All concerns, comments and or recommendations for changing laboratory certification requirements should be addressed with the NYSDOH Environmental Laboratory Approval Program (ELAP).*

**Comment IV-16:** The MSGP (Part IV B 3) states that the *Department* may provide written notice to any facility (including those otherwise exempt from sampling) requiring discharge sampling for specific parameters and a specific monitoring frequency. This defeats the purpose of a general permit with known sample requirements and parameters. It is unfair for facilities to be subject to potentially discretionary enforcement. This is another way for the Department to provide desktop enforcement of a permit without putting boots on the ground.

***Response IV-16:*** *The final MSGP has revised this language to reference Part I.B.3 which contains language relating to additional monitoring required by the Department that is limited to instances where there is evidence indicating that the stormwater discharges are causing or have reasonable potential to cause or contribute to an excursion above an applicable water quality standard. The additional monitoring would be to determine if coverage under the General Permit is appropriate.*

**Comment IV-17:** NYSDEC should include language such as found in EPA's 2008 MSGP for corrective action requirements regarding Section 3.6 (Substantially Identical Outfalls) possibly in the state permit's Part III C.7. The federal language states that if an event triggers corrective action, then the permittee's review must assess all outfalls that are substantially identical to the outfall triggering the review.

***Response IV-17:*** *The final MSGP (Part IV.b.4.d - Representative outfall) includes the following clarification as suggested: If there is an event that triggers corrective action at an outfall that represents other substantially identical outfalls, corrective and follow up actions must be completed for all outfalls claiming the waiver.*

**Comment IV-18:** The MSGP (Part IV B 4 a) includes provisions for waivers due to Adverse Climatic Conditions. Please provide a form for the “Adverse Climatic Conditions Waiver” that includes all of the information the Department needs.

***Response IV-18:*** *A form is being created for each waiver and will be available on the Department's website when GP-0-12-001 is finalized.*

## Part IV.C – Reporting Monitoring Results and Annual Certification Reporting

**Comment IV-19:** The DMR form should be redesigned to match the stormwater testing requirements of the MSGP rather than an individual permit for wastewater for which it was originally designed. Furthermore, the DMR needs to evolve to a format that allows for the clear communication and transmission of data consistent with proposed changes to the Benchmark and Numeric Effluent Limits (i.e.: documentation of corrective actions in response to exceedances).

**Response IV-19:** *The DMR form used by the Department is an EPA form and changes to the structure of the form are beyond the scope of this permit. Each DMR is preprinted with the facility information and updated benchmark and numeric effluent limits to reflect the values in the final MSGP. Documentation of corrective actions may be provided on a report of non-compliance event form or in the cover letter transmitting the DMR.*

**Comment IV-20:** The MSGP (Part IV C 3) requires reporting using forms provided by the Department. Where are these forms located? We recommend including said form as an appendix to the permit.

**Response IV-20:** *The forms will be located on the Department's website at <http://www.dec.ny.gov/chemical/9009.html>. The DMRs are preprinted by the Department with facility specific information so they cannot be included in an Appendix. Preprinted DMRs are mailed to the owner or operator each year unless they sign up to be able to access their DMRs on-line. Information on how to sign up to access DMRs on-line and location of forms will be included in a letter sent to the facilities with coverage under the MSGP.*

**Comment IV-21:** The MSGP (Part IV.C.4.b) requires that in addition to filing the ACRs and DMRs, owner or operators with at least one stormwater discharge associated with industrial activity through an MS4, or a municipal system designated by the Department, must submit signed copies of ACRs and DMRs to the MS4 operator at the same time. The permittee should have to submit DMRs to the MS4 for only those outfalls that discharge into the MS4.

**Response IV-21:** *The final MSGP has been clarified to state that in addition to filing the ACRs and DMRs, owner or operators with at least one stormwater discharge associated with industrial activity through an MS4, or a municipal system designated by the Department, must submit signed copies of ACRs and DMRs for those outfalls to the MS4 operator at the same time.*

## **Part IV.D – Monitoring Reporting Submission Deadlines**

**Comment IV-22:** The MSGP (Part IV D Table IV-2) requires that visual monitoring and dry weather flow inspection reports be retained on-site with the SWPPP. - For “Visual Monitoring” and “Dry Weather Flow Inspection,” the Submission Deadline should read “Forms must be filed on-site with the SWPPP no later than 7 calendar days following the inspection.” For facilities without copy machines onsite, inspection forms may be taken back to a central office, copied, and the original returned to the site.

***Response IV-22:*** *Table IV-2 is intended to indicate that these forms do not need to be submitted to the Department. The Department believes the text “Retain documentation on-site with SWPPP” is sufficient for these two inspections.*

## **Part IV.E – Keeping SWPPPs Current**

*No comments received for this section.*

## **Part IV.F – Special Stormwater Pollution Prevention Plan Requirements**

*No comments received for this section.*

## **Part V – Standard Permit Conditions**

*No comments received for this part.*

## **Part VI – Reopener Clause**

*No comments received for this part.*

## **Part VII – Termination or Transfer or Coverage**

*No comments received for this part.*

## **Part VIII – Sector Specific Permit Requirements**

**Comment VIII-1:** Part VIII : Throughout the sectors of the federal permit certain pollutants have limits based on water hardness on the "Sector-Specific Benchmark" tables. The NYSDEC draft MSGP does not have these limits based on hardness. Some of the limits the state set become less stringent limits as the hardness factor reaches the 0-100 mg/L ranges. For example: copper and zinc limits in the state permit are more stringent than the federal permit in the water hardness range of 100-125 mg/L and greater but are less stringent than federal permit in the water hardness range of 75-100 mg/L and lower. Please include the hardness tables and the corresponding limits or set the limits at lowest possible limit for each pollutant.

***Response VIII-1:*** *The Department believes that statewide application of benchmarks for cadmium, copper, lead, nickel, silver and zinc are appropriate for New York rather than requiring adjustment of the benchmark cut-off concentrations for these metals, based on the hardness of the receiving water. The Department believes that the requirement to monitor the receiving waterbody and adjust benchmarks on a facility specific basis represents an unreasonable regulatory burden and an unmanageable process for assigning benchmark cutoff concentrations to be reported. The Department is concerned that even if collected and analyzed correctly, the result of one time monitoring of hardness would not be a reliable representation of the hardness of a water body.*

*The Department conducted a statistical analysis of water hardness data collected over a span of 18 years (1993-2011) that included over 6000 data points and determined that benchmark cut-off concentrations based on a hardness of 75 mg/l is appropriate for New York State. A hardness value of 75 mg/l represents the 95<sup>th</sup> percentile hardness concentration for New York State waters. This 95<sup>th</sup> percentile represents that if receiving water hardness were to be sampled there exists a 95% probability that the hardness would be greater than 75 mg/L. Benchmark cut-off concentrations contained in the final MSGP are consistent with EPA's 2008 MSGP benchmark cut-off concentrations for water hardness in the range of 75-100 mg/l.*

*The benchmark cut-off concentrations included in the final MSGP are either the same as or more stringent than the benchmarks contained in GP-0-06-002 and GP-0-11-009 and provide steadily increasing and sustainable environmental protection provided by the MSGP program.*

**Comment VIII-2:** The MSGP should lower all of the benchmarks that are presently higher than those set forth in EPA's 2008 MSGP. This may have been done in the Draft MSGP, but we nevertheless wish to emphasize this point and to ensure that the final MSGP is not less stringent in this regard.

***Response VIII-2:*** *See Response VIII-1*

## **Sector A – Timber Products**

*No comments received for this section.*

## **Sector B – Paper and Allied Products Manufacturing**

*No comments received for this section.*

## **Sector C – Chemical and Allied Products Manufacturing**

*No comments received for this section.*

## **Sector D – Asphalt Paving & Roofing Materials & Lubricant Manufacturers**

**Comment D-1:** Non Structural BMPs, 5<sup>th</sup> bullet Suggest “The drip pans shall be inspected for leaks and potential overflow and all liquids properly disposed of in accordance with local, state, and federal requirements.”

**Response D-1:** *The text has been updated to read as follows, “...properly disposed of in accordance with local, state, and federal requirements.”.*

## **Sector E – Glass, Clay, Cement, Concrete and Gypsum Products**

*No comments received for this section.*

## **Sector F – Primary Metals**

**Comment F-1:** The draft permit sets forth a number of best management practices (BMPs) specific to Sector F. Part VIII of the permit lists as available BMPs: confining storage to designated and labeled areas outside of drainage pathways, providing temporary cover, minimizing material storage, minimizing run-on from adjacent properties and stabilizing areas with exposed soil.

First, as you may know, Nucor, due to the nature of its business, must store a substantial amount of raw materials and finished products outdoors. While Nucor has taken a number of steps to minimize stormwater impacts from these storage areas (such as constructing berms and directing storm water flow through sedimentation ponds), the BMPs listed in Section VIII of the permit may, at times, not be practicable. For example, scrap metal piles may cover several acres and stand twenty to thirty feet high. Material is constantly being added to and removed from the piles. Requiring Nucor to temporarily cover these piles is not only impracticable but also presents a significant safety risk to Nucor's team members. It is Nucor understands that the permit does not require permittees to undertake these steps, only that the permittee consider the BMPs and evaluate whether the listed measures are practicable. Nucor requests confirmation that this understanding is correct.

***Response F-1: The MSGP contains non-numeric technology based limits that require the owner/operator to select, install, implement and maintain BMPs to minimize the presence of pollutants in stormwater. Part I.B.1.a.2 (a) requires the owner or operator to minimize the exposure of manufacturing, processing and material storage areas to rain, snow, snowmelt and runoff. To meet the requirement to "minimize" exposure, owners or operators are required to select, design, install and implement control measures that reduce or eliminate discharges of pollutants in stormwater to the extent achievable. These control measures must reflect best industry practice considering their technological availability and economic practicability (BPT) and achievability (BAT). EPA's 2008 MSGP fact sheet further explains, "To determine technological availability and economic achievability, an owner or operator needs to consider what control measures are considered "best" for their industry, and then select and design control measures for their site that are viable in terms of cost and technology. EPA believes that for many facilities minimization of pollutants in stormwater discharges can be achieved without using highly engineered, complex treatment systems. The specific limits included in Part 2 ( I.B.1.a of NY's MSGP) emphasize effective "low-tech" controls, such as minimizing exposure to stormwater (albeit, without significantly increasing impervious surfaces), regular cleaning of outdoor areas where industrial activities may take place, proper maintenance of equipment, diversion of stormwater around areas where pollutants may be picked up, minimization of runoff through infiltration and flow dissipation practices, and effective advanced planning and training (e.g., for spill prevention and response)."***

***In the example provided, the SWPPP would need to describe why the BMPs listed in the permit are not viable for the facility in terms of cost and technology. While covering of the stockpiled material may not be viable, the owner or operator is still obligated to select other BMPs that will be used to minimize the discharge of pollutants from these areas.***

**Comment F-2:** Nucor suggests that the BMPs for outside storage areas under Section VIII, Sector F be revised to read: "BMPs for outside material storage such as foundry returns, scrap metal, turnings, fines, ingots, bars, pigs, wire, where practicable". This language clarifies that Section VIII, Sector F only provides examples of possible measures and does not specifically require them.

**Response F-2:** See Response to Comment F-1

## **Sector G – Metal Mining (Ore Mining & Dressing)**

**Comment G-1:** NYSDEC Part VIII Sector G (Metal Mining): NYSDEC should add to the definitions section of this sector the definition of "Reclamation Phase" found in the EPA MSGP at Section 8.G.3.5.

***Response G-1: The final MSGP includes a definition of "reclamation phase" for Sector G.***

## **Sector H – [Reserved]**

*No comments received for this section.*

## **Sector I – Oil and Gas Extraction and Refining**

*No comments received for this section*

## **Sector J – Mineral Mining and Dressing**

**Comment J-1** The proposed requirement for a Stand-Alone Construction Stormwater Pollution Prevention Plan (SWPPP) for an existing mine (Sector J) is inappropriate, burdensome for the business of mining, and will not result in improvements to the quality of waters of the State. Erosion and sediment control best management practices are and will continue to be implemented at mining sites under the Multi-Sector General Permit (MSGP) SWPPPs and under the NYSDEC Mined Land Reclamation permits (MLRP). This proposed requirement is duplicative and a poor excuse to mandate additional form filling and senseless inspections. If construction SWPPPs are to be required at Sector J sites, then they should only be required for new (greenfield) sites, and only applied for the initial clearing, overburden stripping, and access road construction. Part IX should be deleted or revised to clearly indicate that it applies only to new (greenfield) sites.

***Response J-1: Part IX has been removed from the permit. All soils disturbance associated with mining and reclamation which would include new roads, impervious area and construction of new facilities intended to be covered by Part IX that have the potential to discharge to surface waters of the State must be included in the Erosion & Sediment Control plan, inspections and corrective actions specified in Sector J. See comments IX-0 for addition information on changes to Sector J.***

**Comment J-2:** Limitations of Coverage -The requirement that owners and operators are required to obtain separate coverage for construction activities at mines should be removed.

***Response J-2:*** *Limitations on coverage has been revised to state that stormwater discharges from soils disturbance associated with mining except for reclamation activities where the pre-approved, post-mining use would otherwise require post construction stormwater controls under the SPDES General Permit for Stormwater Discharges from Construction Activity (GP-0-10-001). Those portions of the reclamation would need to obtain separate coverage under GP-0-10-001. The definition of “mining” has been added to the final MSGP to be consistent with the State’s Mined Land Reclamation Law. “Mining Activities” is also defined to mean the activities associated with mining and reclamation including exploration and land disturbance to determine the financial viability of a site, construction of haulageways, building and structures associated with mining. Soils disturbance associated with mining activities are covered under the MSGP provided that they are included in the erosion and sediment plan that must be developed and implemented for all areas with the potential to discharge to surface waters of the State.*

**Comment J-3:** The list of definitions is incomplete and several of the definitions are inaccurate portrayals of the mining process and inconsistent with the State's Mined Land Reclamation Law (MLRL). Especially the following: Exploration and Construction Phase; Active Phase; Reclamation Phase.

The definitions listed in Sector J (pg. 87) do not include one for "initial exploration and construction." The definition of "exploration and construction" as proposed includes the "removal of overburden to expose mineable minerals." Hanson believes that clarification is needed to specifically state in the MSGP that the on-going movement of overburden to expose mineable minerals that is routinely performed at established mine sites is not subject to the Construction SWPPP requirements. At a typical mine site, overburden is not completely stripped from all areas of the permitted mine all at once. Rather, overburden removal occurs gradually over a period of decades as the mine operator needs to access mineable materials. Again, this is already covered in the Mined Land Use Plan approved by the NYSDEC - Division of Minerals.

***Response J-3:*** *. The reference to the different phases associated with mining was continued from the previous version of the MSGP (GP-0-06-002) and reflects language used in EPA’s MSGP. However, it is agreed that the MSGP should be consistent with the terminology used within the industry within New York State. Therefore, the definition of mining and reclamation has been changed to be consistent with the MLRL. A definition for “Mining Activity” has been added to ensure that all activities listed under EPAs permit are included.*

**Comment J-4** There is no definition of "access road" under the proposed Sector J. A definition of "access road" should be included to clarify that it refers to the actual mine entrance(s) from public thoroughfares, and that the internal haul routes within the mine are not included in this definition (and therefore exempt from Construction SWPPP requirements).

**Response J-4:** *Definitions for "haulageway", "mine", "mining" and "mining activity or activities" have been added to clarify the activities that are covered under Sector J. Access roads would be included in the definition of "haulageway" (all roads utilized for mining purposes, together with that area of land over which material is transported that are located within the permitted area). An ESC plan must be developed and implemented for mining activities that result in a soil disturbance with the potential for stormwater discharge to surface waters of the State.*

**Comment J-4:** Limitations on Coverage: The *technical standards* are not always appropriate for mines and requiring these documents to be conformed to for coverage is inappropriate.

**Response J-4:** *The final MSGP has been revised to specify that the design, installation, inspection, maintenance and repair of erosion and sediment controls shall conform to the New York Standards and Specifications for Erosion and Sediment Control, 2005, or equivalent*

**Comment J-5:** NYSDEC should include the extra "site map" requirements found in the EPA MSGP at Section 8.J.6.2.

**Response:** *The final MSGP has been updated to include the extra site map requirements found in EPA MSGP Section 8.J.6.2.*

**Comment J-6:** Mines in New York typically cease operations in the winter. Requiring additional soil stabilization at mines prior to winter shutdowns is excessive and burdensome for the industry.

**Response J-6:** *The ESC plan and associated inspection requirements apply to disturbed areas with the potential to discharge to surface waters of the State. Areas draining internal to the mine that do not have the potential to discharge to surface waters of the State and areas that have achieved final stabilization*

*are not subject to these requirements. For areas with the potential to discharge to surface waters of the State, where soil disturbance activities have been temporarily suspended and runoff is unlikely due to winter conditions (e.g. site is covered with snow, ice or the ground is frozen) the inspection frequency may be reduced to once every 30 days*

## **Sector K – Hazardous Waste Treatment, Storage, or Disposal Facilities**

**Comment K-1:** The "Total Cyanide" limit on the "Benchmark Monitoring Requirement" table of 64 ug/L is less stringent than the federal limit. Please include the federal parameter for "Total Cyanide" with a concentration limit of 22 ug/L. NYSDEC should also include the pollutant "Total Mercury" with a concentration limit of 0.0014 mg/L.

**Response:** *The draft MSGP inadvertently continued the Total Cyanide benchmark cut off concentration of 64 ug/l from GP-0-11-009. The final MSGP includes the correct benchmark cutoff concentration of 22 ug/l for Total Cyanide. The draft and final MSGP incorporates a mercury limit of 50 ng/L, which is more stringent than the Mercury benchmark of 0.0014 mg/L contained in EPA's 2008 MSGP. This change was made to conform to NYSDEC Program Policy (DOW 1.3.10-Mercury – SPDES Permitting, Multiple Discharge Variance and Water Quality Monitoring).*

## **Sector L – Landfills, Land Application Sites and Non-Compliant**

**Comment L-1:** ESC Inspection Follow-Up - Current Language: Within one (1) business day of the completion of an inspection, the qualified personnel shall notify the owner or operator and appropriate contractor of any corrective actions that need to be taken. The owner or operator shall begin implementing the corrective actions within one (1) business day of this notification and shall complete the corrective actions within seven (7) calendar days. Provisions should be made for corrective actions that will require greater than seven days to complete.

**Response L-1:** *The language in the MSGP has been changed to read as follows, "The owner or operator shall begin implementing the corrective actions within one (1) business day of this notification and shall complete the corrective actions within seven (7) calendar days unless otherwise notified by the department". If the owner or operator needs longer than seven calendar days to complete their corrective action they must notify the department in writing.*

**Comment L-2:** The definition of ‘disturbance’ as it relates to the 5-acre limit should be defined. For landfill projects, it is unclear if areas such as daily cover, or areas that do not have the potential to discharge (e.g. from batch discharge holding ponds) should be counted in the disturbance calculations.

***Response L-2:*** *Areas that do not have the potential to discharge to surface waters of the State are not subject to the 5 acre approval requirement. Daily cover is typically treated as leachate and would not be subject to this requirement.*

**Comment L-3:** The Part IX introduction indicates that it is for “Stand-Alone Construction Stormwater Pollution Prevention Plan (SWPPP) Requirements For Soil Disturbances Associated with the initial construction of the Facility and Construction of Access Roads, Buildings, Permanent Structures and Appurtenances at Facilities Covered under Sectors J and L with potential to discharge to waters of the U.S.” This conflicts with the description contained in Sector L (landfills) which indicates subsequent construction of expansion cells are also required to meet the requirements of Part IX. ‘Expansion cell’ should be removed from the language in Section L since the case of a newly permitted landfill cell would be considered ‘initial construction’ and would be covered.

***Response L-3:*** *Part IX has been removed from the permit. All soils disturbance at mines and landfills that have the potential to discharge to surface waters of the State must be included in the Erosion & Sediment Control Plan, inspections and corrective actions specified in those sectors*

**Comment L-4:** If new access roads or other permanent structures are constructed in new areas after completion of the initial construction of the facility, another stand-alone Construction SWPPP must be developed for each project and an NOM must be submitted prior to commencement of construction activity. A separate construction SWPPP is not needed provided the landfill has an E&S plan that is required and approved by DEC Solid Waste Div under Part 360. This is redundant.

***Response L-4:*** *Part IX has been removed from the permit. All soils disturbance at mines and landfills that have the potential to discharge to surface waters of the State must be included in the Erosion & Sediment Control Plan, inspections and corrective actions specified in those sectors. The SWPPP requirements of the MSGP may be fulfilled by incorporating by reference other plans or documents such as an Erosion and Sediment Control (ESC) plan, a Mined*

*Land Use Plan, a Spill Prevention Control and Countermeasure (SPCC) plan developed for the facility or BMP programs otherwise required for the facility provided that the incorporated plan meets or exceeds the plan requirements of Part III.C and the applicable activity- specific requirements in Part VIII. All plans incorporated by reference into the SWPPP become enforceable under the MSGP; however, this enforcement is limited only to those aspects of these other plans that are specifically referenced to provide information or practices required for the SWPPP.*

**Comment L-5:** Current Language: subsequent construction of expansion cells. Clarify that expansions cells mean cells that are not in the current permitted landfill footprint.

***Response: L-5:** Part IX has been removed from the permit. All soils disturbance at mines and landfills that have the potential to discharge to surface waters of the State must be included in the Erosion & Sediment Control Plan, inspections and corrective actions specified in those sectors*

**Comment L-6:** Landfills are already heavily regulated under Part 360 that already includes routine site inspections of the same operating areas. Adding a requirement to conduct weekly inspections every 7 days is a duplicate burden. Coordination between the Solid Waste and Water Division is needed so that competing programs are not redundant. For example erosion and sediment control plans are already required at landfills under Part 360.

***Response L-6:** Inspections done pursuant to other programs satisfy the MSGP inspection requirements provided that the inspections meet or exceed the MSGP requirements. They must cover the specified areas, generate an inspection report with the required elements and the personnel completing those inspections must meet the definition of qualified personnel (i.e. knowledgeable in erosion & sediment control and have the authority to direct changes at the facility.*

**Comment L-7:** The draft MSGP includes the following requirement for employee training - The owner or operator must develop and distribute educational materials to incoming drivers on:

- Materials not accepted by the facility
- Preventing contamination to stormwater from leaky vehicles
- Prohibition of non-stormwater discharges, including but not limited to waste water from truck washout.

Drivers are often not site employees so the requirement to distribute educational materials to non-employees should not be required. Besides the Part 360 permits require signage at the gate that accomplishes the same intent on unacceptable materials.

***Response L-7:*** *The permit has been revised to state that the owner or operator must educate incoming drivers on the specified topics rather than develop and distribute educational materials. Signage at the gate that educates drivers on these topics would satisfy this requirement.*

**Comment L-8:** The requirement for two inspections every week for landfills that disturb more than 5 acres is excessive due to the amount of oversight already in place at these facilities. SMI is obligated through our Part 360 Operating Permit to retain a full-time NYSDEC Environmental Monitor to oversee environmental compliance activities. The Monitor generates a daily report documenting ongoing construction and operations activities throughout the site. It is our opinion that the requirement for a second inspection should be eliminated for landfill facilities that are already required by their operating permit to have a full-time NYSDEC Environmental Monitor.

***Response L-8:*** *Routine facility inspections of erosion and sediment controls at mines and landfills may be done by qualified personnel. The permit defines qualified personnel as those individuals who possess the knowledge and skills to assess conditions and activities that could impact stormwater quality and who can assess the effectiveness of BMPs. Individuals performing inspections for erosion and sediment control must have training in the principles and practices of erosion and sediment control means that the individual working under the direct supervision of the licensed Professional Engineer or Registered Landscape Architect has received four (4) hours of Department endorsed training in proper erosion and sediment control principles from a Soil and Water Conservation District, or other Department endorsed entity.*

*If the landfill has a monitor in place that meets the qualifications of the qualified personnel and is performing daily inspections that generate daily reports documenting erosion and sediment control activities throughout the site and has the authority to*

*direct corrective actions, then the daily inspections performed by the monitor satisfy the MSGP requirements.*

## **Sector M – Automobile Salvage Yards**

*No comments received for this section.*

## **Sector N – Scrap Recycling & Waste Recycling Facilities**

**Comment N-1:** Sector N: Prohibition of Non-Stormwater Discharges states, “All wash water discharges must be authorized under a separate SPDES permit or discharged to a sanitary sewer in accordance with applicable industrial pretreatment requirements.” It is unclear if this is a Sector specific requirement or a general permit condition for all sectors. Additional comment on vehicle washing, pertinent to all sectors, is requested. Is cold-water only vehicle washing permitted if it infiltrates into the ground?

**Response N-1:** *Wash waters are considered to be non-stormwater discharges that are not authorized under the MSGP unless specifically listed in Part I.C.3. The MSGP has been reorganized to clarify the control measures discussed in Part III.C.7 and Part VIII are considered to be non-numeric technology based effluent limits. Part I.B.1.a.2 (a) has been added to clarify the requirements regarding minimizing exposure and clearly states that the discharge of vehicle and equipment wash water, including tank cleaning operations, is not authorized by the MSGP and would need authorization under a separate SPDES permit which would specify the terms and conditions for discharge.*

**Comment N-2:** Sector N: Subsector Definitions. Are stand alone convenience stations that receive source separated recyclables in covered bins subject to the MSGP permit?

**Response N-2:** *Waste recycling facilities are covered under Sector N. Subsector N-1 covers recycling activities at transfer stations, landfills and other facilities engaged in the collection of source-separated recyclables such as aluminum and tin cans; plastic and glass containers; newspapers and cardboard from institutional, commercial/non-industrial and residential sources. Providing covered bins would be a BMP used to satisfy the permit requirement to minimize exposure of these materials. If all industrial activities and materials are completely sheltered from exposure to rain, snow, snowmelt and/or runoff, these facilities may qualify for a "Conditional Exclusion for No Exposure"*

**Comment N-3:** Sector N: Stockpiled materials, processed materials and Non-Recyclable Wastes states, “The SWPPP must describe measures and controls to minimize contact of stormwater runoff with stockpiled materials, processed materials and non-recyclable wastes:

- Store the equivalent one day's volume of recyclable materials indoors;
- Cover containment bins, dumpsters, roll off boxes;
- Install a sump/pump with each containment pit, and discharge collected fluids to a sanitary sewer system;

This is not a practical solution for many facilities, many of which do not have buildings. It should be noted that this requirement is not needed for facilities without available indoor storage. It is also not practical to have constant cover on containment bins, dumpsters and roll off boxes. This language should be edited to address working and non-working hours. Further clarification should be provided for which types of stockpiled material this pertains to. Installation of a sump/pump with each containment pit and discharge of collected fluids to a sanitary sewer system is not a practical solution at all facilities, some of which do not have sanitary sewer connections. Local sewer use permitting ordinances are also not considered with this requirement.

***Response N-3: The MSGP contains non-numeric technology based limits that require the owner/operator to select, install, implement and maintain BMPs to minimize the presence of pollutants in stormwater. Part I.B.1.a.2(a) requires the owner or operator to minimize the exposure of manufacturing, processing and material storage areas to rain, snow, snowmelt and runoff. To meet the requirement to "minimize" exposure, owners or operators are required to select, design, install and implement control measures that reduce or eliminate discharges of pollutants in stormwater to the extent achievable. These control measures must reflect best industry practice considering their technological availability and economic practicability (BPT) and achievability (BAT). EPA's 2008 MSGP fact sheet further explains, "To determine technological availability and economic achievability, an owner or operator needs to consider what control measures are considered "best" for their industry, and then select and design control measures for their site that are viable in terms of cost and technology. EPA believes that for many facilities minimization of pollutants in stormwater discharges can be achieved without using highly engineered, complex treatment systems. The specific limits included in Part I.B.1 emphasize effective "low-tech" controls, such as minimizing exposure to stormwater (albeit, without significantly increasing impervious surfaces), regular cleaning of outdoor areas where industrial activities may take place, proper maintenance of equipment, diversion of stormwater around areas where pollutants may be***

*picked up, minimization of runoff through infiltration and flow dissipation practices, and effective advanced planning and training (e.g., for spill prevention and response).”*

*In the example provided, the SWPPP would need to describe why the BMPs listed in the permit are not viable for the facility in terms of cost and technology. While covering of the stockpiled material may not be viable, the owner or operator is still obligated to select other BMPs that will be used to minimize the discharge of pollutants from these areas.*

**Comment N-4:** Numeric Effluent Limits It should be explicitly stated which subsectors are subject to the numeric effluent monitoring.

**Response N-4:** *The final MSGP has clarified that the numeric effluent limits for Mercury and PCBs apply to sector N-4 only.*

**Comment N-5:** Benchmark Monitoring Subsectors N-2, N-3, N-4, N-5 and N-6: Facilities in these subsectors must complete the benchmark analysis in Table VIII-N-1 below. Table VIII-N-1 is not “below” this statement, it is above. Table N-1 is numeric effluent monitoring, but the statement indicates it is for benchmark monitoring. Is the Department referring to Table VIII-N-2? It is unclear what subsectors are subject to effluent monitoring vs. benchmark monitoring as currently written.

**Response N-5:** *The final MSGP has clarified the numeric limits and benchmark monitoring requirements*

**Comment N-6:** The MSGP should set benchmarks for and require laboratory analysis of mercury at all auto recyclers and scrap metal facilities (due to the presence of mercury switches) and PCBs at all scrap metal facilities (due to the presence of PCBs in transformers, among other sources).

**Response N-6:** *Table VIII-N-1 Sector N- Numeric Effluent Limits includes limitations for Mercury and PCBs for recycling facilities that operate a shredder. It is believed that these facilities are at a greater risk for exposure due to the destructive nature of the activity. The Mercury limit conforms to NYSDEC Program Policy (DOW 1.3.10-Mercury – SPDES Permitting, Multiple Discharge Variance and Water Quality Monitoring). PCB limitations are in accordance with NYSDEC permit writer’s policy.*

## Sector O – Steam Electric Generating Stations

### Comment O-1:-

The Saranac facilities were constructed in 1993, using state-of-the-art technology that included non-PCB transformers. This equipment is located in secondary containment structures and there have been no releases to the environment from this equipment. This would be the case with any New York State power plant constructed after 1979, when the use of PCBs was banned by the Toxic Substances Control Act.

The laboratory that Saranac routinely uses for its other water samples is unable to meet the new minimum detection limit. Saranac has found a laboratory that has the capability of meeting the 0.2 ug/L minimum detection limit (MDL) and determined it is technologically feasible to test at this level; however, the closest laboratory that can meet this detection limit is at a significant distance from Saranac. The special testing method required and the processing through a different lab at a remote location are factors that represent additional costs to Saranac.

Saranac is concerned that if the PCB detection limit in the MSGP is revised to such a low level, the analysis results may not be reliable and the new analysis could identify a potential problem that is not caused by Saranac.

In light of the requirements of the Toxic Substances Control Act and the non-PCB equipment purchased and maintained on-site, Saranac requests that provision be made to allow for application for exemption from the PCB analysis requirement for Sector O, Steam Electric Generating Stations by newer power plants that were constructed without PCBs.

Saranac also respectfully requests the MSGP limits for PCBs remain at the current levels as the existing permit.

***Response O-1: The PCB levels in GP-0-11-009 were not sufficient to adequately protect water quality. New York State rules and regulations (6 NYCRR 750-1.3(f)) do not allow for the issuance of a SPDES permit “when the imposition of conditions cannot ensure compliance with the applicable water quality requirements.” The level specified in the final MSGP is necessary to provide the best possible water quality protection. This level is set at the analytical minimum level so the results should be reliable. The holding time for PCB samples is one year until extraction and 1 year after extraction so the location of the lab should not be an issue. Samples are routinely shipped/mailed to labs for analysis.***

## Sector P – Land Transportation and/or Warehousing

**Comment P-1:** Applicability: Transfer stations that have vehicle and equipment maintenance shops are covered under this sector. It should be stated that “Transfer stations that have vehicle and equipment maintenance shops are covered under this sector in addition to the applicable Sector N subsector requirements.”

***Response P-1:*** *The final MSGP has been updated to clarify, “Transfer stations that have vehicle and equipment maintenance shops are covered under this sector in addition to the applicable Sector N subsector requirements.”*

**Comment P-2:** The SIC codes included in the Applicability of this Sector do not accurately describe activities at the types of facilities that the Department has, in the past, required to include Sector P in their facility coverage. Including an inaccurate SIC code in a facility’s permit for the sole purpose of including the Sector requirements has greater ramifications as the facility is potentially required to abide by other, non-stormwater, requirements of that SIC code. Though the intent of the Department is understood, another approach must be taken that does not subject a facility to classification under an inappropriate SIC code.

***Response P-2:*** *SIC codes indentified for this sector were established by the federal regulation, contained in previous versions of the MSGP (GP-0-06-002 and GP-0-11-009) and are consistent with EPA’s version of the MSGP. Often facilities have industrial activities included in more than one industrial sector. Stormwater discharges from co-located activities must comply with requirements for all relevant sectors. Facilities covered under other sectors that have vehicle and equipment maintenance shops (vehicle and equipment rehabilitation, mechanical repairs, painting, fueling and lubrication) and/or equipment cleaning operations for the fleet of vehicles associated with their operation would be considered co-located and should incorporate the requirements of Sector P for those areas.*

## Sector Q – Water Transportation

*No comments received for this section.*

## **Sector S – Air Transportation**

**Comment S-1:** Sector S - Source Reductions states, “Owners or operators who conduct deicing/anti-icing operations shall consider alternatives to the use of urea and glycol-based deicing/anti-icing chemicals to reduce the aggregate amount of deicing/anti-icing chemicals used and/or lessen the environmental impact. Chemical options to replace ethylene glycol, propylene glycol and urea include: potassium acetate; magnesium acetate; calcium acetate; and anhydrous sodium acetate.” This permit condition applies only to airport deicing operations. Such consideration should also apply to all industrial sectors that conduct deicing operations. In addition, this permit condition requires only *consideration* of deicing alternatives. The *use* of more benign alternatives that exist should be required of all industrial sectors that discharge within NYC Watershed basins.

**Response S-1:** *The final MSGP (Part I.B.1.a.2) includes a non-numeric effluent limitations that apply to all facilities. Part I.B.1.a.2.a requires owners or operators to minimize the exposure of manufacturing, processing and material storage areas and minimize exposure of chemicals by replacing with a less toxic alternative, if practicable. Part III.C.7.d(2) has been revised to clarify that the SWPPP must document considerations of alternative of chemicals exposed to stormwater.*

## **Sector T – Treatment Works**

*No comments received for this section.*

## **Sector U – Food & Kindred Products**

*No comments received for this section.*

## **Sector V – Textile Mills, Apparel & Other Fabric Products**

*No comments received for this section.*

## **Sector X – Printing & Publishing**

*No comments received for this section.*

## **Sector Y – Rubber, Plastics & Miscellaneous Manufacturing Industries**

*No comments received for this section.*

**Part IX – Stand – Alone Construction Stormwater Pollution Prevention Plan Requirements for Soil Disturbances Associated with the Initial Construction of Facility and Construction of Access Roads, Buildings, Permanent Structures and Appurtenances at Facilities Covered Under Sectors J and L with Potential to Discharge to Waters of the U.S.**

**Comment IX-0:** Numerous comments were received regarding the proposal to have a standalone SWPPP for construction activity at mines citing that there is no distinction between “construction” and “operation” phases in the Mined Land Reclamation Law and there is no need to create an inconsistent, confusing distinction in the MSGP. Commenters pointed out that the draft MSGP used definitions that were inconsistent with the methods and terminology used within the industry in New York State and would also contribute to confusion amongst the permitted entities. Commenters expressed concerns that requiring multiple documents that cover the management of stormwater at facilities where operational and construction activities overlap is overly burdensome, duplicative and would substantially increase the cost of doing business in New York.

***Response IX-0:*** *While Part IX was intended to cover activities that were not routine to mining, it is agreed that the definition of the different phases of mining and proposal for a separate SWPPP would create confusion given the overlap in activities. The final MSGP removes the distinction between construction activity and other soils disturbance activities that may occur at these facilities. The final MSGP removes definitions associated with the different phases of mining and replaces them with definitions for mining, mine, haulage, and reclamation that are consistent with the MLRL. A definition for “Mining Activity” has been added to include activities associated with mining and reclamation including the exploration and land disturbance to determine the financial viability of a site, construction of haulage, buildings and structures associated with mining to ensure that all activities listed under EPA’s permit are included. Furthermore, Part IX has been removed from the permit and the Sector specific language has been clarified to identify that mining activities that result in a soils disturbance with the potential to discharge to surface waters of the state must be included in the erosion & sediment control plan (ESC) that must be developed and implemented. The final MSGP has also been revised to clarify that the erosion & sediment control plan and associated inspections and corrective actions do not apply to areas that drain internal to the mine that do not have the potential to discharge to surface waters of the State.*

*Part IX also applied to construction activities that occurred at Landfills. Sector L has also been revised to clarify the requirements for any soils activities that*

*occur at a landfill. The requirements for post construction stormwater controls designed in accordance with the New York State Stormwater Design Manual has been returned to the Sector requirements for landfills as it appeared in GP-0-06-002.*

**Comment IX-1:** The requirement for a ‘stand-alone’ SWPPP should be revised to allow for singular documents that meet the requirements of the MSGP and Appendix IX of the MSGP. Requiring multiple documents that cover the management of stormwater at facilities where operational and construction activities overlap is overly burdensome and could result in missed monitoring/recordkeeping requirements due to confusion between the two documents.

**Response IX-1:** *Part IX and the associated need for a separate stand alone SWPPP has been removed from the final MSGP. It should be noted that the MSGP (Part III.A) does include provisions that allows the SWPPP requirements to be fulfilled by incorporating by reference other plans or documents otherwise required for the facility provided that the incorporated plan meets or exceeds the MSGP SWPPP requirements of Part III.C and the applicable activity- specific requirements in Part VIII. All plans incorporated by reference into the SWPPP become enforceable under the MSGP; however, this enforcement is limited only to those aspects of these other plans that are specifically referenced to provide information or practices required for the SWPPP. If the existing document does not fully cover all requirements of the SWPPP, the document can be amended to fulfill the MSGP requirements in lieu of developing a second document.*

**Comment IX-2:** A policy or additional language consistent with the DOW — 1.2.5 - New York State Stormwater Management Design Manual 2010 Update Transition Policy, which acknowledged that the transition period for construction projects to use the 2010 version of the Stormwater Management Design Manual did not fully consider the economic impact to certain construction activities that had already started the planning, design and review process with another review authority, should be implemented for facilities covered under the MSGP. In particular, Landfill and Mine projects that may have phases that are not yet constructed but have been already permitted (or are in the permitting process) with a very specific footprint. Without a “Transition Policy” that somehow exempts these already permitted of projects, they could be required to develop a stand-alone SWPPP in accordance with Appendix IX and more specifically, the 2010 Stormwater Design Manual for the work to be completed during future construction phases. The Green Infrastructure practices, if required to be implemented, could result in major changes to the facility footprint, which may not have been considered in the SEQR

and permitting process for the facility. The MSGP language should be modified to clarify that projects originally permitted or described in a public or SEQR submittal that was made prior to the implementation date of the MSGP, be covered under the Stormwater Management Design Manual in place at the time of the original application or permit.

***Response IX-2: ; Part IX has been removed from the final MSGP. The requirements for post construction stormwater controls designed in accordance with the New York State Stormwater Management Design Manual has been returned to the Sector requirements for landfills as it appeared in GP-0-11-009. Projects that meet the transition policy may elect to obtain coverage under the SPDES General Permit for Stormwater Associated with Construction Activity and continue to use the SWPPP developed with the 2008 version of the Design Manual.***

**Comment IX-3:** The Part IX requirement regarding the post construction stormwater management practices that meet the technical standards of the 2010 Stormwater Management Design Manual to be implemented at Section J and L sites cannot be met. The 2010 Stormwater Management Design Manual does not adequately address Green Infrastructure Techniques for industrial sites (i.e., hot spots).

***Response IX-3: Part IX has been removed from the final MSGP. The requirements for post construction stormwater controls design in accordance with the New York State Stormwater Management Design Manual has been returned to Sector L as it appeared in GP-0-11-009. Stormwater runoff from all impervious areas that is not handled as leachate must be captured and treated by post-construction stormwater management controls designed, constructed and maintained in conformance with the New York State Stormwater Management Design Manual (August 2010) or equivalent. The manual requires green infrastructure techniques to achieve runoff reduction of the water quality volume (WQv) to address the increased volume associated with development. The manual does acknowledge that there may be projects that cannot achieve runoff reduction of the full WQv and allows for a minimum reduction based on the soil type in the pre-developed condition. Some areas of a landfill are considered hot spots and designers must use non-infiltrative type practices to meet the RRv criteria. If a designer is having difficulty in meeting the treatment criteria of the manual, they should contact the Department for assistance.***

**Comment IX-4:** Disturbance of more than five (5) acres in areas with potential to discharge to surface waters of the State. The owner or operator shall not disturb greater than five (5) acres of soil at any one time without prior written authorization from the NYSDEC Regional Water Engineer. At a minimum, the owner or operator must comply with the following requirements in order to be authorized to disturb greater than five (5) acres of soil at any one time... The Regions review the E&S plan so a separate SWPPP is not warranted

***Response IX-4: The MSGP (Part III.A) includes provisions that allow the SWPPP requirements to be fulfilled by incorporating by reference other plans or documents otherwise required for the facility provided that the incorporated plan meets or exceeds the MSGP SWPPP requirements of Part III.C and the applicable activity- specific requirements in Part VIII. All plans incorporated by reference into the SWPPP become enforceable under the MSGP; however, this enforcement is limited only to those aspects of these other plans that are specifically referenced to provide information or practices required for the SWPP. If the existing document does not fully cover all requirements of the SWPPP, the document can be amended to fulfill the MSGP requirements in lieu of developing a second document.***

**Comment IX-5:** Post-construction Stormwater Management Requirements The owner or operator must:

- a. Document and incorporate into the master copy of the MSGP SWPPP, the policy and procedures in place to ensure operation and maintenance of the practices in accordance with the operation and maintenance plan and
- b. Document the modification of their deed of record to include a deed covenant that requires operation and maintenance of the practice(s) in accordance with the operation and Maintenance plan

Comment: Not clear what this entails or what the intent of deed covenant would mean for private property?

***Response IX-5: Post construction controls require long term maintenance. The SWPPP must specify adequate provisions to ensure the practices are not removed and are operated and maintained. Part IX has been removed from the final MSGP and requirements for post construction controls at landfills has been added to Sector L. The requirements for maintenance in Sector L have been revised to require an operations and maintenance plan that includes inspection and maintenance schedules and actions to ensure continuous and effective operation of each post-construction stormwater management practice. The plan shall identify the entity that will be responsible for the long term operation and maintenance of each practice. In order to ensure continuous***

*and effective operation of each practice, the SWPPP must have adequate legal provisions to ensure that the practices are not removed and are maintained. The responsibility for implementation of long term operation and maintenance of a post-construction stormwater management practice must be vested with a responsible party by means of a legally binding and enforceable mechanism. A deed or restrictive covenant is one type of mechanism that could be used for private property that would be tied to the land and notify future buyers of the location of the stormwater management practices and provide them with the maintenance requirements.*

**Comment IX-6:** At the stakeholder meetings, NYSDEC representatives implied that "construction MSGP" requirements would not apply to on-going mining operations (e.g., overburden stripping, relocation of internal haul roads, etc.). Is it the NYSDEC's intent to only apply the construction MSGP requirements to "greenfield" sites (i.e., a new undeveloped mine site on which no mining activities have previously occurred)?

**Response IX-6:** *The permit has been revised to remove the distinction between construction activity and other soils disturbance activities that may occur at a mine. Part IX has been removed and the Sector specific language has been clarified such that an erosion & sediment control plan (ESC) must be developed and implemented for mining activities that result in a soils disturbance with a potential to discharge to surface waters of the State. Mining activities have been defined to include activities associated with mining and reclamation including the exploration and land disturbance to determine the financial viability of a site, construction of haulageways, buildings and structures associated with mining. The ESC must be developed prior to commencement of any soils disturbance. Greenfield sites would need to ensure that the ESC accurately describes all soils disturbance activities and specifies erosion and sediment controls to be selected, installed, inspected and maintained during the activities necessary to establish the mine.*

**Comment IX-7:** The proposed requirements for needing a stand-alone Construction SWPPP prior to performing routine mining activities such as overburden removal, subsequent construction of access roads and installation of permanent structures is not necessary. Established surface mine operations by their very nature are essentially large stormwater collection systems due to their bowl shape, perimeter berms, internal sumps, detention basins, etc. In nearly all instances at an established mine site, stormwater drainage in areas where the clearing of overburden and relocation of haul roads is performed is already contained within the mine depression. Additionally, these BMPs and other sediment and erosion controls are already described in the Mine Land Use Plan, reviewed and approved by the NYSDEC under the SEQR process. Therefore, a construction SWPPP is unnecessary and adds yet another undue regulatory burden to the myriad of environmental regulations applied to mining operations.

Although the Draft revised MSGP does not require a separate Construction Stormwater MSGP, the proposed Draft will require Sector J facilities to comply with the majority of Construction Stormwater GP requirements. Therefore, for all intents and purposes, a Construction Stormwater GP is required for Sector J facilities. Applying many construction MSGP requirements to on-going mining operations will be prohibitive.

***Response IX-7: Part IX and the need for a standalone SWPPP has been removed from the permit. The Sector J requirements have been revised to clarify that the erosion & sediment control plan and associated inspections and corrective actions do not apply to areas that drain internal to the mine that do not have the potential to discharge to surface waters of the State. See Response IX-0 for additional details on changes to the Sector J requirements.***

**Comment IX-8:** Mining activities and associated run-off controls are already regulated under a NYSDEC Mined Land Reclamation Permit subject to the State Environmental Quality Review Act (SEQR), and issued by the Division of Minerals. Therefore, the proposed Sector J requirement for stand-alone Construction SWPPPs is redundant and will not lead to any improvement in stormwater quality from a mine site. The primary effect the proposed Sector J (Construction SWPPP) requirements will have is to impede business operations, cause delays in a short seasonal production schedule, and drive up the cost of construction aggregates across New York State.

If Construction SWPPPs will be required for Sector J facilities, the requirements should be limited exclusively to "greenfield" sites on which no mining activity currently exists, and only limited to the initial clearing of overburden and initial construction of the site access road(s) associated with the opening of a new mine site. They would be unnecessary at established mine sites, and have no environmental benefit.

The draft revisions to the MSGP, state that stormwater discharges from soil disturbances from "initial" exploration and construction and subsequent construction of access roads and other impervious areas with potential to discharge stormwater to surface water must be covered under a stand-alone Construction SWPPP. Often, initial exploration to determine the financial viability of a site will consist only of the drilling of several core holes. This activity does not warrant the need for a Construction SWPPP as there is limited ground disturbance. There is usually no removal of overburden ("stripping") involved when determining the economic viability of a mine site. Drilling of geologic cores is the most common method.

***Response IX-8: See response to Comment IX-0***

**Comment IX-9:** The definition of "access road" should specify a minimum road length that would subject a facility to the Construction SWPPP requirements.

***Response IX-9:*** *Part IX has been removed from the permit and the definitions for Sector J have been revised. Access road would fall under the definition of "haulageway" and any soils disturbance in areas with the potential to discharge to surface waters of the state would need to be addressed in the ESC developed as part of the SWPPP.*

**Comment IX-10:** There is no definition of a "permanent structure" within Sector J. Is the installation of a new or replacement aggregate plant, or portions of an aggregate plant (e.g., conveyor, wash plant, crusher, screen deck, etc.), considered to be a "permanent structure?" Again, replacement of these pieces of equipment are regular occurrences at an established mine site. These types of equipment replacements do not disturb large surface areas, if any, and they are already contained by the mine depression in nearly all cases. If these routine operations must have a stand-alone Construction SWPPP prior to each time they are performed, it will have a crippling effect on our business. Again this will delay projects being undertaken by federal, state, local, and private entities.

***Response IX-10:*** *Part IX has been removed from the permit. The sector requirements have been modified to clarify the activities and associated requirements that are covered under Sector J. "Mining activities" has been defined to include activities associated with mining and reclamation including the exploration and land disturbance to determine the financial viability of a site, construction of haulageways, buildings and structures associated with mining. The definition of mining includes activities associated with the preparation, washing, cleaning, crushing and stockpiling or other processing of minerals. The ESC plan and associated requirements apply to mining activities that result in soils disturbance in areas that have the potential to discharge to surface waters. Replacement of equipment associated with the preparation, washing, cleaning, crushing and stockpiling or other processing of minerals that do not result in a soils disturbance or are within the mine depression with no potential to discharge to surface waters of the State are not subject to the ESC plan and associated requirements.*

**Comment IX-11:** As is required under a Construction Stormwater GP, the revised MSGP proposes that the Construction SWPPP for Sector J facilities be prepared by a "Qualified Professional" (e.g., licensed Professional Engineer, Registered Landscape Architect, or other Department endorsed individual(s). What are the requirements for qualifying as a "Department endorsed individual?"

***Response IX-11: Part IX has been removed. The need for a qualified professional is not required for Sector J. With regard to the requirements for qualifying as a "Department endorsed individual," the Department included that term in the definition of qualified professional as a place holder in the event that additional certification programs emerged.***

**Comment IX-12:** The proposed language under Part IX refers exclusively to "contractor(s) or subcontractor(s)." Most mining operations do not normally hire outside contractors or subcontractors for routine removal of overburden, relocation of haul roads, etc. As currently drafted, the entire text of Part IX would not apply to the majority of mining operations since most facilities have the necessary personnel and equipment to perform these typical functions, and therefore, contractor(s) and subcontractor(s) are not needed. (M. Lewis)

Part IX.A.3 -The majority of the time the earth moving and materials processing plant set-up at mine sites is performed by mine site personnel. Contractors are typically only sparingly utilized at mines. The references to contractor personnel and certifications by contractors do not reflect typical mining operations. Also, the construction certification requirements are overkill. The certification in the MSGP SWPPP should suffice without the repetitive certification process imposed in the construction SWPPP requirements.

***Response IX-12: Part IX and the associated reference to contractors or subcontractors has been removed from the permit.***

**Comment IX-13:** As drafted, Part IX.A.4 will require that prior authorization from the NYSDEC Regional Water Engineer be obtained prior to the disturbance of greater than five (5) acres of soil at any one time. Under the current Mined Land Reclamation Laws, such notification is not required to be made to the Division of Minerals who is tasked with enforcing the mining regulations. The proposed MSGP should not attempt to regulate mining activities. (M. Lewis)

Part IX.A.4 - Surface mines typically disturb more than 5 acres of land, which is regulated through the NYSDEC Division of Minerals. There is no need to constantly be

requesting authorization from the NYSDEC Regional Water Engineer to expand the mine within the already permitted life of mine area. The proposed construction SWPPP requirement is duplicative and burdensome. It also imposes excess review and demands on the NYSDEC Regional Water Engineer.

***Response IX-13: Part IX and the associated 5 acre authorization requirements for mines has been removed from the permit***

**Comment IX-14:** Part 9 as drafted, will require soil stabilization of disturbed areas within seven (7) days of disturbance. Under the current Mined Land Reclamation Laws, the timeframe for stabilization is typically stated in the Mined Land Use Plan that is approved by the Division of Minerals who is tasked with enforcing the mining regulations.

***Response IX-14: The intent of MSGP is to regulate stormwater discharge from industrial activities that have the potential to discharge to waters of the State. Part IX has been removed from the permit. Sector J includes requirements for the development and implementation of an ESC plan for mining activities that result in a soil disturbance with a potential to discharge to surface waters of the State. The ESC must be designed in conformance with the New York State Standards & Specification for Erosion & Sediment Control, or equivalent which specifies the minimum requirements for an ESC plan including stabilization requirements (Page 2.3).***

**Comment IX -15:** The Draft MSGP requires multiple and frequent inspections by a “qualified inspector” which is limited to a Licensed Professional Engineer, Certified Professional in Erosion and Sediment Control, Registered Landscape Architect or someone working under the direction of one of these individuals. If routine mining operations such as clearing overburden and constructing/relocating internal haul roads will be regulated under the proposed Construction SWPPP requirements, mining companies will be required to employ full time Professional Engineers or Registered Landscape Architect, or hire full time consultants to perform all necessary inspections and reporting. This is especially true for mining companies with multiple locations spread out across New York State or those smaller operations without full time staff. In short, this unnecessary requirement will have a crippling effect on NYMaterials’ member company’s businesses.

***Response IX-15: Part IX and the associated inspections by a qualified inspector have been removed from the permit. The Sector J requirements state that qualified personnel may conduct the erosion and sediment control inspections. The MSGP defines “qualified personnel” as those individuals who***

*possess the knowledge and skills to assess conditions and activities that could impact stormwater quality and who can assess the effectiveness of BMPs. Individuals performing inspections for erosion and sediment control must have training in the principles and practices of erosion and sediment control means that the individual working under the direct supervision of the licensed Professional Engineer or Registered Landscape Architect has received four (4) hours of Department endorsed training in proper erosion and sediment control principles from a Soil and Water Conservation District, or other Department endorsed entity.*

**Comment IX-16:** As drafted, Part IX requires multiple and frequent inspections by "qualified inspector," which is limited to a Licensed Professional Engineer, Certified Professional in Erosion and Sediment Control (CPESC), Registered Landscape Architect, or someone working under the direction of one of these individuals. If the routine mining operations such as clearing overburden and constructing/relocating internal haul roads will be regulated under the Sector J Construction SWPPP requirements, mining companies will have to employ full time Professional Engineers or Registered Landscape Architects, or hire full time consultants, to perform all of the necessary inspections and reporting. This is especially true for mining companies with multiple locations spread out across New York State. Again, this unnecessary requirement will have a crippling effect on our business.

Many mines may only have 3-4 full-time employees. Requiring the breadth and frequency of inspections, inspector training, and reporting (like that required under a Construction GP as drafted in Part IX.) will most certainly be prohibitive to our operations. Realistically, it will be nearly impossible to comply with these proposed additional requirements, as well as run our business.

**Response IX-16:** *Part IX and the associated inspections by a qualified inspector have been removed from the permit. The Sector J requirements state that qualified personnel may conduct the erosion and sediment control inspections. The MSGP defines "qualified personnel" as those individuals who possess the knowledge and skills to assess conditions and activities that could impact stormwater quality and who can assess the effectiveness of BMPs. Individuals performing inspections for erosion and sediment control must have training in the principles and practices of erosion and sediment control means that the individual working under the direct supervision of the licensed Professional Engineer or Registered Landscape Architect has received four (4) hours of Department endorsed training in proper erosion and sediment control principles from a Soil and Water Conservation District, or other Department endorsed entity.*

**Comment IX-17:** The construction inspection requirements are excessive and will be burdensome for the industry. The inspection requirements already stipulated in the MSGP SWPPP are sufficient for the intent of protecting the quality of the waters of the State.

***Response IX-17:*** *Part IX has been removed from the permit. The Department agrees that the inspection requirements stipulated in the sector specific requirements are sufficient to address the soils disturbances that may occur at the mine.*

**Comment IX-18:** Part IX.A.5 -Mining is a transient process wherein the mineral extraction area is routinely expanding and haul roads are adjusted to maintain transport of the mined material to the processing plant and aggregate storage areas. The requirement to revise a SWPPP every time a haul road is lengthened or moved is burdensome and duplicative. The reporting requirements to the Regional Water Engineer are duplicative with those to the Division of Minerals personnel. These construction SWPPP requirements are not suited for mining operations that are long term. Imposing a construction SWPPP to Sector J is like forcing the square peg into the round hole.

***Response IX-18:*** *The permit has been revised to remove the distinction between construction activity and other soils disturbance activities that may occur at a mine. Part IX and the associated requirements for a stand-alone SWPPP have been removed from the permit. However, the SWPPP and associated erosion and sediment control plan are living documents that must be kept current and address all areas of disturbance that have the potential to discharge to surface waters of the State to ensure that the controls are effective at minimizing the discharge of pollutants associated with the industrial activity. If a haul road is lengthened in an area subject to the ESC plan, the ESC must be modified to ensure adequate controls are specified and implemented.*

**Comment IX-19:** Part IX.A.3.b. “The owner or operator shall maintain one copy of the stand-alone Construction SWPPP and all inspection reports at the construction site with the master copy of the facility’s MSGP - SWPPP, until all disturbed areas subject to this part have achieved *final stabilization*.” As with the SWPPP, permittees should be required to submit copies of the inspection reports to the Department to enhance regulatory oversight and facilitate prompt corrective action when necessary. Requiring the Department to retain copies also would make these documents publicly accessible, and help to ensure that the public can play a meaningful role in pollution monitoring.

***Response IX-19:*** *Part IX and the associated need for a stand-alone Construction SWPPP has been removed from the permit. It should be noted that all inspection reports must be maintained with the SWPPP developed in*

*conformance with the MSGP requirements (See MSGP Part III). The NOI must include information on the location of the SWPPP and how the public can request a copy of the SWPPP. The permit requires that the SWPPP is available for review (see MSGP Part III.D)*

**Comment IX-20:** Part IX.B.3 -Formalizing a construction SWPPP for every mine expansion or aggregate processing plant modification is burdensome and duplicative. Erosion and sediment control components are already incorporated in the SWPPP for the MSGP and in the MLRP. Pursuant to the proposed permit, the proposed construction SWPPP process would be activated at the start of every spring season and routinely during the mining season. Mines operate for decades. They are not short term construction events. The existing regulatory process is sufficiently adequate to protect the waters of the State.

**Response IX-20:** *See Response to Comment IX-0.*

**Comment IX-21:** Part IX.E -What is the difference between the MSGP Coordinator and the Regional Water Engineer? There is no definition or discussion of a MSGP Coordinator in the proposed permit.

Again, a mine is a long term operation with seasonal shut downs. As this permit is written then, a mine must provide in writing to the MSGP Coordinator that they are shutting down as each winter season approaches, and implement final stabilization. The existing mine and stormwater permit already covers this. This section is meant for a short term construction project, not a mining operation.

**Response IX-21:** *Part IX and the associated notification requirements have been removed. With regard to the difference between the MSGP Coordinator and Region Water Engineer, the MSGP Coordinator is located in Central Office (See Part I.E3 for contact information) and is responsible for the administration of the MSGP. The MSGP Coordinator receives the NOI, NOM, NOT, DMRs, ACRs and is the primary contact on issues related to the MSGP. The Regional Water Engineers (See Appendix F for contact information) are located in the Regional offices and are responsible for the implementation and oversight of all SPDES permits.*

**Comment IX-22:** Surface mine operations by their very nature are essentially large storm water collection systems due to their bowl shape, perimeter berms, internal sumps, detention basins and other stormwater control features. Nearly universally at an established mine site, stormwater drainage in areas where the clearing of overburden and relocation of haul roads is performed is contained within the mine depression. In addition these activities and associated stormwater controls are already regulated under the MLRL and its implementing regulations. Thus, the proposed requirement for stand-alone construction SWPPPs is redundant and will not lead to any improvement in stormwater quality from a mine site.

***Response IX-22: Part IX and the need for a stand-alone SWPPP have been removed. The Sector J requirements have been revised to clarify that the erosion & sediment control plan and associated inspections and corrective actions do not apply to areas that drain internal to the mine that do not have the potential to discharge to surface waters of the State.***

**Comment IX-23 The Draft MSGP contains terms not defined or inadequately defined.** The Draft MSGP contains numerous terms that are not defined or are inadequately defined. The lack of clear definitions will lead to inconsistent and arbitrary application by DEC staff responsible for implementing the new requirements in the Draft MSGP. Below is a representative sampling of the most troublesome terms and is certainly not an exclusive list.

The Draft MSGP states that “the owner or operator with activities covered under [Sector J] are not required to obtain separate coverage under the SPDES General Permit for Stormwater Discharges Associated with Construction Activities for soil disturbances from initial exploration and construction or subsequent construction of access road, building and other permanent structures in areas with the potential to discharge stormwater to surface water” if, among other things, it prepares a stand-alone Construction SWPPP (Draft MSGP, p 88).

The definitions or lack thereof in the Draft MSGP is troublesome to NYMaterials. The definitions listed in the Draft MSGP, Sector J does not include one for “initial exploration and construction”. Absent a definition, neither the regulated community nor DEC personnel assigned to implement this definition will have any guidance as to what constitutes “initial exploration and construction”. This will lead to inconsistent and arbitrary application of the Draft MSGP’s requirements. Given our experience with how ambiguous regulations are applied, we suspect any ambiguity will be construed against our industry. DEC should remove this language or at least draft a definition for review and comment by the regulated community.

Similarly troublesome is the definition of “exploration and construction” which as proposed includes the “removal of overburden to expose mineable minerals.” This definition is troublesome since it ignores how mining operations work. Consistent with DEC mining permit requirements, implementation of the minerals program by DEC staff and best practices, overburden is not completely stripped from all areas of the permitted mine all at once. Instead, overburden removal occurs gradually over time as the mine operators progresses into new mining phases to access additional mineral reserves. DEC needs to redraft the definition of “exploration and construction” to clarify that the on-going removal of overburden as mining operations progress is not subject to the proposed Construction SWPPP requirements. We would encourage Division of Water staff to discuss this issue with DEC Division of Minerals.

***Response IX-23:*** *The reference to the different phases associated with mining was continued from the previous version of the MSGP (GP-0-06-002) and reflects language used in EPA’s MSGP. However, it is agreed that the MSGP should be consistent with methods and terminology used within the industry within New York State. Therefore, the MSGP no longer refers to the different phases of mining and instead includes the definition of mining and reclamation to be consistent with the MLRL. A definition for “Mining Activity” has been added to ensure that all activities listed under EPAs permit are included. Definitions for “haulageway”, “mine”, “mining” and “mining activity or activities” have been added to clarify the activities that are covered under Sector J. An ESC plan must be developed and implemented for mining activities that result in a soil disturbance with the potential for stormwater discharge to surface waters of the State. See response to comment IX-6 for additional clarifications on Sector J requirements*

**Comment IX-24: The Draft MSGP is directly contrary to the State Mined Land Reclamation Law** The attempt in the Draft MSGP to divide a mining operation into a “construction phase”, “operation phase” is directly contrary to the State Mined Land Reclamation Law (ECL Article 23, Title 27) (“MLRL”), its implementing regulations (6 NYCRR Part 420) and DEC Division of Mineral Resources’ administration of the mining program since the enactment of the MLRL in 1975.

The MLRL’s definition of “mining” is very broadly defined. The MLRL defines “mining” as including “any activities or processes or parts thereof, for the extraction or removal of minerals from their original location” and “extraction of overburden and minerals from the earth” (*see*, ECL § 23-2705[8]). Mining, therefore, includes such activities as the construction of access and haul roads, screening berms, removing timber, tree plantings and monitoring wells. While those unfamiliar with DEC’s minerals

program may improperly classify such activities as a so-called “construction phase”, it is clear that pursuant to the State mining law these activities are “mining.” In fact, these types of activities were recently held by the New York State Court of Appeals to constitute mining activities sufficient to vest a mining operators land use rights against a prohibitory municipal zoning ordinance.

Pursuant to the MLRL, mining also includes the actual “extraction or removal of minerals” from the earth and the “preparation, washing, cleaning, crushing, stockpiling or other processing of minerals at the mine location so as to make them suitable for commercial, industrial or construction use” (*see*, ECL § 23-2705[8]). Thus, the MLRL’s definition of mining does not distinguish between those activities that are necessary to prepare a site for mining and those that involve the actual excavation of material from the ground. All of these activities are considered mining under the MLRL, and are conducted pursuant to an approved DEC mining permit and approved mined land use plan.

The MLRL and implementing regulations require a mining operator to prepare a Mined Land Use Plan (MLUP) outlining, in graphic and narrative form, the plans for mining and reclamation of the site. The MLUP is also required to include a written description of the operator’s measures to be taken to minimize adverse environmental impacts from mining, including control of stormwater. Consistent with the statutory definition of “mining”, the activities required for preparing the site for mining, activities involving actual excavation of materials and reclamation of the site are not treated separately, or in a vacuum. They are all required to be addressed in one document as the blueprint for “mining activities” at the site.

Therefore, there is no distinction between “construction” and “operation” phases in the MLRL and there is no need to create an inconsistent, confusing distinction in the MSGP. As such, there is no need or legal justification to implement “construction” stormwater requirements on the aggregate mining industry in New York State. The Draft MSGP should be revised accordingly.

***Response IX-24: The reference to the different phases associated with mining was continued from the previous version of the MSGP (GP-0-06-002) and reflects language used in EPA’s MSGP. However, it is agreed that the MSGP should be consistent with methods and terminology used within the industry within New York State. Therefore, the MSGP no longer refers to the different phases of mining and instead includes the definition of mining and reclamation to be consistent with the MLRL. A definition for “Mining Activity” has been added to ensure that all activities listed under EPAs permit are included. Definitions for “haulageway”, “mine”, “mining” and “mining activity or activities” have been added to clarify the activities that are covered under Sector J. Access roads would be included in the definition of “haulageway” (all***

*roads utilized for mining purposes, together with that area of land over which material is transported that are located within the permitted area). An ESC plan must be developed and implemented for mining activities that result in a soil disturbance with the potential for stormwater discharge to surface waters of the State. See response to comment IX-6 for additional clarifications on Sector J requirements.*

**Comment IX-25:** Although the Draft MSGP states that a construction SWPPP is required for “construction of access roads”, “access roads” is not defined. In the first instance, construction of access roads or haul roads should not be subject to this requirement. Construction of access roads and haul roads is part of the typical on-going operations at a surface mine and falls within the definition of “mining” in the MLRL. That aside, DEC needs to draft a definition of “access road” to clarify that it refers to actual mine entrance(s) from public thoroughfares, and that the internal haul routes within the mine are not included within this definition of “access road” and are therefore exempt from any requirement to obtain a separate Construction SWPPP, if the Draft MSGP is adopted.

Similarly, there is no definition of a “permanent structure” within Sector J. It is not clear if the installation of a new or replacement aggregate plant or portions of an aggregate plant (e.g., conveyor, wash plant, crusher, screen deck, etc.) is considered to be a “permanent structure”. As an initial matter, components of mineral processing fall within the definition of mining under the MLRL and should not be considered “construction.” Notwithstanding, the term “permanent structure” needs to be defined to avoid a situation where a DEC Division of Water personnel visits a mine site and confuses mining activity with what he or she perceives to be construction.

The above referenced terms should be defined or if already defined should be revised and clarified to avoid inconsistent and arbitrary implementation of the Draft MSGP on the regulated community.

**Response IX-25** *The reference to the different phases associated with mining was continued from the previous version of the MSGP (GP-0-06-002) and reflects language used in EPA’s MSGP. However, it is agreed that the MSGP should be consistent with methods and terminology used within the industry within New York State. Therefore, the MSGP no longer refers to the different phases of mining and instead includes the definition of mining and reclamation to be consistent with the MLRL. A definition for “Mining Activity” has been added to ensure that all activities listed under EPA’s permit are included. Definitions for “haulageway”, “mine”, “mining” and “mining activity or*

*activities” have been added to clarify the activities that are covered under Sector J. An ESC plan must be developed and implemented for mining activities that result in a soil disturbance with the potential for stormwater discharge to surface waters of the State.*

**Comment IX-26:** We are sand and gravel mining company located in southwestern New York, DEC Region 9. The products we supply to market are the basic ingredients of every public works and infrastructure project undertaken in this State. They are also a main component of virtually every private project related to housing and commerce.

Compliance with environmental regulations in New York State is a daunting task due the myriad of Agencies exerting jurisdiction and the multiple facets of the rules and mandates they oversee. Additionally, there seems no end to the modification of existing rules and development of new regulations adding to an already staggering regulatory burden. This constant and ever-changing regulatory onslaught is the reason New York State is losing private business at a rapid pace and is also the reason new businesses choose to operate elsewhere. The cost associated with staying in compliance has become ridiculously absurd and it is driving people and jobs out of the State.

One of the greatest regulatory flaws that leads to wasted time, effort, and money is overlap caused by multiple rules governing the same action or situation. Such is the case with stormwater regulation and the mining industry. New York State has a strong set of regulations in place that govern mining. An applicant for a mining permit in New York subjected to a thorough review of all of the aspects of the proposed operation before permit to operate is granted. The entire plan for the mine, for its proposed duration, must be described in both written and graphic format through the development of a Mined Land Use Plan. These stand alone plans require the applicant to describe in detail, among other things, how the operation will impact the environment including impacts to stormwater. Once a permit has been issued, the detailed plans become enforceable by the Department in case there is deviation from them. It is redundant and unnecessary for the Department to enforce additional stormwater regulation when the topic is already addressed through the Mine Land Reclamation Law (MLRL).

That notwithstanding, the proposed changes to the MSGP under consideration currently do not provide any regulatory relief or retraction of redundancy but do just the opposite, adding extra layers of regulation by blurring the line between a mine and a construction site. Due to the aforementioned MLRL, which construction sites are not subject to, there is a clear distinction between actions that occur at a mine (i.e. stripping, building/extending haul roads, relocation of plant components) and those which are common to a construction operation. The MERE considers the impacts of all activities

within the mine limits over the entire life of the mine; there is no need to subject a mine operator to additional stormwater regulations related to construction within the boundaries of a permitted mine site. These activities are already covered under existing law. If there are documented problems where impacts related to mining are not being controlled it would seem far more prudent, and much cheaper, for the Department to upgrade its oversight rather than create additional regulations. Let's face it, the Department can't keep up with its mission as it is. Does it make sense to create more work through regulation addressing topics already covered under another statute? If we are going to prosper as a State we have got to get away from that mentality.

Please put on the record that the Gematt Family of Companies is opposed to the proposed changes to the MSGP related to mining being considered by DEC. We have operated in New York State since the mid 1950's and would like to continue to provide high quality materials and solid gainful employment to citizens of the State. The continued ratcheting down of redundant regulation however, will make the goal much more difficult to achieve. Thank you for considering our position.

**Response IX-26:** *See response to Comment IX-0*

**Comment IX-27:** Hanson Aggregates New York LLC is aware of the proposed changes to the Multi-Sector General Permit for Industrial Activities that are being proposed by NYSDEC. The changes being suggested detrimentally affect the mining industry and in particular our company. The changes will substantially increase the cost of doing business in New York and will involve a substantial and perhaps prohibitive cost, to comply with the newly proposed regulations without a corresponding environmental benefit. Therefore, Hanson Aggregates is opposed to the changes and further supports New York Construction Materials Association's (NY Materials) efforts to come to a reasonable resolution of these issues with NYSDEC. We urge the NYSDEC to continue to work with NY Materials and not proceed with the adoption of the MSGP as currently proposed.

**Response IX-27:** *See response to Comment IX-0*

**Comment IX-28:** Callanan Industries, Inc., a successful aggregates and heavy construction business in New York since 1883 and member of the New York Construction Materials Association, is aware of the proposed changes to the Multi-Sector General Permit for Industrial Activities that are being proposed by NYS DEC.

The changes being suggested detrimentally affect the mining industry and in particular our company. The changes will substantially increase our cost of doing business in New York and will involve a substantial, if not prohibitive cost, to comply with the newly proposed regulations without what we can rationalize as a corresponding benefit to the environment.

Callanan Industries therefore fully opposes the proposed changes and further supports New York Construction Materials' (NY Materials) efforts to come to a reasonable resolution of these issues with NYS DEC. We urge the NYS DEC to continue to work with NY Materials and not proceed with the adoption of the MSGP as currently proposed.

**Response IX-28** : *See response to Comment IX-0*

**Comment IX-29**: The Dolomite Group is aware of the proposed changes to the Multi-Sector General Permit for Industrial Activities that are being proposed by NYSDEC. The changes being suggested detrimentally affect the mining industry and in particular our company. The changes will substantially increase the cost of doing business in New York and will involve a substantial, and perhaps prohibitive cost, to comply with the newly proposed regulations without corresponding environmental benefit. Therefore The Dolomite Group is opposed to the changes and further supports New York Construction Materials Association's (NY Materials) efforts to come to a reasonable resolution of these issues with NYSDEC. We urge the NYSDEC to continue to work with NY Materials and not proceed with the adoption of the MSGP as currently proposed. Thank you for your time.

**Response IX-29**: *See response to Comment IX-0*

## **Appendix A – Definitions and Acronyms**

**Comment AppA-1:** NYSDEC Appendix A: NYSDEC should add the following definitions to Appendix A: Action Area; Facility or Activity; New Discharger; New Source; and Point Source. (J. Gratz, R2 EPA)

***Response AppA-1:*** *The final MSGP contains definitions for Action Area, Facility or Activity and Point Source. The final MSGP does not use the terms “New Discharger” or “New Source” and therefore, does not include definitions for these terms.*

**Comment AppA-2:** The acronym BPT (Best Practicable Technology) is utilized and has not been previously defined, nor is it defined in the acronym definition list in Appendix A.

***Response AppA-2:*** *The final MSGP includes BPT in the acronym list and Appendix A has been updated to define Best Practicable Control Technology Currently Available (BPT) as meaning the first level of technology-based standards established by the CWA to control pollutants discharged to waters of the U.S. BPT effluent limitations guidelines are generally based on the average of the best existing performance by plants within an industrial category or subcategory.*

## General Comments

**Comment GC-1: Request for Public Hearing** Under Article 70 (Uniform Procedures) of the New York State Environmental Conservation Law (ECL), after evaluating public comments on a permit application, DEC must "determine whether or not to conduct a public hearing on the application." ECL §§ 70-0119(1). Such determination shall be based on whether the comments raise substantive and significant issues relating to any findings or determinations the department is required to make [pursuant to the ECL], including the reasonable likelihood that a permit ... can be granted only with major modifications to the project because the project as proposed may not meet statutory or regulatory criteria or standards." ECL §§ 70-0119(1). In particular, "where any comments received from members of the public or otherwise raise substantive and significant issues ... and resolution of any such issue may result in ... the imposition of significant conditions..., the department shall hold a public hearing." /d. (emphasis added); see also 6 NYCRR § 621.8(b) (same).

Public hearings on SPDES permits must be held according to the provisions of Part 624, which provide that the first portion of the hearing process is a "legislative hearing" during which unsworn statements are received from the public and the parties. See 6 NYCRR §§ 624.2(t), 624.4(a). Following the legislative hearing, but prior to an adjudicatory hearing, the administrative law judge (ALJ) must schedule an issues conference in order to, inter alia: (1) narrow or resolve disputed issues of fact without resort to taking testimony; (2) determine whether disputed issues of fact that are not resolved meet the standards for adjudicable issues; and (3) determine whether legal issues exist whose resolution is not dependent on facts that are in substantial dispute and, if so, to hear argument on the merits of those issues.<sup>2</sup> 6 NYCRR §624.4(b)(2).

A proposed issue is adjudicable if it is both substantive and significant. 6 NYCRR §624(c)(1)(iii). The regulations further provide that, "an issue is substantive if there is sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry."

---

<sup>2</sup> Where substantive and significant legal issues are not dependent on substantially disputed facts, adjudication is unnecessary and the ALJ may direct DEC staff to revise the draft permit to comport with the law. *See, e.g.,* IN THE MATIER OF MODIFICATION OF STATE POLLUTANT DISCHARGE ELIMINATION SYSTEM (SPDES) PERMITS PURSUANT TO ENVIRONMENTAL CONSERVATION LAW ARTICLE 17 AND 6 NYCRR PARTS 621, 624 AND 750 FOR FOURTEEN PUBLICLY OWNED SEWAGE TREATMENT PLANTS OPERATED BY THE CITY OF NEW YORK'S DEPARTMENT OF ENVIRONMENTAL PROTECTION, Ruling on Proposed Adjudicable Nitrogen Issues and Party Status (March 16, 2007) at 22 (identifying a "legal and policy matter" as substantive and significant with no factual issues in dispute and directing DEC staff to revise draft SPDES permits).

Id., § 624(c)(2). "An issue is significant if it has the potential to result in a major modification to the proposed project or the imposition of significant permit conditions in addition to those proposed in the draft permit." Id., § 624(c)(3).

The issues raised in this comment letter meet the criteria for substantive and significant issues requiring that an adjudicatory hearing, in addition to a legislative hearing, be held because those issues have the potential to result in significant additional permit conditions in the MSGP and would prompt a reasonable person to inquire further as to whether the MSGP as written is sufficient to ensure a permittee's compliance with the federal Clean Water Act and state law requirements. Since we can demonstrate that the proposed permit does not meet statutory or regulatory criteria or standards, our comments raise a reasonable likelihood that the permit can be issued only with major modifications or the imposition of significant additional permit conditions. For those reasons, the commenters are entitled to legislative and adjudicatory public hearings on the MSGP.

***Response GC-1: Pursuant to ECL §70-0119 and 6 NYCRR 621.8(b), the Department has determined that no substantive and significant issues have been raised and therefore, there is no need to refer the MSGP to the Office of Hearings and Mediation Services for a hearing. This determination notwithstanding, the Department reserves any and all rights regarding the applicability of the permit hearing process to SPDES general permits.***

**Comment GC-2: Failure to Comply with the State Environmental Quality Review Act** DEC is required to comply with the State Environmental Quality Review Act, ECL Article 8 ("SEQRA") in its consideration of issuance of the Draft MSGP. ECL 8-0105 (4) defines "actions" under SEQRA to include "issuance of ... a permit". Clearly, the Draft MSGP falls within this definition and as such the DEC is required to assess the entire range of potential environmental impacts, including socio-economic impacts, which may result from the issuance of the Draft MSGP.

The Notice of Publication for the Draft MSGP states that the action "is not subject to SEQR because it is a Type II action." The Notice, however, does not provide what type of Type II action this action purportedly falls under. The only conceivable Type II action that this could even arguably fall within is for "permit renewals...where there will be no material change in permit conditions." While designated as a "renewal" of the MSGP, the proposed draft is anything but since it includes new burdensome requirements and countless changes to the existing MSGP. In fact, DEC's own Fact Sheet for the Draft MSGP states that "[t]here are several *major changes* in this permit compared to the previous permit." Obviously, this cannot be considered a "straight" renewal of a permit.

Therefore, DEC's consideration of the Draft MSGP is an action subject to the requirements of SEQRA.

***Response GC-2: Subsequent to the Notice of Publication for the Draft MSGP, the Department has amended its SEQR determination. The Department, as lead agency, has determined that the renewal and modification of the SPDES General Permit for Stormwater Discharges Associated with Industrial Activity (GP-0-11-009) as GP-0-12-001, is an unlisted action and will not have a significant effect on the environment. Revisions were undertaken for the purposes of making the MSGP more closely reflect the United States Environmental Protection Agency's (USEPA) Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity and to address public comments received during the 30 day public comment period. Thus, a Draft Environmental Impact Statement will not be prepared. A short Environmental Assessment Form has been prepared. A State Environmental Quality Review Negative Declaration was also prepared and is on file. All documents are available from the Department upon request.***

**Comment GC-3: PAHs in Coal Tar Paving Sealants** DEC should ban coal tar pavement sealants at industrial facilities covered by the MSGP by including a non-numeric effluent limitation that prohibits the use of any pavement sealant product containing coal tar. Many of the outdoor surfaces at industrial facilities are paved. A large number of these paved surfaces are also "sealed"- a thin, paint-like coating called pavement sealant (or pavement sealcoat) is applied to the asphalt. And many of the pavement sealants marketed in New York are made from refined coal tar- a toxic by-product of the coal coking process that is also referred to as coal tar pitch or RT-12. Coal tar pavement sealants frequently contain hundreds of times more polycyclic aromatic hydrocarbons (PAHs) than competing sealant products made from asphalt.<sup>3</sup>

These sealants are a threat to public health and the environment because they release PAHs into the environment that can be toxic or carcinogenic at concentrations of one part per billion or less. Once applied to pavement, coal tar based sealants begin to degrade under the heavy friction of vehicles. In recent years, federal scientists have learned that, as these sealants degrade into microscopic dust particles they release millions of pounds of PAHs that are washed by stormwater into nearby urban and suburban environments. In 2010, the US Geological Survey (USGS) concluded that coal tar pavement sealants are primarily responsible for an upward trend in the PAH concentrations of urban and

---

<sup>3</sup> The exact ratio depends on the formulation of the two products being compared. See Peter C. Van Metre, Barbara J. Mahler, "Contribution of PAHs from coal-tar pavement sealcoat and other sources to 40 U.S. lakes," 409 *Science of the Total Environment* 334, 335 (2010). There are also alternative sealant products on the market that are entirely PAH free.

suburban waterbodies across much of the United States.<sup>4</sup> EPA has just released a study confirming that coal tar pavement sealants release hundreds of times more PAHs into the environment than other kinds of sealant.<sup>5</sup> Other studies show that aquatic ecosystems contaminated with PAH-laden sealants are less biologically robust, and that animals exposed to these degraded sealants suffer from problems including developmental delays and stunting, poor reflexes, tumors, and early death.

Besides the USGS and EPA, other scientists and government employees in other jurisdictions have reported widespread PAH impairments:

- The Minnesota Pollution Control Agency has found PAH impairments throughout Minnesota's urban watersheds that are attributable to urban runoff.<sup>6</sup>
- Urban runoff is estimated to account for 36% of the total PAH input into Rhode Island's Narragansett Bay.<sup>7</sup>
- In Florida, PAH impacts were discovered in soils adjacent to and beneath an asphalt parking lot of a former retail shopping center. Concentrations adjacent to the parking lot decreased with increasing distance from the parking lot.<sup>8</sup>
- In 2003, Ohio EPA assessed PAH concentrations in the Mad River Basin and found that a large proportion of the samples contained PAH concentrations that were greater than the Probable Effects Concentration (PEC) guidance values published in the academic literature.<sup>9</sup>
- Virginia DEQ has determined that the principal aquatic stressors impacting the Lewis Creek Watershed are lead, total PAHs and sediments.<sup>10</sup>

---

<sup>4</sup> See, e.g. Peter C. Van Metre, Barbara J. Mahler, "Contribution of PAHs from coal-tar pavement sealcoat and other sources to 40 U.S. lakes," 409 *Science of the Total Environment* 334, 335 (2010).

<sup>5</sup> Assessment of Water Quality of Runoff From Sealed Asphalt Surfaces, EPA, September 20 II, available at [www.epa.gov/ORDINRMRUpubs/600r/0/78/600r/0/78.pdf](http://www.epa.gov/ORDINRMRUpubs/600r/0/78/600r/0/78.pdf)

<sup>6</sup> Minnesota Pollution Control Agency, *Contamination of Stormwater Pond Sediments by Polycyclic Aromatic Hydrocarbons (PAHs) in Minnesota* (2010), available at: <http://www.leg.state.mn.us/docs/2010/other/100587.pdf>

<sup>7</sup> Christopher M. Teaf, "Polycyclic Aromatic Hydrocarbons (PAHs) in Urban Soil: A Florida Risk Assessment Perspective," 1 *International Journal of Soil, Sediment and Water*, Article 2, at 5, <http://scholarworks.umass.edu/intlissw/volliss2/2> (2008).

<sup>8</sup> /d., at 11.

<sup>9</sup> /d. at 9.

<sup>10</sup> /d.

Many of these PAH impairments are attributable to stormwater runoff from paved surfaces and there is good reason to believe that such contamination is widespread throughout New York State as well.

There are safer and widely-used alternatives to coal tar based products, including asphalt based and PAH-free sealants. Sealants made with asphalt instead of coal tar, for example, contain 1000 times fewer PAHs, but are similar in cost and performance. Historically, asphalt- based sealants have dominated the western U.S. market, while coal tar sealants have been more prevalent east of the Rocky Mountains. In cities and states where coal tar sealants already are banned, they have been replaced with asphalt-based sealants without any reported disruption.

More than 25 jurisdictions around the United States, including New York's Suffolk County, have banned or restricted the use of coal tar pavement sealants. The State of Washington and the District of Columbia have enacted a complete ban on coal tar pavement sealants and both Minnesota and Massachusetts have enacted severe restrictions on their use. New York should follow suit with a complete ban. Until such a ban is enacted, however, DEC's obligations under state and federal law require the agency to prohibit the use of coal tar pavement sealant at industrial facilities.

**Relevant Authority:** The Clean Water Act obligates the agency to ban the use of coal tar pavement sealants at industrial facilities. EPA regulations require that a general NPDES permit contain appropriate technology-based effluent limits. See 40 C.F.R. § 122.44(a) and discussion above in Section I. A general permit does not meet the BAT effluent standard unless it bans the use of coal tar pavement sealants because any user of coal tar pavement sealant can easily and cost-effectively eliminate a major source of PAHs simply by switching to an asphalt or PAH-free sealant product. There are no technical, engineering, or economic considerations preventing such a switch, and the alternatives are widely available. Further, federal regulations require that a general NPDES permit contain water quality based effluent limits for pollutants for which the state determines that there is a reasonable potential for the pollutant to cause or contribute to a violation of water quality standards. See 40 C.F.R. §122.44(d)(1)(iii). Where they are used near a water body that is impaired for PAHs, coal tar pavements sealants will cause or contribute to a violation of water quality standards. Therefore, NPDES permits must prevent the discharge of PAHs in order to meet the Clean Water Act's technological requirements and to protect water quality.

**Recommendation No.1:** DEC should ban the use of coal tar sealants at industrial facilities. In particular, the MSGP should contain, as a BMP and a non-numeric effluent limit, a prohibition on the use of coal tar based pavement sealants. The current MSGP does not authorize the discharge of hazardous substances. MSGP Part II.B.I (p. 10). Sixteen of the PAHs commonly found in coal tar pavement sealant are EPA priority

pollutants and the Department has listed these PAHs as hazardous substances.<sup>11</sup> Therefore, the discharge of PAHs from a paved surface at an industrial facility - particularly in the quantities that emerge over time from a coal tar sealed parking lot- is a clear violation of the existing MSGP. Rather than issuing notices of violation to hundreds of covered facilities, DEC should revise the MSGP to eliminate the senseless environmental threat posed by coal tar pavement sealants.

Recommendation No. 2: DEC should extend the ban to all paved surfaces at industrial sites. In other words, DEC should not only ban the use of coal tar pavement sealants on paved areas that are traditionally within the definition of an area dedicated to industrial activity, it should also extend the ban to other paved surfaces at industrial facilities such as employee parking lots. This issue arises because, in establishing the 1999 Phase II stormwater regulations, EPA determined that administrative and employee parking lots are non-industrial areas and are not subject to industrial stormwater permit requirements. See 40 C.F.R. § 122.26(b)(14). But EPA explained that its decision to exclude employee parking lots and similar paved surfaces from permitting was based on the lack of "data indicating that discharges from these areas at an industrial facility cause significant receiving water impairments."<sup>12</sup>

Today, DEC and regulators around the country have access to a considerable volume of data, compiled by the USGS and others, indicating that even a single employee or administrative parking lot can cause a significant receiving water impairment for PAHs if it is sealed with a coal tar pavement sealant. Thus, DEC has ample reason to address this regulatory lacuna. It also has clear authority, both under state law and under EPA's reservation of residual authority. See 40 C.F.R. 122.26(a)(9). Thus, DEC should revise the Multi-Sector General Permit to include a ban on the use of coal tar pavement sealants on every paved surface at industrial facilities, including administrative and employee parking lots and similar areas.

***Response GC-3: Commenter suggests that the Department should ban coal tar pavement sealants at industrial facilities covered by the MSGP by including a non-numeric effluent limitation that prohibits the use of any pavement sealant product containing coal tar. This issue is not appropriate for resolution in the MSGP. The MSGP only regulates stormwater discharges that are associated with industrial activity, and this would not include most paved areas where such sealants would be used. Also, as the commenter points out, the MSGP already***

---

<sup>11</sup> See 6 N.Y.C.R.R. § 597 (listing Acenaphthene, Acenaphthylene, Anthracene, Benz[a]anthracene, Benzo[a]pyrene, Benzo[b]fluoranthene, Benzo[ghi]perylene, Benzo[k]fluoranthene, Chrysene, Dibenz[a,l]anthracene, Fluoranthene, Fluorene, Indeno[1,2,3-cd]pyrene, Naphthalene, Phenanthrene, and Pyrene as hazardous substances).

<sup>12</sup> EPA, "National Pollutant Discharge Elimination System-Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges," 64 Fed. Reg. 68,722, 68,783 (Dec. 8, 1999).

*prohibits the discharge of hazardous substances (as listed in 6 NYCRR Part 597) or petroleum. Commenter asserts that the Department could use residual designation authority to regulate PAHs. However, staff have not yet determined that the discharge of PAH contributes to a violation of a water quality standard or is a significant contributor of pollutants to New York waters. Although commenter cites technical studies on PAHs impact on waterbodies (none of which involve New York waters), commenter only states “there is good reason to believe that such contamination is widespread throughout New York State as well.” Therefore, commenter’s reliance on 40 CFR 122.44(d)(1) is misplaced.*

*The Department believes that further study is needed to determine the impacts of Coal Tar Sealants/PAHs on New York waters and determine an appropriate approach. The MSGP Part I.B.1.a.2.a includes a non-numeric effluent limitation that requires owners or operators to minimize the exposure of manufacturing, processing and material storage areas and minimize exposure of chemicals by replacing with a less toxic alternative, if practicable. The term “minimize” means to reduce and/or eliminate to the extent achievable using control measures (including best management practices) that are technologically available and economically achievable (BAT) and practicable (BPT) in light of best industry practice. To determine technological availability and economic achievability, an owner or operator needs to consider what control measures are considered “best” for their industry, and then select and design control measures for their site that are viable in terms of cost and technology. If there are safer and widely-used alternatives to coal tar based products and there are no technical, engineering, or economic considerations preventing such a switch, then the owner or operator should replace them with their less toxic alternative.*