

## 1. Introduction

Colorado Mining Association (“CMA”) submits these comments on the draft general permit for stormwater discharges associated with active and inactive metal mining industrial activity, CDPS Permit No. COR040000 (“draft permit”), which went to public notice on July 1, 2022.<sup>1</sup> CMA is providing these in word format as requested by the Water Quality Control Division (“Division” or “WQCD”).<sup>2</sup>

CMA is concerned that the draft permit documents expand on the authority of the Division. Some of the terms and conditions in the draft permit appear to encroach on the regulatory duties assigned by statute to the Water Quality Control Commission (“Commission” or “WQCC”) or the Division of Reclamation, Mining and Safety (“DRMS”). Certain terms and conditions may even go beyond the authority permitted under the Colorado Water Quality Control Act (“CWQCA”) and the federal Clean Water Act (“CWA”). As a result, this draft general permit is not consistent with statute or regulation.

CMA is particularly concerned about the following:

- Numeric limitations based on the U.S. Environmental Protection Agency (“EPA”) Effluent Limitation Guidelines (“ELGs”) which were not developed to apply to stormwater.
- Numeric limitations based on the state’s water quality standards, which EPA has never required for stormwater in its own multi-sector general permit (“MSGP”), and which the Commission did not intend to apply to stormwater.
- Whole effluent toxicity (“WET”) testing requirements, which should never apply to stormwater.
- Requirements related to per- and polyfluoroalkyl substances (“PFAS”), contrary to the Commission’s PFAS policy, Policy 20-1.
- The excessive frequency of both monitoring and inspections, with no distinguishment between active and inactive mines.
- The potential that this general permit could apply to thousands of sites that were never previously within its coverage.

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<sup>1</sup> CMA notes that revised drafts were shared with certain certificate holders on July 13, 2022, but not communicated on the Division’s website nor via any of the email lists originally used to notify of the July 1 drafts. CMA has concerns about whether this permit has been properly noticed.

<sup>2</sup> CMA did not use the Division’s suggested template due to the length of these comments. CMA notes there is no statutory or regulatory requirement to use this template.

- The economic unreasonableness and feasibility of applying the substantial new limitations, monitoring, and other requirements.

CMA is also concerned about the variety of terms and conditions that could be included in a certification, as it is unclear from the general permit what a certification might include. It appears that the Division will ultimately make case-by-case determinations of what conditions will be in a certification. There is no public notice and comment process on general permit certifications, so there may not be an opportunity to explain to the Division why a certain term and condition is incorrect, infeasible, or that more time is needed to comply with a certain condition. CMA is further concerned about this because of the Division's position that there are no administrative appeals allowed for general permit certifications.

CMA is also concerned about the economic costs to comply with a certification under this general permit, and concerned that it could have unintended effects to businesses. See Legislative's Declaration under the State Administrative Procedure Act ("APA"), C.R.S. § 24-4-101.5. As noted in these comments, CMA requests that the Division provide a list of analysts so that a cost-benefit analysis can be performed under C.R.S. § 25-8-503.5.

Contrasted with other general permits, the Division did not engage in a robust stakeholder process. More stakeholder discussion would have enabled a better understanding of the new terms and conditions, as well as the feasibility of implementing these terms and conditions for stormwater runoff at inactive and active metal mining facilities. Given the extensive nature of these comments and CMA's concerns, CMA requests that the Division engage in stakeholder discussions, and then issue a second draft general permit for notice and comment.

## **2. Inadequate stakeholder process**

**Parts:** Fact Sheet Part IV; Permit & Fact Sheet generally

**Comments:** The Division's outreach and the "stakeholder process" were inadequate.

Many affected entities were likely unable to comment on this draft permit because they were not aware of the potential scope of coverage under this new draft permit. The notice of renewal at the Permits Webinar and in an email to those on the Division's distribution list were not sufficient to alert entities of the expanded scope of this general permit.

To the best of CMA's knowledge, the notices of the general permit renewal sent to current COR040000 permittees, renewal announced in the Permits Webinar, and notice of the general permit renewal to current permittees and interested parties, were truly

only “notices” of renewal.<sup>3</sup> There was no mention of the new terms and conditions that could be included in the metal mining stormwater general permit.

The Division did hold one meeting on June 2, 2022. However, materials were not provided ahead of the meeting, so attendees learned of the extensive proposed new terms and conditions in the renewal during the meeting itself. This made it difficult to prepare for the meeting and to ask questions during this meeting. CMA does not believe that the few comments at the meeting were reflective of the level of concern with the permit conditions. Some CMA members did participate in the meeting, and were surprised by the scope and substance of the new terms and conditions that could be included in the renewal permit, as indicated by these permit comments. The Division did not hold a follow-up meeting, and there was not an opportunity to review potential terms and conditions prior to the formal public notice of the draft permit.

In contrast, the Division has held a number of stakeholder meetings for other general permits to solicit input from the affected entities prior to developing the draft permit renewal terms and conditions. These include the renewals of COR090000 and COR080000 (general permits for municipal separate storm sewer systems (“MS4s”) and MS4s that discharge to Cherry Creek Reservoir Drainage Basin, WQCD held a series of meetings from 2012-2013), COR070000 (general permit for non-standard MS4s, WQCD held at least 5 meetings from 2019-2020), and COR900000 (general permit for non-extractive industries, WQCD held at least 5 meetings in 2020). Additional meetings and outreach to potential permittees and the public about the draft terms and conditions, prior to the public notice, would have allowed for permittees to gain a better understanding of the proposed terms and conditions in the renewal permit. It would have also allowed permittees to provide input prior to the Division drafting the renewal permit.

Although the Division is routinely invited by CMA to attend CMA water quality committee meetings, and is aware that many certifications under this general permit are held by CMA members, the Division did not contact CMA prior to the public notice of the draft permit.

**Request:** Engage in additional outreach as well as meaningful stakeholder discussions with expected and new permittees, and prepare a second draft permit and fact sheet for public notice once those discussions have been held.

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<sup>3</sup> See, e.g., Permits Webinar on April 14, 2022, recording of meeting at approximately 56:25–57:18, available at [https://drive.google.com/drive/folders/1\\_ERS--6pFGto-tEQ9oOQbkyD5Sz8D6M9](https://drive.google.com/drive/folders/1_ERS--6pFGto-tEQ9oOQbkyD5Sz8D6M9). The March 1 email (and the follow up April email) to certificate holders referred to a renewal application supplement and requested information from permittees, but there was no indication of the scope of changes to the draft renewal permit. The May 10 notice was an email with information on how to register for the June 2 meeting and did not include any information on the terms or conditions that could be included in the draft permit.

### **3. WQCD has not presented evidence supporting the need for the new proposed permit requirements**

**Parts:** Permit and Fact Sheet generally

**Comments:** C.R.S. § 25-8-503.5(1)(b) requires the Division when proposing new or amended permit requirements to a general permit to “[p]resent evidence supporting the need for the proposed requirements, including information regarding pollutant potential and available controls, incidents of environmental damage, and permit violations . . .” As discussed throughout these comments, CMA does not believe that the Division has provided sufficient evidence supporting the need for the new and amended requirements.

CMA requests that the Division provide additional evidence to support the departure from decades of prior practice of relying on best management practices (“BMPs”) to control stormwater discharges and relying on the oversight of implementing agencies, such as DRMS, that require a robust sediment control system at metal mining facilities. From CMA’s review of the draft permit documents, it is unclear whether there were concerns about water quality under prior general permits for the metal mining industry, or if there were incidents of environmental damage. In addition, the only permit violations noted by the WQCD (failures to submit discharge monitoring reports, “DMRs”) are unrepresentative of all certifications under this permit as most were not required to submit DMRs. CMA requests additional justification for the new conditions in the permit.

The Division also has not clarified the basis for excluding non-stormwater discharges from the general permit. The Division’s rationale that this permit “relies largely on control measures and not numeric effluent limits for protection of water quality” is contradicted by the terms of this general permit, which includes effluent limits and other requirements that typically apply to non-stormwater discharges. (Draft Fact Sheet, Part V, D).

**Request:** Revise draft permit documents to meet statutory requirements, including explaining the need for the requirements, and presenting evidence supporting this need.

### **4. WQCD is required to use a risk-based permitting approach**

**Parts:** Permit generally; Fact Sheet generally and including Parts I and V.D

**Comments:** The draft permit departs from the current general permit and the majority of certifications issued under that current general permit. The Division explains this departure, in part, by saying it must “scrutinize at each renewal.” (Draft Fact Sheet, Part I, pg. 3). But the CWQCA and the Commission’s Regulation 61 (5 CCR 1002-61) state:

For any permit, at the time of permit renewal, the Division **shall use a risk-based approach** applied to the receiving water(s) that considers the most recent water quality/quantity information, information in the renewal

application, and any other relevant information, **to determine whether the permit can be reissued with minimal or no change.**

C.R.S. § 25-8-501(3)(j); Reg. 61.1(5) (emphasis added). The Division is certainly tasked with reviewing the most recent information, but it must also assess whether a permit can be reissued with minimal or no change.

As evident from Part V.D. of the Draft Fact Sheet, this permit has been modified significantly. The current permit and fact sheet (including comments) are collectively only 33 pages long. See CDPS General Permit COR-040000 (Aug. 28, 2006) (“2006 Permit”) (Attachment 1) and Rationale for CDPS Permit No. COR-040000 (“2006 Fact Sheet”) (Attachment 2). The new draft permit and fact sheet (without comments) are collectively 133 pages long.

CMA takes issues with numerous conditions in the permit, including those specified as major changes in the Fact Sheet at Part V.D, among others not explicitly listed here. The significant modifications imply that the previous version did not perform in meeting its objectives. Why did the previous permit not meet objectives? Please describe the process to arrive at this decision.

**Requests:** Revise the draft general permit consistent with the CWQCA and Regulation 61, taking into account the requirement to use a risk-based approach to permit renewal. The major changes should not be included in the general permit.

## **5. Lack of notice of permit conditions and lack of appeal rights**

**Parts:** Permit generally and including Part I.C.1 including Tables C.1.1-C.1.9, I.E, I.F; Fact Sheet generally and including Parts III, III.C, IV, V.D, VII.B, IX, XI.E.7-8

### **5.1 General permit provides insufficient notice contrary to Regulation 61**

**Comments:** The draft general permit is a substantial departure from the current general permit that applies to stormwater at a metal mining facility. For many of the certifications issued under the currently-effective permit, there were no specific deviations from the general permit—meaning that the certification for most of facilities consists of a single page sheet authorizing coverage under the general permit as written. See Attachment 1, 2006 Permit, Page 2 of 22 (“This permit specifically authorizes the facility listed on page 1 of this permit to discharge stormwater associated with metal mining operations . . . in accordance with the permit requirements and conditions set forth in Parts I and II hereof”).<sup>4</sup> Permittees largely knew what to expect in a certification issued under the 2006 Permit, how to comply with the permit, and the likely economic impact of the permit, because the permit they received was the one that was noticed, that was available for public comment, and that was issued by the Division.

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<sup>4</sup> A handful of certifications did include monitoring requirements and DMR reporting, but did not include numeric limits.

In contrast, it is impossible for a permittee to know what a certification might contain under this draft renewal permit. The resulting certification may only include monitoring for a handful parameters, or it could include numeric limitations and/or monitoring at 100+ outfalls, chronic WET testing, arsenic treatment, limitations for PFAS, and other onerous and expensive terms and conditions that are typically seen in individual, not general permits. Regulation 61 provides that general permits “will include all conditions determined necessary by the State for protection of waters of the State.” (Reg. 61.9(2)(f)). The draft permit is inconsistent with Regulation 61 because it fails to include all the conditions determined to be necessary. Furthermore, if finalized, this general permit would fail to provide notice of what may or may not apply in a certification. See, e.g., *Wis. Res. Prot. Council v. Flambeau Mining Co.*, 727 F.3d 700, (7th Cir. 2013) (“[I]t is ‘a cardinal rule of administrative law’ that a regulated party must be given ‘fair warning’ of what conduct is prohibited or required of it.”).

Additionally, the draft permit does not provide the notice required by Regulation 61. Regulation 61.5(2)(b) requires that the draft permit and rationale include, among other things, the proposed effluent limitations for each discharge point for those pollutants proposed to be limited (§ 61.5(2)(b)(i)), and proposed schedule of compliance, including interim dates and requirements for meeting the proposed effluent limitations if the permittee is not presently doing so (§ 61.5(2)(b)(iii)). In review of the draft permit and fact sheet, CMA, permittees, and the public cannot determine what effluent limitations may be included in a certification under the general permit, and there is no indication what limitations would apply at each “discharge point.” Only a handful of limitations are specified in the draft permit for each type of industry (see Permit Part I.C.1, Tables C.1.1–C.1.8); the majority of the limitations say “various.” It is unclear if all of these limitations will be included, and if they would be imposed as 30-day averages, daily maximums, and/or as two-year rolling averages. It is also unclear if any or all of the potential “site-specific” limitations will apply, and what they might be if they do apply.

Even when a potential permittee cross-references the draft permit with the draft fact sheet, it is unclear which potential effluent limitations could be included in a certification. The draft fact sheet explains that the limitations will depend on the receiving stream, hardness, whether antidegradation review will be applied, and other case-specific information. See Draft Fact Sheet, pg. 26. CMA requests that the Division provide additional information about how an entity can determine what parameters will be included in its certification, what numeric limitations may be included in the certification, and for which discharge points. This clarification is necessary for entities to be able to determine whether they can comply with a certification issued under this general permit, including whether it is technologically, economically, and/or environmentally feasible.

The draft permit and fact sheet do not include sufficient information about the proposed compliance schedule(s), as required by Regulation 61.5(2)(b)(iii). While an initial draft of the permit (that was public noticed on July 1) included example years, the revised draft of the permit (shared July 13 with some interested permittees) only says “TBD.” There are no interim dates included in these compliance schedules. The Division indicates that

milestones will be approximately one year apart, but this will only be set when a certification is issued. It is unclear how a certificate holder can determine whether a compliance schedule may be needed or included, or whether the duration they receive will be sufficient to lead to compliance.

The draft general permit is also unclear about the frequency of sampling and monitoring requirements that will appear in a certification, and the number of “outfalls” that such sampling could be required at. It is also not apparent from the draft permit documents if the Division has considered that many stormwater “outfalls” at a mining site could be in remote locations making them more difficult to access for regular monitoring, and/or that they could be covered by snow and/or inaccessible for half of the year.

The table in the Draft Fact Sheet (pg. 40) does not provide enough clarity on what monitoring or conditions could apply. The table is “a guide only,” does not cover all situations, and is only indicating potential certification requirements. It also says the Division can still include more requirements on a case-by-case basis.

## **5.2 No notice or comment period**

CMA is concerned about the lack of notice for permittees about the conditions they could be required to comply with, as well as the inability to provide the Division comments on the terms and conditions. The certification “guide” fails to include sufficient information on the criteria the Division will consider to determine if certain conditions (including WET) will apply. Also, the Division still reserves the right apparently to consider anything, as their considerations include “etc.” If this general permit is finalized as drafted, the result will be the inclusion of enforceable permit conditions without any notice or comment period. Permittees and members of the public will have no opportunity at all to comment on the quite significant new conditions that could be imposed in a certification.

Also, the lack of notice is problematic given the following statements in the Fact Sheet:

- Part XI.E.7 says that failure to contest a condition “constitutes consent by permittee.” It is unclear how this can be the case when the permittee has no idea what conditions may be included in a certification based on this draft general permit.
- Part XI.E.8 provides the “opportunity” to request a stay of terms and conditions of the final permit. It is impossible to tell what terms and conditions will actually be in the certification, and therefore impossible to determine at this juncture whether a stay would be necessary and for what terms and conditions.

## **5.3 “Lack of appeal rights”**

The lack of notice of certification terms and conditions is even more concerning considering the Division’s position that only the general permit (and not certifications

issued under the general permit) is subject to administrative and/or judicial review. See, e.g., *WQCD Order Denying Request for Adjudicatory Hearing*, In the Matter of CDPS Certification No. COX634066, Upper Blue Sanitation District, Summit County (June 18, 2020). Although not explicit in the draft renewal documents for the COR040000 permit, in the past several years the Division has taken the position that there are only appeal rights for the general permit, and not for a certification issued under the general permit, regardless of whether the certification departs from the terms of the general permit. This position is not supported by the CWQCA, Regulation 61, or the State APA. In addition, CMA is aware that at least one court recently ruled that this is incorrect, because all permits are subject to the right of an adjudicatory hearing. See *Upper Blue Sanitation Dist. v. Opila, Order Regarding Motion to Dismiss*, Case No. 2020CV30078, Div. T (Summit County Dist. Court, Colo., Feb. 4, 2021).

CMA notes that the CWQCA allows “any party directly affected” by “any final order or determination” of the Division to seek a hearing, rehearing, or reconsideration of the order or determination. C.R.S. § 25-8-403. Regulation 61 also provides that “[t]he applicant or any other person, affected or aggrieved by the Division’s final determination, may demand an adjudicatory hearing within 30 days of the final permit determination.” Reg. 61.7(a). A certification is certainly a “final determination” by the Division that is statutorily subject to an adjudicatory hearing, and a final agency action subject to judicial review under the State APA.

The draft general permit also says that the failure to contest any condition in the permit “constitutes consent to the condition by the permittee.” (Draft Fact Sheet, pg. 47). Since the draft general permit is unclear as to what will show up in a certification, it is not possible to deem a permittee to be consenting to any of its conditions by failing to challenge the general permit.

Moreover, until a certification is issued, a permittee may not know if they are “adversely affected or aggrieved” by a condition, a requirement for seeking an adjudicatory hearing under Regulation 61. The general permit itself is unenforceable without WQCD’s action providing authorization to the discharger. See Reg. 61.9(2)(b)(iii)(B).

Further, it is unclear how a stay of the general permit could be requested (Draft Fact Sheet, pg. 47), since it is unclear what the terms of a certification will be.

**Requests:** The WQCD should engage in a stakeholder process with potentially affected entities, revise the draft permit documents, and notice a second draft permit and fact sheet for public comment. The Division should also acknowledge that certifications issued under this general permit are final determinations that are subject to the appeal process.



## 6. Economic reasonableness issues

**Parts:** All, including Fact Sheet Parts XI.E and XI.E.2

**Comments:** Certifications under this draft general permit have the potential to be extremely expensive to comply with. The Division must consider economic reasonableness issues as required under the CWQCA. In addition to the comments about the various terms and conditions throughout this document, CMA provides the following comments.

### 6.1 General economic reasonableness provision

**Parts:** Permit generally; Fact Sheet generally including Parts XI.E and XI.E.2

**Comments:** C.R.S. § 25-8-102(5) says:

[The] general assembly intends that this article **shall be construed to require** the development of a water quality program in which the water quality benefits of the pollution control measures utilized have a reasonable relationship to the economic, environmental, energy, and public health costs and impacts of such measures, and that **before any final action is taken**, with the exception of any enforcement action, **consideration be given to the economic reasonableness of the action**. Such consideration shall include **evaluation of** the benefits derived from achieving the goals of this article and of the **economic, environmental, public health, and energy impacts** to the public and affected persons.

(emphasis added). This requirement to consider economic reasonableness is also ingrained in the State APA, which explains that it is “the continuing responsibility of agencies to analyze the economic impact of agency actions . . . to determine whether the actions promote the public interest.” See C.R.S. § 24-4-101.5. Among other things, the Colorado legislature was concerned about agency action taken without evaluation of its economic impact “may have unintended effects, which may include . . . increased product and consumer costs” and that “agency rules can negatively impact the state’s business climate by impeding the ability of local businesses to compete with out of state business, by discouraging new or existing business from moving to this state, and by hindering economic competitiveness and job creation.” *Id.*

The draft permit action does not currently contain sufficient information about economic reasonableness, nor does it include a sufficient evaluation of the economic, environmental, and energy impacts. From a cursory review of draft individual permits with only 20 stormwater outfalls, the cost of the proposed stormwater monitoring in this draft general permit alone could add several million dollars to the operating cost of a site. The additional requirements such as numeric limitations, PFAS sampling, WET testing (and the potential for expensive toxicity identification evaluations (TIEs)/toxicity

reduction evaluations (TREs)), and the like would drive up the costs of the permitting action significantly, negatively impacting the active mining industry as well as mines undergoing reclamation. The draft permit also does not address the significant economic impact on exploration and drilling.

Although CMA does not believe the permit is or should be applicable to historic or legacy mines, it could be interpreted to include them. This could have a significant negative impact on the state's tourism industry. The Division does not appear to have considered the cultural and historical consequences for historic, legacy/inactive mines. Some legacy mine sites drive significant tourism revenue. If all are ultimately eliminated what is the impact on tourism? CMA questions whether the Division has properly considered the economic impacts as related to these types of sites.

The Division is also required to evaluate the perceived benefits of the permitting actions against the economic, environmental, public health, and energy impacts to the public and affected persons. In addition to not properly considering the economic impacts, the Division has ignored the potential environmental and energy impacts associated with this permitting action. The general permit could create irreconcilable issues with ongoing reclamation under the DRMS, disrupting post-mining land use and requiring reopening of reclamation plans that have been underway for decades. Even if compliance with the general permit terms were feasible, it could result in reduced water being available due to treatment, which would have economic and environmental consequences. Many of these sites do not have power, and the actions required by the permit could create new energy impacts which would also have environmental consequences such as air quality issues.

CMA and its members reserve the right to identify additional economic, environmental, energy, and other impacts as the result of this general permit and certifications under the permit. The true nature of these impacts will not be understood until a certification is issued.

**Request:** Properly consider economic reasonableness as required by the CWQCA and the State APA, and evaluate the economic, environmental, and energy impacts. The Division should discuss these issues with stakeholders and then prepare a second draft permit for public notice and comment.

## **6.2 Economic Reasonableness Determination and Evaluation**

**Parts:** Permit generally; Fact Sheet generally and Part XI.E.2

**Comments:** In the draft Permit and Fact Sheet, the Division seeks to apply a test for determining the economic reasonableness of permit conditions that is not found in, and is contrary to, the applicable statutes and regulations.

As an initial matter, citing C.R.S. 25-8-503(8), the Fact Sheet asserts: "Note this provision specifically applies to water quality standards-based effluent limitations, not

technology-based limits, monitoring requirements, benchmarks, special studies, recordkeeping requirements, control regulation requirements, antidegradation requirements<sup>5</sup> or other permit terms and conditions that are not water quality standard based effluent limitations.” Fact Sheet, part XI, E, 2.

CMA is concerned because this statement is inconsistent with the CWQCA, which, as set forth in these comments, requires that “before **any** final action is taken, with the exception of any enforcement action, **consideration be given to the economic reasonableness of the action.**” C.R.S. 25-8-102(5) (emphasis added). Thus, the Division must consider economic reasonableness of every condition in the permit—not just the effluent limitations as the Division claims. Because the Division failed to do so here, CMA believes the draft permit does not meet the minimum requirements of the CWQCA.

Furthermore, CMA disagrees with the Division’s suggestion that the Commission adequately considered the economic, environmental, public health, and energy impacts of applying effluent limitations to the stormwater outfalls that are covered by this general permit during the various basin rulemakings. As set forth in these comments, numeric effluent limitations are not intended to apply to stormwater outfalls. Therefore, the Commission would not have considered the significant economic impacts of imposing effluent limitations to stormwater covered under this permit. Therefore, CMA believes that the presumption in Regulation 61.11(a) does not apply here. Instead, the Division has made a case that it must look at this information prior to including any and all water quality based effluent limitations in a certification (including antidegradation based limits).

CMA also questions whether the Division is impermissibly adding requirements that are not found in the statute and regulation which limit the categories of information the Division will consider when conducting an economic reasonableness evaluation.

Specifically, the Division claims that it will only conduct an economic reasonableness evaluation if the permittee provides evidence meeting three criteria (see draft fact sheet, pp. 46-47):

- First, evidence of additional information not anticipated or considered at the time of the standards rulemaking.
- Second, comprehensive evidence of the economic, environmental, public health, and energy impacts of implementing the water quality standard. The Division claims that this evidence should satisfy the test for determining the need for a *variance* set forth in Regulation 31.7(4). The Division further reads additional language into Regulation 31.7(4) that does not appear to apply to this permit and

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<sup>5</sup> The Division is still required to comply with Regulation 31.8(1)(d): “Water quality designations and **reviewable water provisions shall not be utilized in a manner that is contrary to the provisions of sections 25-8-102** and 25-8-104, C.R.S.”

seems to be taken from the Division’s antidegradation Regulation (Regulation 31.8(3)), including that the Division will consider factors such as the per-customer cost to a water utility” and the “significant adverse effect upon the projects profitability or competitive position.”<sup>6</sup>

- Third, comprehensive evidence regarding the benefits of meeting the water quality standards.

CMA questions the Division’s authority to include these limitations when they are not found in the plain language of the regulation, which requires the Division to consider “information available to it including previous water quality classification and standards hearing records, **information provided during the public comment period** on the draft permit, information provided by the permittee or in response to specific requests for information” when determining whether additional information or factors have emerged that were not considered at the rulemaking hearing. Reg. 61.11(b) (emphasis added). The applicable regulation goes on to instruct that the “applicant is advised to make available to the Division **any** economic, environmental, public health, or energy impact information regarding the reasonableness of the need for beyond technology based limitations” during the public notice period. Reg. 61.11(b)(ii) (emphasis added).

Thus, the applicable regulation places no restrictions on or mandates the types of information that the Division shall consider. Instead, CMA is concerned that the Division is creating new regulatory requirements by reading into the provision criteria taken from wholly inapplicable regulations that apply to variances and antidegradation review. See *Rags Over the Ark. River v. Colo. Parks & Wildlife Bd.*, 360 P.3d 186, 192 (Colo. App. 2015) (“[T]o defer to the agency’s position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.”).

Further, like the regulation none of these requirements are found in the plain language of the CWQCA, which provides:

Where a permit requires treatment to levels necessary to protect water quality standards and beyond levels required by technology-based effluent limitation requirements, the division must determine whether or not any or all of the water-quality-standard-based effluent limitations are reasonably related to the economic, environmental, public health, and energy impact to the public and affected persons, and are in furtherance of the policies set forth in sections 25-8-102 and 25-8-104. **The division’s determination shall be based upon information available to it including information provided during the public comment period on the draft permit** or in response to specific requests for information.

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<sup>6</sup> Notably, consideration of “adverse effect upon [a] projects profitability or competitive position” implies that there is an industrial endeavor and would have no applicability to historic or inactive mines.

C.R.S. § 25-8-503(8) (emphasis added). Although this section goes on to mention variances, the language of the statute makes it clear that the economic reasonableness evaluation required by this provision is a distinct consideration from whether a variance is appropriate for a discharger, stating that such economic reasonableness “determinations shall be included as a part of the written record of the issuance of the final permit, **whether or not** a variance is available.” *Id.*

Thus, under the plain language of the statute and regulation, the Division is required to consider any information provided by permittees during the public comment period. The requirement that permittees provided “comprehensive” evidence implies a heightened evidentiary standard, which CMA does not believe has any support in the CWQCA or regulation. Further, permittees would not have sufficient time to develop comprehensive evidence during the short public comment period.

Furthermore, the Division cannot add requirements that conflict with or modify the statute. The State APA provides that any rule that conflicts with a statute “shall be void.” C.R.S. § 24-4-103(8)(a). Administrative agencies are legally bound to strictly comply with their enabling statutes, and are not authorized to legislate. Administrative rules that add to, change, or modify a statute are without force and effect and void. C.R.S. § 24-4-103(4)(b)(IV), (8)(a); *see also Flavell v. Dep’t of Welfare*, 355 P.2d 941, 943 (Colo. 1960); *Colo. Common Cause v. Gessler*, 410 P.3d 451, 454 (Colo. App. 2012); *Rodgers v. Atencio*, 608 P.2d 813, 816 (Colo. App. 1979).

Thus, CMA believes the Division should remove the unauthorized terms and conditions included in the economic reasonableness determination and evaluation analysis subpart from the draft Permit and Fact Sheet.

**Requests:** The Division should remove the limiting language from this subpart as it is contrary to the CWQCA. The Division must also clarify its requirement to consider any information provided during the public comment period, and must consider this information prior to finalizing the permit.

### **6.3 Information to support the unreasonableness of the terms and conditions (economically, environmentally, technologically, and otherwise)**

**Parts:** All generally, Fact Sheet Part XI.E.2

**Comments:** Although CMA challenges the new requirement developed for the first time in this permit, as discussed in the comment above, CMA submits the following additional information on the economic issue associated with the water quality based effluent limitations (“WQBELs”) as well as other terms and conditions in this permit. As discussed throughout these comments, the general permit does not provide sufficient information to adequately respond to these issues, nor has there been sufficient time to develop “comprehensive evidence” in the short public notice period. CMA and its members reserve the right to submit additional evidence, including but not limited to a cost-benefit analysis as indicated below. Moreover, failure to identify or provide

“comprehensive evidence” does not relieve the Division of its statutory duty to consider the economic reasonableness of its actions under C.R.S. § 25-8-102(5).

CMA also refers the Division to these comments generally regarding additional support for the economic infeasibility of the new terms and conditions.

- Additional information that was not anticipated or considered at the times of the standards rulemaking.

Colorado’s water quality criteria do not account for the unique conditions posed by runoff from precipitation events. In addition, Colorado CDPS regulations (see Reg. 61.8((2)(b)(viii))) require calculation of effluent permit limits using low flow conditions that do not appropriately account for conditions occurring in receiving waters during storm events. Consequently, CMA believes that there is information and other technical factors that were not anticipated or considered when the applicable standards and classifications were adopted in any of the potential receiving segments that may be considered in a future permit.

Also, the Division may be requiring a discharge permit for stormwater runoff at “outfalls” that have not previously been considered “outfalls” or “discharges” subject to a permit at any time during Commission classification and standards rulemakings in the last several decades. Therefore, the Commission could not have considered the economic reasonableness as applied to this situation.

The Commission has also never previously anticipated nor considered other information such as the application of certain standards and other requirements to stormwater, including but not limited to the iron water quality-based standards that would require treatment below that required by an ELG; arsenic standards, feasibility studies, and/or treatment (as well as the application of temporary modifications in every potential segment that could now be considered a “receiving water” for a stormwater discharge), and the narrative standards being used to apply requirements for PFAS, EC/SAR, and/or WET to stormwater.

- Evidence of the economic, environmental, public health, and energy impacts of implementing the water quality standard, including that attaining the standards is technologically infeasible, that it would cause substantial and widespread adverse social and economic impacts.

Compliance with numeric effluent limitations (and especially antidegradation-based limitations) at stormwater outfalls is likely to be economically and technologically infeasible. Many metal mining sites are located in remote areas of Colorado’s mountains, and based on recent permitting drafts, the Division could impose “outfalls” at areas that are difficult to access in good weather, let alone during storm events or in the winter. Routine monitoring alone will be infeasible, let alone attainment of standards. Furthermore, given their location, the costs of attaining standards could greatly exceed the existing cost of managing a site. The Division must consider this information under

C.R.S. § 25-8-102(5). See also Regulation 31 (5 CCR 1002-31), Section 31.8(1)(d) (“Water quality designations and **reviewable water provisions shall not be utilized in a manner that is contrary to the provisions of sections 25-8-102 and 25-8-104, C.R.S.**”).

In many instances attaining conditions in the permit could cause environmental damage. Attaining many of the potential standards could require treatment beyond BMPs, including but not limited to construction of new sediment ponds, treatment with chemicals and/or requiring power, and construction of a water treatment plant and/or reverse osmosis (“RO”) system. Many mining sites are remote, and have at least some access roads that are not fully paved. These sites would need to bring in substantial infrastructure to be able to construct treatment of any kind, which could require (among other things) construction vehicle traffic that would have air quality implications and could require paving of roads if they are not equipped to handle such vehicles, bringing power to remote sites either on a temporary or permanent basis, which would have environmental and energy implications, and disturbance and other potential impacts (including to the post-mining use) to sites that are undergoing or have undergone reclamation.

Also, as mentioned in these comments, PFAS are human-caused conditions and its presence in rainwater cannot be remedied by remote active or inactive mining sites, without installing significant treatment infrastructure that would cause environmental damage. Treatment for PFAS (through RO or otherwise) is also likely to result in a sludge that would have its own environmental consequences.

Treatment options such as RO have major energy and environmental consequences, and are incredibly expensive. Conservative estimates for RO can range from \$30-50 million for capital expenditure, and \$10 million for operating expenses, at sites that are not remote. RO at any of these sites for any of these stormwater “outfalls” will likely cost a great deal more. RO also consumes approximately 20% additional water in treatment, which can present a problem where water is scarce (as it is throughout Colorado). It is not appropriate or economically or environmentally reasonable to be including requirements for stormwater only discharges that could require RO treatment.

There are also likely to be water rights concerns if there is not sufficient substitute water supply or water to augment the loss of water associated with RO treatment. Water rights would also need to be obtained if water is collected in a sediment pond without the current water rights to do so. It would be prohibitively expensive for most if not all sites to procure additional water rights for these purposes, assuming that water rights are even available.

Other adverse impacts include economic impacts to the tourism industry if these historical sites are required to be disturbed to bring in treatment infrastructure. The WQCD has not indicated that it has considered the National Historic Preservation Act, nor sought the input of the State Historical Preservation Office (“SHPO”) and Historical Societies regarding these new terms and conditions. See also comments below.

There are also public health impacts, including but not limited to the potential increase for injury to workers traveling to remote areas of the site to install and operate treatment, not to mention to perform frequent monitoring and inspections.

- Evidence regarding the benefits of meeting the water quality standards.

CMA could not identify evidence on the benefits of meeting water quality standards in stormwater only discharges. EPA has already determined that there was not a benefit to requiring attainment with numeric limitations, and instead its 2021 MSGP relies on best management practices.

**Requests:** Remove numeric limitations and other problematic terms and conditions for stormwater (as detailed throughout these comments) as there are negative economic, environmental, energy, and other consequences associated with attaining these limits. These impacts far outweigh the potential benefit of requiring stormwater-only runoff to meet water quality standards.

#### **6.4 Cost benefit analysis**

**Parts:** Fact Sheet Part XI.E.1

**Comments:** The CWQCA requires that when proposing new or amended permit requirements for discharges to meet, obtain, or maintain authorization for discharges under the general permit, the Division “shall . . . [u]pon request by an affected party, consider and give due weight to a cost-benefit analysis.” C.R.S. § 25-8-503.5(1), (1)(d). As indicated in these comments, CMA requests a list of analysts and the opportunity to consult with the Division about that list so that a cost-benefit analysis can be performed.

**Request:** Provide CMA a list of analysts. Schedule a time for discussion with interested entities on other potential analysts.

### **7. Coverage under the permit**

#### **7.1 Permit can only apply to point source discharges of pollutants to surface water**

**Parts:** Permit generally including Part I.A; Fact Sheet generally including Part V.C.4

**Comments:** Permittees are concerned that the draft permit documents will be interpreted to allow the Division to permit nonpoint source flows, which would be contrary to the CWA and CWQCA.

The Clean Water Act only requires a discharge permit for point source discharge additions of pollutant(s) into navigable waters. The CWQCA likewise only requires a discharge permit for point source discharges of pollutants into state waters. C.R.S. § 25-8-501(1). The Division cannot require a discharge permit where there is no point source



discharge of a pollutant into state waters. See *also* Reg. 61.9(2)(a) (“The general permit shall be written to regulate . . . (i) stormwater **point source**.”) (emphasis added).

Commission Regulation 61 applies to “all operations discharging to waters of the State from a point source.” Regulation 61.1(1)(b) defines a “discharge” as “the introduction or addition of a pollutant in state waters.” See *also* CRS § 25-8-103(3). Regulation 61.2(22) defines a “point source” as “any discernible, confined, and discrete conveyance . . . from which pollutants are or may be discharged.” See *also* C.R.S. § 25-8-103(14). Likewise, the federal ELGs are applicable only to “discharges” at the relevant mining facility. See 40 C.F.R. §§ 440.30, 440.100.

Nonpoint sources are not regulated under the federal or state discharge permitting programs. Nonpoint source pollution “generally results from land runoff, precipitation, atmospheric deposition, or percolation,” and does not result from a discharge at a specific location. *Cortland Co. Inc. v. Union Carbide Corp.*, 2:21-cv-00101, 2:21-cv-00487, 2022 WL 2392871, \*8 (S.D.W.V. July 1, 2022) (“*Cortland*”); see *also* EPA Office of Water, *Nonpoint Source Guidance*, 3 (1987).

Numerous cases have addressed the fact that unlocalized natural flow of water from seepage and stormwater, and uncontrolled percolation of groundwater, are nonpoint sources not subject to discharge permitting. See, e.g., *Cortland*, 2022 WL 2392871, at \*8–9; *Sierra Club v. Va. Elec. & Power Co.*, 903 F.3d 403, 406 (4th Cir. 2018); *Simsbury-Avon Pres. Club, Inc. v. Metacon Gun Club, Inc.*, 575 F.3d 199, 220 (2d Cir. 2009). Surface runoff that is neither collected nor channeled is also nonpoint source pollution not subject to permitting. *Simsbury-Avon Pres. Club, Inc.*, 575 P.3d at 221. Indeed, “[a] finding that uncontrolled water running off the width of a hillside in a natural, diffuse manner in any number of channels, trenches, gullies, or otherwise are each individual point sources would expand the term out of existence.” *Cortland*, 2022 WL 2392871, at \*9.

EPA also has clarified that its National Pollutant Discharge Elimination System (“NPDES”) stormwater discharge requirements do not apply to diffuse flow or sheet flow. See, e.g., 64 Fed. Reg. 68722, 68772 (Dec. 8, 1999) (National Pollutant Discharge Elimination System—[Phase II] Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges) (“Regardless of the threshold established by EPA, a NPDES permit can only be required if a construction site has a point source discharge. A point source discharge means that pollutants are added to waters of the United States through a discernible, confined, discrete conveyance. ‘Sheet flow’ runoff from a small construction site would not result in a point source discharge unless and until it channelized.”) (emphasis added); 63 Fed. Reg. 42534, 42538 (Aug. 7, 1998) (diffuse runoff from waste rock and overburden piles is outside the scope of the NPDES permit program, including the requirement to obtain stormwater permit coverage).

The draft permit and fact sheet apply discharge permitting requirements to surface runoff and sheet flow, as well as percolation of runoff into groundwater. See Draft

Permit, pp. 4-5; Draft Fact Sheet, pp. 6-8. This is contrary to the intent of Congress in exempting nonpoint sources from permitting:

In regulating discharges of pollutants from point sources, Congress clearly intended to target the *measurable* discharge of pollutants. Not only is this revealed by the definitional text of “point source,” but it is also manifested in the effluent limitation enforcement scheme that the Clean Water Act employs. The National Pollutant Discharge Elimination System Program and § 1311’s enforcement scheme specifically rely on “effluent limitation[s]”—restrictions on the “quantities, rates, and concentrations” of pollutants discharged into navigable waters. 33 U.S.C. § 1362(11) (defining “effluent limitation”). And state-federal permitting programs under the Clean Water Act apply these precise, numeric limitations to discrete outfalls and other “point sources,” see *California ex rel. Res. Control Bd.*, 426 U.S. at 205–08, 96 S.Ct. 2022, at which compliance can be readily monitored. When a source works affirmatively to *convey* a pollutant, the concentration of the pollutant and the rate at which it is discharged by that conveyance *can be measured*. But when the alleged discharge is diffuse and not the product of a discrete conveyance, that task is virtually impossible. . . . [I]ndeterminate and dispersed percolation indicates the absence of any facility constituting a discernible, confined, and discrete conveyance. Moreover, it indicates circumstances that are incompatible with the effluent limitation scheme that lies at the heart of the Clean Water Act.

*Va Elec. & Power Co.*, 903 F.3d at 411.

The draft permit and fact sheet must be clear that a permit can only be required for the discharge of pollutants from a point source to State Waters, and that only specific stormwater is subject to regulation as a point source.

**Requests:** Clarify that sheet flow and surface runoff that is not a point source, does not include an addition of pollutants, and/or is not a discharge to state waters is not within the Division’s permitting jurisdiction. Clarify that the Division will not be applying these terms and conditions unless the stormwater is a point source discharge addition of a pollutant to state water that is not exempt from permitting.

## **7.2 Some stormwater runoff is exempted from permitting**

**Parts:** Permit generally including Part I.A, Fact Sheet generally including Part V.C.4

**Comments:** Although some stormwater runoff requires a discharge permit, there is an express exemption in the CWA and Regulation 61 for certain types of stormwater at mining sites. Specifically,

The Division **may not require a permit for discharges of stormwater runoff from mining operations . . . composed entirely of flows** which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and **which are not contaminated by contact with or that have not come into contact with**, any overburden, raw material, intermediate products, finished product, byproduct or waste products located on the site of such operations.

Regulation 61.3(2)(c) (emphasis added). See also CWA Section 402(l)(2) (33 U.S.C. § 1342(l)(2)) (“The Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of stormwater runoff from mining operations . . . composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.”); 40 C.F.R. § 122.26(a)(2) (“The Director may not require a permit for discharges of storm water runoff from the following: (i) Mining operations composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with or that have not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations, except in accordance with paragraph (c)(1)(iv) of this section.”).

These provisions are intended to exempt from permitting mining sites that employ good water management to ensure runoff does not contact, or is not contaminated by contact, with certain materials at a mining site. A permit application is not required if there is no contact with certain materials. See NPDES Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47990, 48,032 (Nov. 16, 1990) (“If the owner or operator determines that no storm water runoff comes into contact with overburden, raw material, intermediate product, finished product, byproduct, or waste products, then there is no obligation to file a permit application. This framework is consistent with the statutory provisions of section 402(1)(2) and **is intended to encourage each mining site to adopt the best possible management controls to prevent such contact.**”) (emphasis added). Even if there is contact with these materials, a permit cannot be required for stormwater that is **not contaminated by contact**. *Id.*

The draft permit documents are silent on this exemption. See, e.g., Draft Permit Part I.A, Fact Sheet Part V.C.

**Request:** Include a citation to Regulation 61 and the language from Regulation 61.3(2)(c) in the draft permit documents to clarify that the Division is not requiring a permit “for discharges of stormwater runoff from mining operations . . . composed entirely of flows which are from conveyances or systems of conveyances (including but

not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with or that have not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct or waste products located on the site of such operations.”

### **7.3 Some stormwater is within the jurisdiction of DRMS**

**Parts:** Permit Part I.A; Fact Sheet Part V.E

**Comment:** The draft permit documents include examples of stormwater and “wastewater sources” that could be subject to permitting, but are unclear about the role of the DRMS with respect to water quality. C.R.S. § 25-8-202(7) expressly provides certain “implementing agencies” like DRMS jurisdiction over certain water quality matters at a mine site.

The Memorandum of Agreement (“MOA”) between DRMS and the Division related to mineral mine regulation states that DRMS is responsible for discharges other than “point source discharges to surface water” (pg. 3), and that WQCD “shall recognize the water quality responsibilities of the DRMS” (pg. 5). See MOA (2010), [https://drive.google.com/file/d/1bl0TSmcDTt7\\_AYhG3ke2tsew14F6kj62/view](https://drive.google.com/file/d/1bl0TSmcDTt7_AYhG3ke2tsew14F6kj62/view). With limited exceptions related to the Commission’s rulemaking authority, “WQCD shall not require permits for, or otherwise regulate, activities subject to the jurisdiction of DRMS.” *Id.*, pg. 5.

The permit documents include language that could be interpreted as overstepping the jurisdiction provided to the DRMS by C.R.S. § 25-8-202(7) and the MOA. The draft permit needs additional clarifications of the types of sites and activities that DRMS has jurisdiction over so that there is appropriate understanding of which activities fall under this permit.

Additional questions and comments:

- Did the Division discuss the specific terms and conditions in this draft general permit with DRMS? Do they agree with the new terms and conditions compared to the current stormwater permit? Did DRMS express any concerns about the proposed terms and conditions?
- Part I.A.3.d of the Permit (pg. 5) needs clarification as to the implementing agencies.
- The draft permit should clarify that stormwater discharges to groundwater are regulated by an implementing agency (e.g., DRMS) and are not subject to discharge permitting.

- The draft permit should clarify the factors the Division would use to determine whether a discharge is to groundwater that is in direct hydrologic connection to surface waters. (pg. 10).

**Requests:** Clarify the roles of the Division and DRMS with respect to water at a mining site. Consult with DRMS about the proposed terms and conditions, including related to DRMS's role at mining sites, and the feasibility of implementation of certain terms and conditions. Provide the criteria the Division would use to determine whether a discharge is to a groundwater that is in direct hydrologic connection to surface waters.

#### **7.4 The permit cannot apply to certain reclaimed sites**

**Parts:** Permit and fact sheet generally, including Permit Part I.A; Fact Sheet Part V.E

**Comments:** Regulation 61 specifies that areas of “mining operations which have been released from applicable State or Federal reclamation requirements after December 16, 1990” are not considered to be engaging in industrial activity subject to a stormwater discharge permit. See Reg. 61.3(2)(e)(iii), Reg. 61.3(2)(e)(iii)(C). Although the existing 2006 Fact Sheet is clear on this point (see Attachment 2, pg. 6), the renewal draft fact sheet and draft permit are not.

**Request:** Clarify that areas of a metal mining facility that have been released from applicable reclamation requirements are not subject to permitting.

#### **7.5 Stormwater associated with industrial activity**

**Parts:** Permit Part I.A.1, I.A.1.b; Fact Sheet Part V.C

**Comment:** The Division's draft permit appears to expand the Division's permitting authority conferred by the CWA, CWQCA, and associated regulations.

States are prohibited from requiring a permit for discharges composed entirely of stormwater unless they fall within limited categories such as a discharge “associated with industrial activity,” 33 U.S.C. § 1342(p), and only if they are not exempt under 33 U.S.C. § 1342(l)(2) (as discussed above).

Regulation 61 defines “stormwater associated with an industrial activity,” as “the discharge from any conveyance which is used for collecting and conveying stormwater and which is **directly related to manufacturing, processing or raw materials storage areas** at an industrial plant.” Reg. 61.3(2)(e)(ii)(A) (emphasis added). Regulation 61 further limits the categories of facilities that are considered to be engaging in “industrial activity” (see Reg. 61.3(2)(e)(iii)), and expressly exempts “areas of non-coal mining operations which have been released from applicable State or Federal reclamation requirements after December 16, 1990.” Reg. 61.3(2)(e)(iii)(C). (Note that this exemption is inexplicitly not referenced anywhere within the draft permit documents). Regulation 61 also limits the categories of facilities to those that “discharge

stormwater contaminated by contact with or that has come into contact with, any overburden, raw material, intermediate products, finished products, byproducts or waste products located on the site of such operations.” *Id.*

Regulation 61 further explains what is meant by stormwater associated with industrial activity:

For the categories of industries identified in subparagraphs (iii)(A) through (K) of this subsection, the term “stormwater discharge associated with industrial activity” includes, but is not limited to, stormwater discharges from industrial plant yards; immediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility; material handling sites; refuse sites; sites used for the application or disposal of process waste waters; sites used for the storage and maintenance of material handling equipment; sites used for residual treatment, storage, or disposal; shipping and receiving areas; manufacturing buildings; storage areas (including tank farms) for raw materials, and intermediate and final products; and areas where industrial activity has taken place in the past and significant materials remain and are exposed to stormwater.

Reg. 61.3(2)(e)(ii)(B).

Facilities and stormwater that do not fall within these criteria are not “stormwater associated with industrial activity” and do not require a permit. Moreover, stormwater that is located on plant lands separate from the plant’s industrial activities, such as office buildings and accompanying parking lots, also do not require a permit, as long as the drainage from the excluded areas is not mixed with stormwater drained from the certain described areas. Reg. 61.3(2)(e)(ii)(C). Despite the regulatory language and guidance, the Division’s draft permit documents could be read to expand on the concept of stormwater associated with industrial activity.

The draft permit and fact sheet language appear to expand on the Commission’s (and EPA’s) regulatory decisions in providing “examples of wastewater sources” as including any disturbed areas, access roads, pads, or storage areas, as well as run-on. Not every area at an industrial plant or site is “associated with industrial activity.” Rather, this includes only conveyances that are “directly related” to manufacturing, processing, or raw materials storage areas. See Reg. 61.3(2)(e)(ii)(A); see *also* 40 C.F.R. § 122.26(b)(14).

### 7.5.1 Specific comments on wastewater sources

**Parts:** Permit Part I.A.1; Fact Sheet Part V.C.1

**Comments:** In addition to challenging these subparts as a whole (as described above), CMA has the following specific comments:

- Fact Sheet V.C.1.g, “areas where industrial activity has taken place in the past and significant materials remain and are exposed to stormwater.” (See also Permit Part I.A.1.b.vii).
  - Unless this results in a discharge to surface water, then a permit is not required. The term “significant materials” is also subjective, and does not provide enough information to determine if coverage is needed under this permit. Moreover, this statement ignores the CWQCA, EPA regulations, and Commission regulations that limit application of stormwater discharge permits to those areas that are contaminated by contact with certain materials.
  - This statement also presupposes “at SIC Major Group 10 facilities.” Clarify the intent as related to legacy, historic mines.
- Fact Sheet V.C.1.h, “all disturbed areas, including mine pit out slopes” and Fact Sheet V.C.1.k, “disturbed areas, piles, storage, or accumulations of: topsoil, overburden, waste rock, ore (including any low grade ore identified as waste), tailings.” (see also Permit Part I.A.1.b.viii).
  - CMA is concerned about this permit applying to any “disturbed” land. As written, it could be inappropriately applied to historical disturbance without any time frame limiting its application. For example, it is unclear if the WQCD would require permit coverage for old waste rock piles from 100 years ago.
  - As written, this would appear to require permits for disturbance of land to construct diversions for good water management, even though the CWA would exempt the flows in such situations.
  - This section as written could be interpreted to apply to fully vegetated out slopes, which it should not. It is unclear how one would account for sheet flow off a fully vegetated slope.
  - This “source” is further confusing when reviewed in conjunction with the statement at Part I.A.1.c that says that run-on that commingles with stormwater discharge associated with metal mining is covered. The permit needs to clarify that construction of a ditch to control run-on to convey around disturbed areas do not require a permit.

- Fact Sheet V.C.1.m, “haul or access road(s), pads, storage areas, laydown areas, etc.” (see also Permit Part I.A.1.b.viii).
  - This section overstates which access roads are “industrial activity.” Neither EPA nor the Commission envisioned that all access roads at a mine site would automatically be considered industrial activity—rather, as is clear in the regulation, only “immediate” access roads that are traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility are “industrial activity” subject to stormwater permitting. Reg. 61.3(2)(e)(ii)(B). This position is supported by language from EPA’s original stormwater rule preamble that clarifies that stormwater runoff from immediate access roads is regulated as “stormwater discharge associated with industrial activity” only if “used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility.” 55 Fed. Reg. at 48,009.
  - Pads, storage areas, and laydown areas should not automatically be considered “associated with industrial activity.”

**Request:** Revise to be consistent with Regulation 61, CWA, and CWQCA. Provide additional justification for including these “wastewater sources” in the scope of this permit.

### 7.5.2 Specific comments on exploration activities

**Parts:** Permit Part I.A.1.a.vi, 1.A.1.b.viii; Fact Sheet Parts V.A, V.B., V.C.1.j

**Comment:** The draft permit includes SIC Code 1081, “metal mining services” and “exploration activities such as prospect and test drilling.” The draft fact sheet says SIC Code 1081 is covered by the current permit, but the 2006 Permit does not mention this category, and the 2006 Fact Sheet instead says that it covers “most,” but not all, of SIC Code 10. See Attachment 2, pg. 4. There was not sufficient notice of the potential to include exploration activities in this general permit; the first mention of this was at the June 2 presentation. Affected entities may not have known that this permit could apply to exploration.

CMA disagrees with inclusion of SIC Code 1081 as a whole, and specifically exploration activities such as prospect and test drilling, in this new draft general permit. Including SIC Code 1081 and all exploration activities such as prospect and test drilling under this general permit might deter entities from undertaking these activities in the first place, as a certification issued under this draft general permit could include onerous terms and conditions. This would be detrimental to the mining industry in Colorado, and could have impacts on the U.S. economy. Exploration is needed to produce critical minerals that the federal government has determined are necessary for national security, economy, renewable energy development, and infrastructure. See *U.S. Geological Survey*



*Releases 2022 List of Critical Minerals* (Feb. 22, 2022), <https://www.usgs.gov/news/national-news-release/us-geological-survey-releases-2022-list-critical-minerals> (listing palladium, platinum, and zinc –which are mined or being explored in Colorado—as “critical minerals” (among others)). There could also be economic impacts to those drilling service providers.

Prospecting is also an activity that is within the jurisdiction of DRMS. See, e.g., 2 CCR 407-1, Rule 5; C.R.S. § 25-8-202(7)(a) (delegating to DRMS implementation of the water quality standards and classifications for state waters); C.R.S. § 25-8-202(7)(b)(II) (“Neither the commission nor division shall require permits for, or otherwise regulate, other activities subject to the jurisdiction of the implementing agencies . . .”). DRMS rules already provide for protection of state waters related to prospecting activities. See, e.g., 2 CCR 407-1, Rule 3.1.6(5) (regulations requiring that drilling pits for prospecting be operated to minimize the impact to state waters); and Rule 3.1.7 (regulation requiring that prospecting must be protective of groundwater).

**Request:** Remove SIC Code 1081 and exploration and test drilling from coverage under this general permit.

### **7.5.3 Specific comments on construction activities**

**Parts:** Permit Part I.A.1.e; Fact Sheet Part V.C.2:

**Comment:** The draft permit says that stormwater runoff from construction activities that disturb less than an acre may be covered under this draft permit. These activities should not be required to provide an “outfall location” to be covered by the permit (if that is the Division’s intent).<sup>7</sup>

Construction activities should not require a separate permit or outfall as long as the activity is already within an area where stormwater from the construction activity would be covered by BMPs and other stormwater controls.

Also, it is unclear why a separate permit is required for construction activities of 1 acre or more at a facility that is already permitted to disturb. While CMA understands that some construction activities are also not included under the current general permit, there are situations where it could be administratively expeditious to include those types of activities in a general permit, so long as the Division does not require “outfall locations.”

It is worth noting that sites undergoing construction activities are within DRMS permitted areas of disturbance, and are already regulated by DRMS. See, e.g., 2 CCR 407-1, Rule 1.1(4) (defining the affected land for purpose of a mining permit as the surface disturbed as the result of the mining operation), Rule 1.15(1) (requiring annual

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<sup>7</sup> Requiring an “outfall location” for every “construction activity” at a mining site could require multiple permit modifications. This could become a problem if the permit goes into administrative extension again, as it is the Division’s position that an administratively extended permit cannot be modified.

reports to indicate current and planned disturbances). The permitting requirements impose additional layers of administrative burden for permittees and the state, and overstep activities that are regulated by DRMS. See C.R.S. § 25-8-202(7)(b)(II).

**Request:** A mine permitted by DRMS should not have to get a CDPS permit for disturbance. To the extent a CDPS permit is required, it should not require specific “outfall locations.”

#### **7.5.4 Specific comments on roads at metal mining facilities**

**Parts:** Permit Parts I.A.1.b.ii, I.A.1.b.viii; Fact Sheet Part V.C.3

**Comments:** In addition to challenging these subparts as a whole (as described above), CMA has the following specific comments.

This subpart says that access/haul roads that fall under any of the 3 categories listed “is subject to the stormwater provisions identified in the permit, and the applicable federal ELG.” The categories identified *may* be subject to stormwater provisions (if they are a point source discharge that meets the definition of stormwater associated with industrial activity, discussed above), but are not subject to the ELGs. As discussed below, the ELGs referenced here should not apply to stormwater. Moreover, the Division has not provided a basis that the particular ELGs it seeks to apply are actually applicable to access/haul roads. Subpart C ELGs (Uranium, Radium, and Vanadium Ores Subcategory) “are applicable to discharges from (a) mines either open-pit or underground, from which uranium, radium and vanadium ores are produced; and (b) mills using the acid leach, alkaline leach, or combined acid and alkaline leach process for the extraction of uranium, radium and vanadium.” 40 C.F.R. § 440.30. Subpart J ELGs (Copper, Lead, Zinc, Gold, Silver, and Molybdenum Ores Subcategory) are applicable to “discharges from” certain mines and mills. 40 C.F.R. § 440.100. Stormwater runoff from a haul/access road is neither a discharge from a mine nor a mill.

**Request:** Revise this section as these are not automatically stormwater associated with industrial activity, nor are they automatically subject to the federal ELGs. Provide additional explanation.

#### **7.5.5 Summary of comment and request**

**Requests:** Remove example wastewater sources that are not consistent with the language in the CWA, CWQCA, EPA regulations, and/or the Commission regulations. Clarify that the permit only applies to non-exempt stormwater that is associated with industrial activity, as defined by the EPA and Commission.

## **7.6 Additional comments regarding coverage (or lack thereof) under the permit**

**Parts:** Permit Parts I.A.1, I.A.2, I.A.3; Fact Sheet Parts V.A, V.B, V.C, V.E

### **Comments:**

- Permit Part I.A.1 (pg. 4): In the context of this permit, describe what is an inactive facility engaged in metal mining.
- Permit Part I.A.1 (pg. 4): Historic, legacy sites not primarily engaged in mining, developing mines, or exploring for metallic minerals are not described by SIC Code 10.
- Permit Part I.A.2 (pg. 5): It is not clear what is meant by indirectly discharges to surface water.
- Permit Part I.A.2 (pg. 5): It is not clear how an entity can capture and sample sheet flow off of a mine site. If it gets channelized, then it's not sheet flow anymore. It is not clear what is meant by "enters a waterway within the facility," including the meaning of "waterway." Clarification is needed in this subpart. See also comments that sheet flow is not a point source discharge.
- Permit Part I.A.3.a (pg. 5): This section explains that discharges not comprised solely of stormwater runoff are excluded from coverage under this general permit. EPA says ELGs only apply to stormwater if they are commingled with process water or the like. Therefore, ELGs cannot be considered in this permit.
- Permit Part I.A.3.h (pg. 5) says "Except for placer mining (gravity separation), stormwater discharges associated with ore dressing and beneficiating operations are not eligible under this permit." It is not clear if this excludes milling operations, and if all milling operations need to seek coverage under an individual permit. It is not clear what happens for stormwater captured from outside buildings that contain milling equipment and where mill chemicals are off-loaded.
- Fact Sheet V.A. (pg. 5): The last paragraph in this subpart says that the permit authorizes stormwater-only discharges "consistent with" Regulation 61, Section 61.3(2)(e)(iii)(C)." For consistency with that section, this subpart should also specify that the permit does not apply to mining operations which have been released from applicable State or Federal reclamation requirements after December 16, 1990.
- Fact Sheet Part V.B. (pg. 5): The statement that the SIC 10 "major group includes establishments primarily engaged in mining, developing mines, or exploring for metallic minerals (ores)" is unclear. It should be clarified that

historic, legacy mines are not within this group, as well as potentially some inactive mines. See *also* Draft Permit Part I.A.1 (pg. 4).

- Fact Sheet Part V.C. (pg. 6): CMA requests clarification on the statement that the permit “authorizes stormwater-only discharges.” It is not clear what constitutes a stormwater discharge under this permit (qualitative, quantitative, de minimis).

**Request:** Provide additional justification and explanation, as well as make revisions as described in these comments.

## 8. Stormwater outfall locations /latitude and longitude

**Part:** Permit Part I.A.2; Fact Sheet Part V.C.4, V.D

**Comment:** Most certifications under the current general permit do not have specific outfalls identified as this was not previously required. CMA is unable to tell from the draft permit how many “outfalls” could be included in a certification. CMA members are aware that in recent draft individual permits, the Division included over 100 new stormwater “outfalls.”

CMA generally objects to these requirements. It makes no sense for a state to attempt to identify new outfalls as part of a general permit review. These terms and conditions should be removed.

If they are not removed, CMA requests that the Division provide more clarification regarding what constitutes a “stormwater outfall” in the context of a mining facility. CMA also requests that the Division clarify that the Division is only looking for facilities to identify features that are subject to point source permitting (i.e., discharge of a pollutant from a point source to state waters, that is not exempt from permitting under the no contact/no contamination by contact analysis, and are within the meaning of stormwater associated with industrial activity). Without further explanation, the Division’s expectations of a permittee, and the Division’s potential approaches to permitting a specific site, are not justified.

CMA also has the following questions/comments on this section:

- Permit Part I.A.2. says “Stormwater outfalls are locations where stormwater discharges to a surface water (directly or indirectly), and may be located within or outside of the CDPS permit boundary; stormwater outfalls are located prior to entering the surface water. It is not clear what would be an indirect discharge to surface water in this context.
- Permit Part I.A.2 says, “Alternately, if the discharge is not to a surface water located within or outside of the CDPS permit boundary, the stormwater outfall is where the industrial stormwater leaves the CDPS permit boundary.”

- The Division should clarify that to be considered an outfall, the discharge must be to a state water. As written, this sentence suggests that the WQCD could require a permit for all stormwater runoff even if there is not a point source discharge to a state water, as required by the CWQCA.
- It is unclear what is meant by the CDPS permit boundary, and whether the WQCD or the permittee defines that boundary.
- The last paragraph in Permit Part I.A.2 refers to sheet flow. This paragraph should be removed because sheet flow is not a point source discharge, as explained above.

**Request:** Clarify the requirement for identifying outfalls consistent with the CWQCA and Regulation 61.

## 9. Application of federal ELGs to stormwater

**Parts:** Permit Part I.C.1, Tables C.1.1, C.1.3, C.1.4, C.1.5, C.1.6, C.1.8; Fact Sheet Part III.C.2, V.D, and VII.A.1

**Comment:** For the first time in this general permit, the Division seeks to apply the federal ELGs found in 40 C.F.R. 440 for ore mining and dressing. Specifically, the Division asserts that certain stormwater discharges are subject to numeric ELGs in 40 C.F.R. 440, subpart C for uranium, radium, and vanadium ores and in subpart J for copper, lead, zinc, gold, silver, and molybdenum ores. CMA disagrees that ELGs apply to stormwater discharges.

The EPA was mandated by CWA Section 304(b) to develop “technology-based” ELGs for certain industrial classes of point sources regulated under the permit program found in Clean Water Act Section 402 (i.e., the NPDES permit program). EPA’s ELGs for the ore mining and dressing category only apply to two types of discharges: “mine drainage” and “process” wastewater. EPA and Hardrock Mining: A Source Book for Industry in the Northwest and Alaska, at 10 (EPA January 2003). EPA’s ore mining and dressing ELGs define “mine drainage” as “any water drained, pumped, or siphoned from a mine.” 40 C.F.R. § 440.132(h). “Mine” is defined as “an active mining area, including all land and property placed under, or above the surface of such land, used in or resulting from the work of extracting metal ore or minerals from their natural deposits by any means or method . . . .” *Id.* § 440.132(g). “Active mining area” is defined as “a place where work or other activity related to the extraction, removal, or recovery of metal ore is being conducted . . . .” *Id.* § 440.132(a).

Thus, as the Division acknowledges, “[t]he 40 CFR 440 federal ELGs are not applicable to stormwater discharges from top soil, waste rock, or overburden at a mining facility . . . .” Draft Fact Sheet, part VIII, A, 1, a. The Division goes on to assert, however, that this type of stormwater discharge would become subject to the ELGs if the discharge “commingles with stormwater discharges otherwise” subject to the regulations. *Id.* But

the Division does not explain the types of stormwater it believes would be subject to the ELGs.

Given the lack of clarity and specificity, CMA is concerned about how the Division will implement the general permit. As currently drafted, CMA believes that the fact sheet and permit do not sufficiently explain how the Division interprets 40 CFR 440 or whether the Division would apply the federal ELGs to a permittees' stormwater outfalls. It is not until a facility receives its certification that it would have a clear understanding of whether an outfall would be required to meet the federal ELGs. Yet, at that stage, a permittee would be foreclosed from being able to challenge the permitting decisions.

The only statement CMA was able to find explaining the Division's position, is a brief reference that stormwater runoff from access/haul roads "is subject to the stormwater provisions identified in the permit, and the applicable federal ELG." Draft Fact Sheet, part V, C, 2.<sup>8</sup>

However, as applied to stormwater and the ore mining and dressing ELGs, EPA issued a clarification in 1998 that the ELGs were not applicable to stormwater runoff from waste rock and overburden sources, including from haul roads constructed of waste rock or overburden. 63 Fed. Reg. at 42,534-42,548 (Aug. 7, 1998). Part of the rationale for this clarification was that EPA "did not evaluate the technological feasibility and cost impacts of diverting drainage from these sources into the active mining area when it developed the Ore Mining and Dressing Guidelines." *Id.* at 42,539.

Further, stormwater runoff from ore conveyance features (such as conveyor belts or haul roads) at mining sites is not "mine drainage" as defined in 40 C.F.R. § 440.132(h). EPA has clarified that certain areas at mines and mills, including areas conveying ore such as haul roads, are not subject to the federal ELGs, but are potentially subject to stormwater permitting if they flow to a point source. See, e.g., 63 Fed. Reg. 42,538, 42,544 (Aug. 7, 1998) (finding that stormwater runoff from onsite and offsite haul roads is eligible for coverage under EPA's MSGP and not subject to federal ELGs). EPA also has clarified that stormwater runoff from haul roads and conveyor belt systems at coal mines is not subject to the federal ELGs for the coal mining point source category, but rather is eligible for coverage under EPA's general stormwater permits. See, e.g., *Industrial Stormwater Fact Sheet Series Sector H: Coal Mines and Coal Mining-Related Facilities*, at 1 (EPA Feb. 2021 (EPA-833-F-06-023)); 60 Fed. Reg. 50,903 (Sept. 29, 1995) (EPA's 1995 MSGP). Importantly, the coal mining point source category has definitions of "active mining area" and "mine drainage" similar to and slightly broader

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<sup>8</sup> The draft fact sheet (pg. 8) does note that "this change provides a general permit option (as opposed to individual permit coverage) for stormwater discharges subject to specific ELGs." Aside from the fact that these ELGs do not apply to stormwater, it is unclear what the benefit would be to a site to obtain a general permit when it does not know what terms and conditions it will be required to comply with until it receives the certification, there is no opportunity to comment on the certification, and (according to the WQCD) there is no opportunity for administrative or judicial review of the certification.

than those found in the ore mining and dressing category. See 40 C.F.R. § 434.11(b) (“active mining area”) & (h) (“mine drainage”).

A review of EPA’s development documents and other guidance for the ore mining and dressing category confirms that “mine drainage” is limited to water, whether groundwater or surface runoff, that infiltrates active mine workings such as underground mines and open pits and can then be drained, pumped, or siphoned to a treatment plant. See, e.g., *Development Document for Effluent Limitations Guidelines and New Source Performance Standards for the Ore Mining and Dressing Point Source Category, Volume I -Sections I–VI*, at 180 (EPA July 1978) (“Water is a natural feature that interferes with mining activities. It enters mines by ground-water infiltration and surface runoff and comes into contact with materials in the host rock, ore, and overburden. . . . The mine water then requires treatment depending on its quality before it can be safely discharged into the surface drainage network.”); *Part 440—Ore Mining and Dressing Point Source Category—Clarification of Regulations* (44 Fed. Reg. 7953, 7954 (Feb. 8, 1979) (the ore mining and dressing ELGs “are concerned with water that has been collected. For example, the regulations would apply to process water, impregnated with metal values, that the operator has collected in holding facilities after application to the leach dump. The regulations require that water containing such contaminated leach solutions not be discharged. The regulations also are meant to apply to storm precipitation and runoff which may, on occasion, drain into or be channeled to the holding facility, and commingle with the leach solution.”); *Part 440 Ore Mining and Dressing Point Source Category—Interim Final Rules* (40 Fed. Reg. 51,724 (Nov. 6, 1975) (“Water enters mines via precipitation, ground water infiltration, and runoff where it may become polluted by contact with materials in the ore, overburden material, mine bottom, or exposed in the areas disturbed by the mining operation.”).

Based on this review, it is clear that “mine drainage” does not include, and was never intended to include, stormwater runoff from periphery features such as haul roads or conveyor systems, especially in light of the linear nature of such features and the inability to capture all runoff from such features. EPA explained in its 2011 study on the ore mining and dressing category that the study “examined information pertaining to the two types of wastewater discharged by ore mines: process wastewater (including mine drainage) and stormwater. Process wastewater is covered under 40 CFR Part 440. Stormwater is not covered under 40 CFR Part 440 unless it is commingled with process wastewater prior to discharge to a surface waterbody.” *Ore Mining and Dressing Preliminary Study Report*, at 1-1 (EPA Sept. 2011 (EPA-820-R-10-025)); see also 63 Fed. Reg. 42,539 (Aug. 7, 1998) (see language at the bottom of the first column on page 42,539 clarifying that there are point sources of drainage or runoff from within even the active mining area at a mine that would not meet the definition of “mine drainage”).

Thus, the Division’s assertion that stormwater is subject to 40 CFR 440 is inconsistent with the federal regulations. The EPA has made clear that its stormwater regulations — not the ore mining and dressing ELGs — apply to most stormwater discharges from

active and inactive mine sites where the stormwater discharges are not commingled with process/mill water or mine drainage. EPA and Hardrock Mining: A Source Book for Industry in the Northwest and Alaska, at 17. But, the draft general permit specifically provides that “[d]ischarges not comprised solely of stormwater runoff are excluded from coverage under this general permit.” Draft Fact Sheet, part V, E. Thus, the commingled storm and process water that could be subject to the federal ELGs are specifically not covered by the general permit.

Notably, the Division recognizes that the state’s technology-based limits found in Regulation 62 “do not apply to the stormwater-only discharges authorized under this general permit.” Draft Fact Sheet, part VII.A.1.b. For the reasons set forth above, the technology-based ELGs likewise do not apply. Therefore, the Division should remove consideration of the Federal ELGS in the permit as they are not applicable to the discharges to which this permit applies.

The application of ELGs for the first time is further problematic because the Division says no compliance schedules can be granted to comply with EPA’s ELGs. But as discussed above, EPA did not consider that numeric ELGs would be applied to stormwater. The Division must remove consideration of these ELGs from the stormwater general permit. If it does not, then it must determine some viable pathway that would not immediately put a permittee in noncompliance with limitations that have never applied, and never were intended to apply to stormwater.

**Requests:** The Division should remove consideration of the ELGs in the stormwater general permit. If the Division does not remove consideration of the ELGs in the stormwater general permit, then it must determine some viable way for permittees to comply with the new imposition of ELGs that will not immediately put them in noncompliance with a permit.

## **10. Misapplication of water quality standards and inclusion of numeric water WQBELs to stormwater**

### **10.1 Numeric limitations are not appropriate nor feasible for stormwater**

**Parts:** Permit Part I.C.1 including all tables; Fact Sheet Parts VII, VII.A.2, VII.B.2, IX.

**Comments:** The Division’s application of WQBELs to stormwater is both legally and technically suspect, and is contrary to EPA’s practice and research. EPA has long recognized that the nature and variability of stormwater renders the use of numeric pollutant standards impracticable. For example, EPA has stated that “storm water discharges are highly variable both in terms of flow and pollutant concentrations, and the relationships between discharges and water quality can be complex.” *Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits*, (EPA 1996). The variability of stormwater discharges is in large part why, 32 years into the stormwater permitting program, EPA has never applied water quality standard-based or other numeric effluent limits to stormwater discharges associated



with industrial activity in any of its industrial general permits. See U.S. EPA, National Pollutant Discharge Elimination System (NPDES) Multi-Sector General Permit (MSGP) for Stormwater Discharges Associated with Industrial Activity, <https://www.epa.gov/npdes/stormwater-discharges-industrial-activities-epas-2021-msgp> (“2021 MSGP”). The 2021 MSGP Permit Parts 1-7, Part 8, and the Fact Sheet are included with these comments as Attachments 3, 4, and 5, respectively.

Following litigation related to the 2015 MSGP, EPA agreed to fund a study conducted by the National Academy of Sciences, Engineering, and Medicine’s (“NAS”) National Research Council. The NAS was tasked with evaluating improvements to monitoring for stormwater and whether evaluating the feasibility of numeric standards. The study recommended certain monitoring, but did *not* recommend the development of numeric effluent limitations for any specific sector. See Attachment 5, 2021 MSGP Fact Sheet, Part III.

Application of any numeric criteria to stormwater is problematic given (a) the unique conditions that occur during episodic storm events and (b) that such an approach fails to account for the receiving water assimilation of any potential pollutants in stormwater discharge (this later part is highlighted in the draft permit documents, as the Division says the WQBEL is equal to the water quality standard).

The criteria supporting Colorado’s current water quality standards do not account for the unique conditions that are created by episodic and highly variable stormwater discharges. This critical issue was identified in the recent NAS study: National Academies of Sciences, Engineering, and Medicine. 2019. *Improving the EPA Multi-Sector General Permit for Industrial Stormwater Discharges*. Washington, DC: The National Academies Press.<sup>9</sup> The study discusses on page 10 concerns with applying water quality criteria or standards to stormwater discharges:

Most often, [water quality] criteria are pollutant specific and numeric and are designed around a low-flow dry weather condition, with the idea that this condition represents the highest pollutant concentration in a water body. However, stormwater flows will occur during quite different flow and loading conditions than those for which the criteria are typically established. Questions have been raised about the applicability and relevance of these criteria to wet weather conditions, but separate criteria for wet weather allowances have not been developed and implemented for industrial stormwater discharges.

This NAS discussion has particular relevance in Colorado because of the requirement in the CDPS regulations to use chronic low flow conditions in a stream “as defined in Regulation No. 31, section 31.9(1) of the Basic Standards” when deriving limitations from both acute and chronic water quality standards. Reg. 61.8(2)(b)(viii). Consequently, because WQBELs are established when an analysis determines that a

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<sup>9</sup> Per the terms of the report, please retrieve the PDF at this link: <https://doi.org/10.17226/25355>.

discharge causes or has the reasonable potential to cause or measurably contribute to an instream excursion above water quality criteria using low flow conditions, the application of WQBELs and any related reasonable potential evaluation is necessarily questionable as applied to stormwater discharges.

Furthermore, the Division's proposal deviates from national recognition that numeric effluent limits are "infeasible" for industrial stormwater discharges, and that in accordance with Regulation 61.8(3)(r) and conforming regulations nationally, practice-based effluent limits are appropriate. Regulation 61.8(3)(r) says: "The permit shall include best management practices to control or abate the discharge of pollutants **when numeric effluent limits are infeasible.**" (Emphasis added.) EPA and the Division have had a longstanding practice of recognizing that numeric limits are infeasible for stormwater discharges, due to factors such as the episodic nature of the discharges, the variability of discharge durations and concentrations, and the disconnect between how water quality standards are derived, measured for attainment, and the methods used to derive numeric effluent limits for low flow conditions and steady state discharges.

There is also insufficient information in the fact sheet regarding the new determination to add numeric limitations in light of EPA's 2021 MSGP, contrary to C.R.S. § 25-8-503.5.

Further, numeric limitations in the general permit could trigger the anti-backsliding provisions. This would not make sense in the stormwater permit context.

Limitations based on water quality standards are also likely to be more stringent than the technology-based ELGs that are applied to specific mine and mill wastewater. Many "contaminants" that could be limited by this permit are naturally occurring in soil, rain, or snow. Thus, stormwater runoff will also have levels of these naturally occurring metals and minerals, potentially in concentrations higher than the numeric water-quality based limitations.

A non-exhaustive list of potential WQBEL issues include the following, regardless of the speciation (i.e., dissolved, total recoverable, etc.): dissolved oxygen, pH, arsenic, antimony, beryllium, boron, cadmium, chromium (all forms), copper, iron, lead, mercury, molybdenum, nickel, radium, selenium, silver, sulfate, thallium, uranium, zinc, and "other pollutants of concern" not expressly identified. See also comments on the parameter evaluation and the Part I.C.1 tables in the draft permit. Absent review of a certification with the WQBELs, CMA cannot fully comment on these issues. CMA and its members reserve the right to appeal on these and other issues that are not "reasonably ascertainable" in the draft permit. See Reg. 61.7(c).

The draft permit also fails to comply with Regulation 61.5(2)(b)(i), which requires that the draft permit and rationale include, among other things, the proposed effluent limitations for each discharge point for those pollutants proposed to be limited.

There are also economic concerns with applying numeric WQBELs to stormwater. See also comments on economic reasonableness issues.

**Request:** Remove consideration of numeric limitations, including water quality standard-based limitations, in the general permit. These should not be applied to stormwater

## **10.2 WQCD should not conduct an antidegradation review**

**Parts:** Permit including Part I.C.1 Tables C.1.1-C.1.8; Fact Sheet Part VII.A.4

**Comments:** The Division should not conduct an antidegradation review for stormwater runoff. As explained above, EPA has declined to apply numeric effluent limitations to stormwater runoff. C There is not a basis to apply even more stringent numeric effluent limitations through an antidegradation review.

Antidegradation reviews in other individual permits have resulted in antidegradation based limitations that are technologically and economically infeasible to meet. Based on the general permit documents, there is no way of knowing what limits may be included in the certification as the result of antidegradation review.

It is also difficult to determine whether the Division will conduct an antidegradation review. Stormwater runoff could go to a stream designated as use protected, which does not require an antidegradation review. But, the Division may apply the designation from a further downstream segment that is “reviewable.”

CMA also notes that the Division substantially added to its description of antidegradation review, including the discussion of nonimpact limits, in the revised draft Fact Sheet that was sent to some permit holders on July 13, 2022. The revised permit and fact sheet were not communicated on the Division’s website and was not provided to the email list used to notify stakeholders of the July 1 draft. Therefore, CMA questions whether there was adequate notice for this change.

As set forth above, antidegradation review should not apply to stormwater runoff, and therefore, the Division’s Antidegradation Significance Determination Guidance and the 2022 Clarifications of Antidegradation Guidance Regarding Implementation of Implicit Non-Impact Limits (the “NILs Memorandum”) should not be referenced or relied upon in this general permit.

Further, CMA has concerns about whether the draft Fact Sheet and NILs Memorandum accurately set forth antidegradation review under Regulation 31 and the 2001 Antidegradation Significance Determination for New or Increased Water Quality Impacts Procedural Guidance. For example, the NILs Memorandum arbitrarily includes a baseline date of September 2000. This is inconsistent with Regulation 31.8(3)(a), which does not contain a baseline date for determination whether a regulated activity will have a new or increased water quality impact.

**Request:** The Division should not conduct antidegradation review for stormwater, and should not include antidegradation-based limitations in a certification under this general permit.

#### **11. Requirements for numeric flow limitations and continuous flow monitoring**

**Parts:** Permit Parts I.C.1, Tables C.1.1-C.1.8, Part I.K.4; Fact Sheet Parts V.D and IX.

**Comment:** The Division should not include numeric limitations for flow, and should not require continuous flow sampling.

Stormwater flow cannot generally be controlled. The size and frequency of precipitation events are inherently unpredictable and stormwater discharges cannot be expected to comply with a numeric effluent flow limit based on expected discharges. Further, attempting to collect such flow information will be extremely costly and burdensome.

Continuous flow monitoring should not be required at all. It is extremely difficult to configure, install, maintain, and manage continuous flow meters at stormwater outfalls and there is no justification for requiring this information.

Regulation 61 only allows continuous monitoring to be included in a permit “when appropriate” (Reg. 61.8(4)(d)). Considering that stormwater is unlikely to be flowing continuously, and that precipitation events can be unpredictable, it is not appropriate to require continuous monitoring for flow, especially not for every discharger. Using a continuous recorder when there is not a continuous flow can have an impact on the data. These should only be required under exceptional circumstances perhaps at an outfall that is always discharging and has significant flow when compared to receiving stream. In the majority of sites, a continuous flow recorder will be impracticable. If flow monitoring is required, it should be limited to grab/instantaneous sampling.

Moreover, if the Division continues to apply its Baseline Monitoring Frequency Policy, then it must also apply Footnote 2 to the Table in Appendix C, which allows for flow at mining facilities to be measured on an instantaneous basis when power is not available on site. In such a case, minor facilities would receive monthly flow monitoring, and major facilities would require 2 days/month flow monitoring. This exception should also be extended to sites where power is available because it is impracticable to use continuous flow recorders.

The Division needs to provide more than the 90 days included in Part I.K.4 to come into compliance with the flow monitoring requirement, regardless of whether a continuous or instantaneous flow device is used. Ninety days is too short of a timeframe for selection and installation of continuous or instantaneous flow monitoring devices, as infrastructure would need to be constructed to collect a flow measurement. The construction season is limited to the summer months when there is no snow cover and during times of low flow. Also, there is a possibility that a certification could be issued during the winter

months. Either the WQCD should allow for a year to install these devices, or include language that allows for additional time if ground conditions prevent installation.

**Request:** Provide practical and economic justification for flow monitoring requirements and numeric limitations. Provide at least one year to install any flow recording device.

## **12. Misapplication of the state’s narrative standards**

### **12.1 Agriculture use protection and EC/SAR**

**Parts:** Permit Part I.C; Fact Sheet Parts VII.A.3.a, VII.B.2.f

**Comment:** The Division specifically states that stormwater discharges were not contemplated during development of the EC/SAR policy, *WQP-24, Implementing Narrative Standards in Discharge Permits for the Protection of Irrigated Crops (2008)*. (Draft Fact Sheet, pg. 20).

The Division does not provide support for including EC/SAR monitoring and/or limitations, and has not explained the basis for applying this to stormwater that cannot be controlled. The Division has not explained how an entity could comply with these requirements for stormwater. The Division should therefore not be considering including monitoring and/or limitations related to EC/SAR.

It is also unclear from the drafts when the WQCD may apply EC/SAR monitoring and/or limits. If the Division intended for this to be considered an “other pollutant of concern” in the Permit Part I.C.1 tables, this needs to be clarified since EC/SAR can involve calculated parameters, not just parameters subject to grab samples.

**Request:** Remove consideration of EC/SAR requirements. Alternatively, provide additional explanation and justification for including these requirements.

### **12.2 Whole effluent toxicity (WET) testing**

**Parts:** Permit Parts I.C.1, I.D, III Appx. D; Fact Sheet Parts V.D, VII.A.3.b, VII.B.2.f,<sup>10</sup> IX

**Comment:** The Division should not consider whole effluent toxicity (WET) testing in the certifications. EPA did not apply WET testing to stormwater in its 2021 MSGP.

WET is not an effective means of representing or calculating stormwater toxicity, making it an inappropriate screening tool to determine the toxicity of stormwater discharges. Toxicity testing of stormwater discharges does not provide data that can be meaningfully correlated to actual habitat impacts in receiving waters. In fact, impacts of stormwater on receiving waters (which are primarily beneficial) are not fully understood and there is no basis to presume that stormwater discharges are potentially toxic.

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<sup>10</sup> CMA notes that the WQCD made substantial changes to Fact Sheet Part VII.B.2.f between the July 1 noticed version and the July 13 version.

Proven methodologies or approaches for correctly collecting water samples, interpreting the resulting data, and effectively responding to stormwater toxicity determinations do not exist. Other technical concerns or issues include: (1) WET testing results do not represent actual impacts that stormwater may have on the receiving waters; (2) WET testing results are so highly variable and unreliable that it is impossible to know if any given test result actually shows toxicity to test organisms, or shows random or statistical anomalies; (3) the test species used for WET tests are not representative of indigenous aquatic life, and therefore do not respond to stormwater the same way as indigenous species; (4) when should stormwater discharges should be sampled (*i.e.*, first flush versus some other point) in order for the data to be representative; and (5) how to determine the appropriate actions in response to a positive toxicity test in light of the changing and episodic nature of stormwater discharges.

Even beyond the identified technical and other issues with applying WET to stormwater discharges the Division's WET policy from 2010 Paragraph 2.c.C provides for an exemption for discharge comprised solely as precipitation events. Indeed, the draft Fact Sheet states that the Division "has established the use of WET testing as a method for identifying and controlling toxic discharges from *wastewater treatment facilities*." Draft Fact Sheet, part VII. A.1.3.b (emphasis added). In past permits, WET was never required for stormwater only discharges and in particular chronic WET was not required.

While CMA disagrees with the application of WET testing to stormwater, if the Division does include WET testing, it should apply acute WET as the default, not chronic.

Furthermore, the potential to include WET testing (or not) in a certification provides inadequate notice to permittees. WET testing and the TIE process can be extremely expensive. If a permittee does not know until it receives the certification if it will be required to complete WET testing, and does not know whether that testing will be acute or chronic, it is impossible to determine if the condition can feasibly be met.

Finally, saying that WET may be required on a "site-specific basis" fails to provide notice of potential permit terms. It is unclear how the Division will determine which facilities will be required to perform WET testing. Further this condition impermissibly attempts to treat this general permit as if it is an individual permit by applying site-specific conditions to individual certifications.

**Request:** Remove WET testing requirements. Alternatively, make the default acute WET testing. Provide additional justification for why the Divisions is deviating from its own policy.

### 12.3 PFAS terms and conditions

**Parts:** Permit Part I.C.1, Table C.1.9, I.C.4.k, I.K.3.f; Fact Sheet Parts III.C, V.D, VI.C, VII.A.3.c, VII.B.2.f, XI.B

#### 12.3.1 Which entities are subject to PFAS conditions

**Comment:** The draft permit documents indicate that the WQCD may include PFAS terms and conditions in a certification to facilities that “have used or stored” PFAS in the past or that “had an untreated release of materials containing PFAS to land or surface water.” Draft Fact Sheet, pp. 15, 32. The WQCD also refers to the potential to include terms and conditions for facilities “with a likelihood” of PFAS discharges. Draft Fact Sheet, pg. 15). The conditions could range from monitoring and practice-based effluent limitations to potentially numeric PFAS limitations (see Draft Fact Sheet, pg. 3, explaining that WQCD “may make a facility-specific determination as to whether additional [pollutants of concern] (e.g., organics, **PFAS**, etc.) **must be limited** and/or monitored to protect the classified used assigned to the receiving water.”) (emphasis added).

The draft permit documents should be revised because they would seek to apply PFAS conditions to a broader class of entities than intended by Policy 20-1. Policy 20-1 says: “With regards to stormwater, limits or use conditions will apply only to those permittees **using or possessing** materials containing PFAS.” Policy at 1. Policy 20-1 only allows conditions on stormwater if there is a present use or possession of the materials, and does not permit conditions when PFAS were used in the past.

Also, while the WQCD has not included a time frame of when the facility “used or stored,” it should be understood that facilities inactive since the 1970s should not be within its meaning, as industrial processes and products using PFAS were not generally used prior to the 1970s.

**Request:** The Division should clarify in the draft permit that PFAS conditions would only be applied to facilities that are currently using or possessing materials containing PFAS.

#### 12.3.2 Numeric limitations on PFAS are contrary to Policy 20-1 and inappropriate for stormwater

**Comment:** It is a mischaracterization to say that Policy 20-1 only “discourages the division from including PFAS limits.” Policy 20-1 is clear that WQCC did not intend its policy to be used to require numeric effluent limits for PFAS in stormwater discharges. (Policy 20-1 at pg. 16).

Given the ubiquitous nature of PFAS, **it is not the commission’s intent that this policy be used to require numeric effluent limits for PFAS in stormwater discharges.**

For this reason alone, numeric limitations for PFAS should not be included in the general permit or in a certification issued under this general permit.

Numeric PFAS limits are also inappropriate to apply to stormwater because they could require treatment, and there are limited technologies available to treat for PFAS. Although technologies that are able to reduce PFAS are still in development, PFAS treatment technologies may be broadly defined by two categories: 1. non-destructive PFAS technologies and 2. destructive PFAS technologies. In a non-destructive PFAS treatment scenario, the PFAS are removed from the impacted media and concentrated in a treatment residual (e.g., high-pressure membrane separation and adsorption). In these non-destructive processes, PFAS are not destroyed, and the resulting treatment residual requires careful management as to not reintroduce the accumulated PFAS back into the environment. Destructive PFAS treatment technologies intend to fully destroy the PFAS compounds and break apart the characteristic carbon-fluorine bonds. Many of the promising destructive PFAS technologies are still being proven at the laboratory bench and remain far from the technology readiness level necessary for field scale implementation, let alone implementation at a remote mine site. With the exception of incineration, which recently came under scrutiny as a PFAS residual disposal alternative due to questions regarding the terminal fate and transport of PFAS molecules in the incineration processes, there are no field-demonstrated destructive PFAS technologies.

To meet limits in stormwater discharges, a permittee would likely need to use a nondestructive PFAS treatment. Aside from the fact that this would be infeasible to implement for the majority of sites and majority of stormwater “outfalls” at the sites, there are economic, environmental, and energy consequences of nondestructive PFAS treatment. It would result in concentrated PFAS residuals (e.g., spent adsorbent, RO reject, etc.) that would require separate management/disposal. There is limited access to PFAS treatment residual management alternatives—these are generally limited to hazardous waste landfills, specialty incinerators, and deep well injection sites. These treatment options are expensive and require significant energy consumption, and they do not represent a sustainable, long-term disposal alternative. They are also certainly not appropriate when the subject matter is stormwater.

**Request:** Remove any language that would inappropriately apply numeric limits for PFAS to stormwater. Changes must be made in the Fact Sheet and Permit.

### **12.3.3 Infeasibility and impracticality of PFAS requirements**

**Comment:** Although CMA disagrees that PFAS requirements should be included in this general permit, to the extent that Policy 20-1 may allow practice-based limits or conditions to be applied to stormwater, CMA has concerns about the scope of these requirements and the practicality of complying with them at mining sites.

The WQCD mischaracterizes Policy 20-1, in saying that it “encourages the division to include practice-based limits to prevent PFAS from entering state waters.” Instead, the



policy says that: “The division should also, of course, establish practice-based effluent limits for PFAS **when appropriate**.” Policy 20-1, pg. 15 (emphasis added). Monitoring and practice-based limitations are certainly not appropriate here.

While CMA understands the value of PFAS data generally, monitoring for PFAS in stormwater would be infeasible and expensive. Sampling for PFAS is extremely complicated. PFAS have been used in a variety of industrial, commercial, and consumer products, and some of these products are present and/or used during sampling. As such, there is a high probability of PFAS cross-contamination in sampling. Current best-practices for PFAS sampling include restricting showers for 24 hours before the sampling event, not applying any products that could contain PFAS after showering (e.g., lotions, makeup, sunscreen, etc.), and wearing a specific outfit that minimizes the potential for cross-contamination. This sampling protocol is difficult to implement in normal conditions, and the timing component (i.e., planning a monitoring event over 24 hours in advance) could be impractical for stormwater driven by precipitation events.

PFAS monitoring is also incredibly expensive even when sampling is required at a single location. Although prices for some labs could be in the \$300-400/per sample range, it is not unheard of for samples to cost close to \$1,000. A proper sampling protocol requires 1 sample and 2 blanks, meaning that a single sampling event at one outfall could cost \$3,000 to analyze (this cost does not include the labor required to collect the sample). These costs would only be compounded if PFAS monitoring is required at multiple “outfalls” at a site. CMA cannot determine from the general permit if and where PFAS monitoring would be required in a certification. If the Division does impose monitoring in a certification, it should limit the monitoring to a single outfall to increase the probability of a usable sample and to minimize cost. It should also reduce monitoring to at most quarterly instead of monthly, both due to cost and lab turnaround time (discussed more below).

Also, Part I.C.4.k.iii says: “The permittee is responsible for identifying sources of PFAS at the permitted facility.” This statement is vague and could allow for different interpretations, which creates regulatory uncertainty. Moreover, monitoring for PFAS may not provide reliable information about what levels of PFAS may be contributed by a facility, and the practice-based limitation requirement of “identifying sources of PFAS” could be impossible. The WQCC acknowledged the ubiquitous nature of PFAS in exempting stormwater from PFAS limitations and conditions. Recent studies have shown that PFAS is present in rainwater.<sup>11</sup> It would stand to reason that stormwater runoff as the result of rain or snow precipitation would have an inherent level of PFAS unrelated to any industrial activity at a site.

**Request:** Remove PFAS requirements from the permit.

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<sup>11</sup> See, e.g., I.T Cousins et al., Outside the Safe Operating Spaces of a New Planetary Boundary for Per- and Polyfluoroalkyl Substances (PFAS), *Environ. Sci. Technol.* 2022, 56, 16, 11172–11179, <https://doi.org/10.1021/acs.est.2c02765>.

#### **12.3.4 Draft Method and 40 PFAS compounds.**

**Comment:** It is premature for the Division to require use of a draft method for sampling for PFAS. Draft Method 1633 has only gone through single lab validation. EPA also recently released a second draft method 1633. Clean Water Act regulations outline a clear process for the establishment of test procedures for the analysis of pollutants, and that process has not yet been completed with respect to Draft Method 1633. As such, it is premature for the State to develop a stormwater general permit that requires reliance on an unapproved test method. This method would also require monitoring for additional PFAS compounds not included in Policy 20-1.

Additionally, few labs are able to analyze using this draft method (most recent estimates are 10 labs in North America, none of which are located in Colorado). These laboratories are currently reporting turnaround times of 20 to 25 business days for PFAS sample results because of the demand for analysis. If all general permit certification holders in the state are required to use the draft method, along with potential individual permit holders, then these labs are likely to be even more backlogged and unable to process samples in the time required by the Division. This will make it difficult to comply with the monthly DMR requirements (see also comments on Reporting). The WQCD should change reporting to quarterly for any PFAS requirements.

Moreover, even EPA does not yet have ICIS reporting codes for 4 of these PFAS compounds, so these requirements are unclear and likely to cause confusion.

**Request:** Do not require draft method 1633. Change reporting to quarterly.

#### **12.3.5 Summary of PFAS comment/request**

**Requests:** The draft permit documents should be revised to clarify that the conditions will only be considered for application for permittees using or storing PFAS containing materials at the time of issuance of the permit certification, consistent with Policy 20-1. The draft permit documents should also be revised to clarify that numeric PFAS limitations will not be included in any circumstance. The WQCD should also consider a reduced monitoring program for those facilities that are within Policy 20-1, and should limit monitoring to when appropriate. The WQCD must also examine the economic impacts and reasonableness consistent with C.R.S. § 28-5-102, as discussed in these comments. The WQCD also must provide flexibility in the use of lab methods and should not require the use of an unapproved draft method. Reporting for PFAS should be quarterly to avoid compliance issues related to lab backlogs.

### 13. Permit limit tables, reasonable potential, and parameter evaluation issues

#### 13.1 Generally

**Parts:** Permit Part I.C.1; Fact Sheet Parts VII.A.4.g, VII.B, VII.B.2.

**Comment:** As explained above, numeric limitations should not be required for stormwater. Moreover, even if it were appropriate to apply numeric limitations (which it is not), water quality-based effluent limitations should only be included in a permit for parameters “which the Division determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or measurably contribute to an excursion above any water quality standard.” Reg. 61.8(2)(b)(i)(A). Regulation 61.8(2)(b)(i)(B) requires the Division to “use procedures, including appropriate water quality modeling, which account for existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, ... and, where appropriate, the dilution of the effluent in the receiving water.”

CMA does not believe there is sufficient information to determine that there would be reasonable potential (“RP”) for all of these parameters. CMA also notes that the Division should consider available dilution before making this determination.

Moreover, an RP analysis will depend on the specific permittee. CMA therefore questions whether it is appropriate for a general permit to conduct an RP analysis, where there will be no opportunity to comment on the terms and conditions of a certification. CMA has tried to address potential issues associated with RP with these comments, but reserves the right to identify further issues when the specific parameters appear in a certification given the difficulty of determining what terms may be included in a certification (i.e., these issues are not “reasonably ascertainable”).

CMA is concerned about numerous aspects of the RP evaluation and the resulting “limitation tables,” including but not limited to:

- Imposing the federal numeric ELGs (addressed more throughout these comments). These should not be applied to stormwater.
- Imposing WQBELs in addition to numeric ELGs based on a parameter evaluation which would be more consistent with an individual permit (addressed more throughout these comments). It is unclear how this general permit is different from an individual permit. The Division should not be including WQBELs for stormwater.
- Imposing monitoring and/or WQBELs for other parameters contained in the ELG “development documents.” Limits for metals that were screened out by EPA in its development of the ELGs as not being of concern should not be imposed in this permit.

- The extensiveness of the parameters analyzed, and the potential for limits and/or monitoring. This is not appropriate for stormwater, or this general permit.
- Imposing WQBELs based on “natural occurring geology.” For example, the Division should not include sulfate in every certification simply because it is naturally occurring. For starters, this parameter should only be considered for water supply (WS) classified segments. Also, RP cannot be determined without calculating the sulfate WS standard for each segment, since the WS standard is the less stringent of 250 mg/L or existing quality as of 2000. Certificate holders should be allowed time to provide information to establish existing quality as of 2000 prior to a determination that sulfate will be limited in a discharge permit.
- Imposing WQBELs for Regulation 31 standards that the WQCC has not adopted on a receiving segment. CMA questions the development of limits based on standards that appear in Regulation 31, when the WQCC has decided not to adopt that standard on the receiving segment (i.e., aluminum in most cases).
- Imposing WET testing, and in particular chronic WET testing (addressed more throughout these comments). WET testing should not be applied to stormwater.
- Evaluating site-specific parameters. This section does not provide notice of what may be in a certification given the WQCD’s “case by case” approach (addressed more throughout these comments). It is unclear what the purpose of having a general permit is if the WQCD intends to establish site-specific limitations based on stream hardness TVS.

**Request:** Do not apply numeric WQBELs to stormwater discharges especially in a general permit, where there is no opportunity to respond to the specific reasonable potential analysis to be included with a certification. The fact sheet’s reasonable potential section should be revised in recognition of Regulation 61 and in conformance with the comments included herein.

### **13.2 Uranium, Radium, Vanadium Mines subject to Subpart C (BAT/BPT/NSPS).**

**Parts:** Permit Part I.C.1, Table C.1.1; Fact Sheet Part VII.A.1.a, VII.A.1.a.i, VII.B.1.a, VII.B.2.a

**Comment:** CMA questions the appropriateness of the RP analysis included in the Fact Sheet at Part VII.B.2.a. The WQCD needs to provide additional explanation for the appropriateness of making qualitative RP determinations for any and all of these parameters (pH, dissolved oxygen, uranium, zinc, radium 226+228, antimony, arsenic, cadmium chromium, copper, iron, lead, mercury, nickel, selenium, etc.).

The permit table in Part I.C.1, Table C.1.1 provides inadequate notice of the proposed effluent limitations at each outfall, as required by Regulation 61.<sup>12</sup> Please also refer to CMA’s related comments including lack of notice; inappropriateness of applying ELGs to stormwater; misapplication of numeric and narrative standards; flow limits and continuous recorder requirements; monitoring frequencies; antidegradation; WET testing; etc. In particular, the notations to “various” for the limitations, and the inclusion of site-specific requirement for “other pollutants of concerns” provides insufficient notice of what may be included in a certification.

It is also unclear in what situations the WQCD may apply the requirements associated with the Subpart C ELGs and those in Table C.1.2 not subject to Subpart C ELGs.

**Request:** WQCD needs to provide additional information to support a finding of RP for parameters discussed in the fact sheet and permit. The WQCD should not apply ELGs or numeric or narrative standards, including numeric limitations. The WQCD should not require WET testing in every case.

### **13.3 Uranium, Radium, Vanadium Mines NOT subject to Subpart C**

**Parts:** Permit Part I.C.1, Table C.1.2; Fact Sheet Part VII.B.2.b

**Comment:** CMA questions the appropriateness of the RP analysis included in the Fact Sheet at Part VII.B.2.b. The WQCD needs to provide additional explanation for the appropriateness of making RP determinations for any or all of these parameters (pH, dissolved oxygen, antimony, arsenic, cadmium, chromium, copper, iron, lead, mercury, nickel, radium 226+228, selenium, uranium, zinc, etc.).<sup>13</sup>

The permit table in Part I.C.2, Table C.1.2 also provides inadequate notice of the proposed effluent limitations at each outfall as required by Regulation 61. Please also refer to CMA’s related comments including lack of notice; misapplication of numeric and narrative standards; flow limits and continuous recorder requirements; monitoring frequencies; antidegradation; WET testing; etc. In particular, the notations to “various” for the limitations, and the inclusion of site-specific requirement for “other pollutants of concerns” provides insufficient notice of what may be included in a certification.

It is also unclear in what situations the WQCD may apply the requirements associated with the Subpart C ELGs, and in what situations the WQCD would not apply the Subpart C ELGs.

**Request:** WQCD needs to provide additional information to support a finding of RP for parameters discussed in the fact sheet and permit. The WQCD should not apply

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<sup>12</sup> CMA also notes there is a numeric limitation for uranium included in Table C.1.1 in the July 13 version that had not appeared in the July 1 version.

<sup>13</sup> CMA notes that Fact Sheet Part VII.B.2.b was revised between the July 1 and July 13 versions to include an additional discussion for pH that did not appear in the originally noticed documents. The permit tables were also revised to include a numeric pH and adjust some monitoring frequencies.

numeric or narrative standards, including numeric limitations. The WQCD should not require WET testing in every case.

#### **13.4 Copper, Lead, Zinc, Gold, Silver Mines subject to Subpart J (BAT/BPT)**

**Parts:** Permit Part I.C.1, Table C.1.3; Fact Sheet Part VII.A.1.a, VII.A.1.a.ii., VII.B.1.b., VII.B.1.b.i, VII.B.2.c.i

**Comment:** CMA questions the appropriateness of the RP analysis included in the Fact Sheet at Part VII.B.2.c.i. The WQCD needs to provide additional explanation for the appropriateness of making RP determinations for any or all of these parameters (pH, Cadmium, Copper, Lead, Mercury, Zinc, Antimony, Arsenic, Beryllium, Chromium, Iron, Nickel, Selenium, Silver, Thallium, etc.).<sup>14</sup>

The permit table at Part I.C.1, Table C.1.3 also provides inadequate notice of the proposed effluent limitations at each outfall as required by Regulation 61. Please also refer to CMA’s related comments including lack of notice; inappropriateness of applying ELGs to stormwater; misapplication of numeric and narrative standards; flow limits and continuous recorder requirements; monitoring frequencies; antidegradation; WET testing; etc. In particular, the notations to “various” for the limitations, and the inclusion of site-specific requirement for “other pollutants of concerns” provides insufficient notice of what may be included in a certification.

It is also unclear in what situations the WQCD may apply the requirements associated with the Subpart J ELGs and those in Table C.1.7 not subject to Subpart J ELGs.

**Request:** WQCD needs to provide additional information to support a finding of RP for parameters discussed in the fact sheet and permit. The WQCD should not apply ELGs or numeric or narrative standards, including numeric limitations. The WQCD should not require WET testing in every case.

#### **13.5 Molybdenum Mines (producing less than 5,000 metric tons (5,512 short tons)/year) BPT/BAT**

**Parts:** Permit Part I.C.1, Table C.1.4; Fact Sheet Part VII.A.1.a, VII.A.1.a.ii., VII.B.1.b., VII.B.1.b.iii, VII.B.2.c.i

**Comment:** CMA questions the appropriateness of the RP analysis included in the Fact Sheet at Part VII.B.2.c.i. The WQCD needs to provide additional explanation for the appropriateness of making RP determinations for any or all of these parameters (pH,

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<sup>14</sup> This section also was revised between the July 1 and July 13 versions to include selenium as a potential parameter. Selenium did not appear in the noticed document.

Cadmium, Copper, Lead, Mercury, Zinc, Antimony, Arsenic, Beryllium, Chromium, Iron, Nickel, Selenium, Silver, Thallium, etc.).<sup>15</sup>

The permit table at Part I.C.1, Table C.1.4 also provides inadequate notice of the proposed effluent limitations at each outfall as required by Regulation 61. Please also refer to CMA’s related comments including lack of notice; inappropriateness of applying ELGs to stormwater; misapplication of numeric and narrative standards; flow limits and continuous recorder requirements; monitoring frequencies; antidegradation; WET testing; etc. In particular, the notations to “various” for the limitations, and the inclusion of site-specific requirement for “other pollutants of concerns” provides insufficient notice of what may be included in a certification.

It is also unclear in what situations the WQCD may apply the requirements associated with the Subpart J ELGs and those in Table C.1.7 not subject to Subpart J ELGs.

**Request:** WQCD needs to provide additional information to support a finding of RP for parameters discussed in the fact sheet and permit. The WQCD should not apply ELGs or numeric or narrative standards, including numeric limitations. The WQCD should not require WET testing in every case.

### **13.6 Molybdenum Mines (producing 5,000 metric tons [5,512 short tons] or greater/year) BPT/BAT**

**Parts:** Permit Part I.C.1, Table C.1.5; Fact Sheet Part VII.A.1.a, VII.A.1.a.ii., VII.B.1.b.ii, VII.B.2.c.ii

**Comments:** CMA questions the appropriateness of the RP analysis included in the Fact Sheet at Part VII.B.2.c.ii. The WQCD needs to provide additional explanation for the appropriateness of making RP determinations for any or all of these parameters (pH, Arsenic, Cadmium, Copper, Lead, Mercury, Zinc, Antimony, Beryllium, Chromium, Iron, Nickel, Selenium, Silver, Thallium, etc.).<sup>16</sup>

The permit table at Part I.C.1, Table C.1.5 also provides inadequate notice of the proposed effluent limitations at each outfall as required by Regulation 61. Please also refer to CMA’s related comments including lack of notice; inappropriateness of applying

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<sup>15</sup> CMA notes that Fact Sheet Part VII.B.2.c.i was revised between the July 1 and July 13 versions to include selenium as a potential parameter for the first time. Selenium did not appear in the originally noticed document. Molybdenum had also been omitted from this RP discussion, and an additional section on molybdenum was also added at Fact Sheet Part VII.B.2.c.i between July 1 and July 13. Table C.1.4 was also revised between drafts to include molybdenum in the main portion instead of the “site-specific parameters” portion of the table.

<sup>16</sup> CMA notes that Fact Sheet Part VII.B.2.c.ii was revised between the July 1 and July 13 versions to include selenium as a potential parameter for the first time. Selenium did not appear in the originally-noticed document. Molybdenum had also been omitted from this RP discussion, and an additional section on molybdenum was also added at Fact Sheet Part VII.B.2.c.ii between July 1 and July 13. Table C.1.5 was also revised between drafts to include molybdenum in the main portion instead of the “site-specific parameters” portion of the table.

ELGs to stormwater; misapplication of numeric and narrative standards; flow limits and continuous recorder requirements; monitoring frequencies; antidegradation; WET testing; etc. In particular, the notations to “various” for the limitations, and the inclusion of site-specific requirement for “other pollutants of concerns” provides insufficient notice of what may be included in a certification.

It is also unclear in what situations the WQCD may apply the requirements associated with the Subpart J ELGs and those in Table C.1.7 not subject to Subpart J ELGs.

**Requests:** WQCD needs to provide additional information to support a finding of RP for parameters discussed in the fact sheet and permit. The WQCD should not apply ELGs or numeric or narrative standards, including numeric limitations. The WQCD should not require WET testing in every case.

### **13.7 Copper, Lead, Zinc, Gold, Silver, Molybdenum Mines subject to Subpart J (NSPS)**

**Parts:** Permit Part I.C.1, Table C.1.6; Fact Sheet Part VII.A.1.a, VII.A.1.a.ii., VII.B.1.b.iv, VII.B.2.c.i, VII.B.2.c.ii

**Comments:** CMA questions the appropriateness of the RP analysis included in the Fact Sheet at Parts VII.B.2.c.i and VII.B.2.c.ii. The WQCD needs to provide additional explanation for the appropriateness of making RP determinations for any or all of these parameters for copper/lead/zinc/gold/silver/molybdenum less than 5,000 metric tons a year (pH, Cadmium, Copper, Lead, Mercury, Zinc, Antimony, Arsenic, Beryllium, Chromium, Iron, Nickel, Selenium, Silver, Thallium, etc.), and molybdenum mines 5,000 metric tons or more a year (pH, Arsenic, Cadmium, Copper, Lead, Mercury, Zinc, Antimony, Beryllium, Chromium, Iron, Nickel, Selenium, Silver, Thallium, etc.).<sup>17</sup>

The permit table at Part I.C.1, Table C.1.6 also provides inadequate notice of the proposed effluent limitations at each outfall as required by Regulation 61. Please also refer to CMA’s related comments including lack of notice; inappropriateness of applying ELGs to stormwater; misapplication of numeric and narrative standards; flow limits and continuous recorder requirements; monitoring frequencies; antidegradation; WET testing; etc. In particular, the notations to “various” for the limitations, and the inclusion of site-specific requirement for “other pollutants of concerns” provides insufficient notice of what may be included in a certification.

It is also unclear in what situations the WQCD may apply the requirements associated with the Subpart J ELGs and those in Table C.1.7 not subject to Subpart J ELGs.

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<sup>17</sup> CMA notes that Fact Sheet Parts VII.B.2.c.i and ii were revised between the July 1 and July 13 versions to include selenium as a potential parameter for the first time. Selenium did not appear in the originally-noticed document. Molybdenum had also been omitted from this RP discussion, and an additional section on molybdenum was also added at Fact Sheet Part VII.B.2.c.i and ii. between July 1 and July 13. Table C.1.6 was also revised between drafts to include molybdenum.



**Requests:** WQCD needs to provide additional information to support a finding of RP for parameters discussed in the fact sheet and permit. The WQCD should not apply ELGs or numeric or narrative standards, including numeric limitations. The WQCD should not require WET testing in every case.

### **13.8 Copper, Lead, Zinc, Gold, Silver, Molybdenum Mines NOT subject to Subpart J**

**Parts:** Permit Part I.C.1, Table C.1.7, Fact Sheet Part VII.B.2.d

**Comments:** CMA questions the appropriateness of the RP analysis included in the Fact Sheet at Part VII.B.2.d. The WQCD needs to provide additional explanation for the appropriateness of making RP determinations for any or all of these parameters (pH, Antimony, Arsenic, Beryllium, Cadmium, Chromium, Copper, Iron, Lead, Mercury, Nickel, Selenium, Silver, Thallium, Zinc, etc.).<sup>18</sup>

The permit table in Part I.C.2, Table C.1.7 also provides inadequate notice of the proposed effluent limitations at each outfall as required by Regulation 61. Please also refer to CMA's related comments including lack of notice; misapplication of numeric and narrative standards; flow limits and continuous recorder requirements; monitoring frequencies; antidegradation; WET testing; etc. In particular, the notations to "various" for the limitations, and the inclusion of site-specific requirement for "other pollutants of concerns" provides insufficient notice of what may be included in a certification.

It is also unclear in what situations the WQCD may apply the requirements associated with the Subpart J ELGs, and in what situations the WQCD would not apply the Subpart J ELGs.

**Requests:** WQCD needs to provide additional information to support a finding of RP for parameters discussed in the fact sheet and permit. The WQCD should not apply numeric or narrative standards, including numeric limitations. The WQCD should not require WET testing in every case.

### **13.9 Gold Placer Mines**

**Parts:** Permit Part I.C.1, Table C.1.8; Fact Sheet Part VII.B.2.e

**Comments:** CMA questions the appropriateness of the RP analysis included in the Fact Sheet at Part VII.B.2.e. The WQCD needs to provide additional explanation for the appropriateness of making RP determinations for any or all of these parameters (Aluminum, Antimony, Arsenic, Beryllium, Boron, Cadmium, Chromium, Copper, Iron, Lead, Manganese, Mercury, Molybdenum, Nickel, Selenium, Silver, Thallium, Zinc,

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<sup>18</sup> CMA notes that Fact Sheet Part VII.B.2.d was revised between the July 1 and July 13 versions to include new evaluation about pH and molybdenum that were originally omitted from this RP discussion. Table C.1.7 was also revised between drafts to include a numeric pH limit and to include molybdenum in the main portion of the table.

etc.). The WQCD has also not provided a sufficient basis for its inclusion of parameters mentioned in a development document and a 1994 technical resource document.

The permit table in Part I.C.2, Table C.1.8 also provides inadequate notice of the proposed effluent limitations at each outfall as required by Regulation 61.<sup>19</sup> Please also refer to CMA’s related comments including lack of notice; misapplication of numeric and narrative standards; flow limits and continuous recorder requirements; monitoring frequencies; antidegradation; WET testing; etc. In particular, the notations to “various” for the limitations, and the inclusion of site-specific requirement for “other pollutants of concerns” provides insufficient notice of what may be included in a certification.

**Requests:** WQCD needs to provide additional information to support a finding of RP for parameters discussed in the fact sheet and permit. The WQCD should not apply numeric or narrative standards, including numeric limitations. The WQCD should not require WET testing in every case.

### **13.10 Site-specific parameters for all facilities**

**Parts:** Permit Part I.C.1, Tables C.1.1-C.1.9; Fact Sheet Part VII.B.2.f

**Comments:** The RP analysis included in the Fact Sheet at Part VII.B.2.f for “site-specific parameters” is not appropriate. First, it is not appropriate for a general permit to include site-specific parameters; this would be included in an individual permit subject to notice and comment. The WQCD also needs to provide additional explanation for the appropriateness of making RP determinations for any or all of these parameters (pH, Sulfate, Radium 226+228, Molybdenum, PFAS, Organics, WET Testing, Other Pollutants), etc.).<sup>20</sup> The WQCD has also not provided a sufficient basis for their inclusion.

Also, the reference to “Other Pollutants” provides inadequate notice of the potential pollutants that could be reviewed in developing a permit certification. Potential legal and factual issues cannot be “reasonably ascertained” from the draft permit and CMA reserves the right to identify further issues.

**Requests:** WQCD needs to provide additional information to support a finding of RP for parameters discussed in the fact sheet and permit.

## **14. Effluent evaluation**

**Parts:** Permit Part I.E.1, Fact Sheet Parts V.D, VII.B.2, VII.C

**Comment:** The draft Permit and Fact Sheet seek to add a requirement that if a permittee determines that its stormwater discharge exceeds applicable water quality

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<sup>19</sup> Table C.1.8 was also revised between drafts to include a numeric pH limit.

<sup>20</sup> CMA notes that Fact Sheet Part VII.B.2.f was revised between the July 1 and July 13 versions to include pH as a potential site-specific parameter for the first time.

standards then it must: (1) “halt or reduce any activity” to prevent that discharge; and (2) submit a modification request to the division for possible inclusion of new effluent monitoring requirements or effluent limitations. Draft Permit, Part I, E, 1; Draft Fact Sheet, VII, C. However, CMA questions the Division’s authority to include either of these requirements in this permit.

CMA is concerned that by including this requirement, the Division is attempting to establish effluent limitations without actually including limits in the permit. CMA disagrees with this approach and believes that permittees should not be subject to ambiguous and undefined permit limits. For example, if this general permit includes a report only requirement for a parameter, this should be the only permit requirement and the Division should not use this provision to attempt to apply unspecified effluent limits.

Further, it is unclear to CMA whether permittees would need to continuously calculate water quality based effluent limits for their outfalls in order to ensure that they are satisfying this permit requirement, as water quality based effluent limitations change based on inputs such as chronic low flows and ambient concentrations, which would inherently be inconsistent in stormwater discharges.

The Division’s language also is contrary to EPA’s approach in its 2021 MSGP (Part 2.2.1) (and prior MSGPs), which clarifies that stormwater discharges should be controlled as necessary such that the receiving water of the United States will meet applicable water quality standards, not that the discharge itself must meet applicable water quality standards. Consequently, the governing standard for stormwater discharges is that they not cause or contribute to exceedances of applicable water quality standards in receiving waters, not that the stormwater discharges themselves meet every applicable standard. EPA’s permitting approach to stormwater has long recognized that stormwater is different and harder to control than standard effluent, and have made allowances accordingly. Because there is no justification to take a different approach, the Division should follow the EPA’s permitting approach with respect to meeting applicable water quality standards in the receiving waters.

The Division appears to have taken the “halt or reduce” language from Regulation 61.8(3)(k), which states that “[i]t shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of the permit.” Contrary to the Division’s application here, this regulation does not impose an affirmative duty on permittees to “halt or reduce” their activities. Rather, it simply serves as a warning that needing to stop an activity in order to comply with a permit term will not be accepted as an affirmative defense in an enforcement action. While the Division certainly can bring an enforcement action when a permittee violates a condition in its permit, it cannot impose this term as a requirement of the permit.

Further, CMA questions how a facility would comply with this requirement or what the Division means by halting or reducing an activity in the context of stormwater discharges. Unlike process water discharges that can generally be controlled and traced

to a particular activity at a facility, stormwater events are inherently unpredictable, and the associated discharges are variable and are largely outside of permittees' control. Because of the dispersed nature of stormwater, it is unlikely in most instances that the origin of a particular parameter in rainwater could be traced to a singular source or activity, and it may be entirely unrelated to a facility's operations. Therefore, there may not be any activity to "halt" or "reduce" that would have an impact on the parameters in the discharge.

Even if a permittee could "halt or reduce" stormwater discharges, the permittee may not legally be able to do so due to water rights issues.

Moreover, halting or reducing a permittee's mining activity would not stop the discharge, as stormwater flows are unrelated to permittee's activities and would continue to occur even if mining operations ceased. Furthermore, it would be impossible for permittees to prevent the discharge of stormwater from their properties. This is particularly true of the large, remote mining operations to which this general permit applies.

Further, CMA is concerned because the Division does not have authority to require permittees to apply for a modification of the terms of their certification. Regulation 61.8(8) provides the circumstances when the Division and permittees *may* seek modifications of permits. However, this regulation does not give the Division authority to impose an affirmative obligation on permittees to submit modification applications as a condition of the permit. Instead, it is the responsibility of the Division to initiate a modification if it believes that there are circumstances that warrant such a modification under Regulation 61.8(8) and shall not do so unless good cause exists. Regulation 61.8(8)(j).

Finally, CMA is concerned about whether this permit requirement will lead to an enforcement action if a permittee is unable to control naturally occurring parameters, such as iron, over which permittees have no control. Additionally, it is unclear what would happen if this requirement was triggered while the permit was in administrative extension. The Division takes the position that it cannot modify administratively extended permits. Many permits, including metal mine permits, have sat in administrative extension for at least a full permit term.

**Request:** Remove the "effluent evaluation" requirement.

## **15. Sampling requirements and frequency**

### **15.1 Baseline Monitoring Frequency Policy not intended to apply to stormwater**

**Parts:** Permit Part I.C.1 including Tables C.1.1-C.1.9; Fact Sheet Part XI.A

**Comment:** The Division's Baseline Monitoring Frequency, Sample Type and Reduced Monitoring Frequency Policy for Industrial and Domestic Wastewater Treatment

Facilities, WQP-20, (the “Monitoring Policy”) does not apply to stormwater discharges and should therefore not be relied upon when setting monitoring frequencies for permittees under this general permit. As the name suggests, the Division’s Monitoring Policy provides the baseline monitoring requirements for outfalls from industrial and domestic *wastewater treatment facilities*. Nowhere in the policy does it contemplate that these monitoring frequencies should be applied to stormwater discharges. Instead, the policy provides that “intermittent type discharges . . . are not subject to this policy. Monitoring frequencies for these types of discharges will be determined as assigned in either the general permit, or by the permit writer in the case of an individual permit.” WQP-20, pg. 2. Stormwater discharges are the very type of unpredictable, intermittent discharges that are excluded from the policy.

CMA believes that the policy’s discussion of sampling frequencies for industrial facilities, which the Division contends apply here, further underscore that the Monitoring Policy was not intended to apply to stormwater discharges. For example, the policy states that the sampling frequency for industrial facilities is determined based in part on the flow rate, which is typically determined by a facility’s “actual production rates, with a default rate equal to the design capacity of the facility.” WQP-20, pg. 2. This discussion makes no sense in the context of stormwater, as such discharges are not tied to a facility’s production rate or its design capacity.

Finally, individuals that helped develop the Monitoring Policy have confirmed that it was never intended to apply to stormwater discharges. Therefore, the Division should not apply the Monitoring Policy to permittees under this general permit and reference to the Policy should be deleted from the Fact Sheet and Permit. Instead, monitoring frequencies should be set as described below.

**Request:** Delete reference to the Baseline Monitoring Frequency Policy and revise sampling frequencies.

## **15.2 Proposed monitoring is not feasible**

**Parts:** Permit Part I.C.1 including Tables C.1.1-C.1.9; Fact Sheet Part XI.A

**Comments:** Most certifications under the current permit did not require this type of monitoring. See 2006 Permit, pg. 12 (“Sampling and testing of stormwater for specific parameters is not required on a routine basis under this permit.”). In the draft renewal permit, the WQCD has included extensive monitoring requirements at an excessive frequency—ranging from twice a month to weekly for most parameters. WQCD has not provided sufficient information to support the proposed monitoring or the frequency of the monitoring that could appear in a discharge permit. This monitoring could be prohibitively expensive and infeasible to comply with depending on where an “outfall” may be on a site, how that outfall is accessed, how many “outfalls” are included in a permit covering a vast mine site, and availability of employees to perform the monitoring (factors that the WQCD must consider under its WQP-20, if applied). This is especially

concerning for remote and/or inactive sites. Also, the WQCD has not indicated if there will be a different monitoring requirement for active vs. inactive sites.

For comparison, the EPA's 2021 MSGP stormwater monitoring for hard rock mining facilities is required to be conducted on a quarterly basis for the first and fourth year of permit coverage for most monitoring (Part 4.2.2.3) and on an annual or bi-annual basis for monitoring for runoff from waste rock and overburden piles (Parts 8.G.8.3 and 8.G.8.4). In addition, under the MSGP (Part 4.1.1) monitoring is not required to be conducted for every "outfall" that is substantially similar in terms of exposed materials, general industrial activities, and control measures. Rather, only one representative outfall for each set of substantially similar outfalls is required to be monitored.

The Division also has not explained how the increased monitoring frequency is consistent with Regulation 61's requirement that monitoring can be included "as may be reasonably required . . ." Reg. 61.8(4)(a). Additionally, the Division has not yet explained why this frequency of monitoring is necessary to "yield data which are representative of the monitored activity," Reg. 61.8(4)(d), and why quarterly or annual monitoring at representative outfalls is not sufficient to produce this data.

**Request:** The Division should make monitoring requirements consistent with EPA's 2021 MSGP, including limiting the frequency as well as the locations that need to be monitored to only representative outfalls.

### **15.3 Clarification is needed if the Monitoring Policy does apply**

If the WQCD nevertheless applies the Baseline Monitoring Frequency Policy, then it should provide clarifications including:

- The basis for determining if a site is a Minor Facility vs. Major Facility.
- How the WQCD's proposal to use EPA's Rating System (NPDES PERMIT RATING WORKSHEET) is appropriate for stormwater, particularly for an inactive site.
- How an inactive site is handled under the Monitoring Frequency Policy.

**Request:** Provide additional explanation.

### **15.4 Permittees will need time to comply with the new monitoring requirements**

**Parts:** Fact Sheet Part XI.A; Permit Part I.C.1 including Tables C.1.1-C.1.9.

**Comments:** The permit currently requires monitoring to begin immediately upon issuance of the certification. See Part I.C.1. The monitoring proposed in the general permit, if adopted in a certification, could require significant amount of time, resources, staff, training, and equipment. Sampling stormwater runoff is complicated and difficult;

EPA recently issued a 63-page guidance document for its 2021 MSGP to assist sites in the very task.<sup>21</sup>

CMA cannot determine from the draft general permit what monitoring frequency may be applied and to what number of “outfalls,” or where these outfalls may be. CMA objects to the attempt to identify new “outfalls” as part of this general permit renewal. At the very least, the Division needs to allow facilities time to comply with the new proposed monitoring requirements, including but not limited to hiring additional staff and determining a reliable and safe method to sample stormwater runoff at potential new “outfalls.” A facility cannot begin these tasks until it has an idea of what monitoring it will need to conduct at how many locations, which will only be known when a certification is issued.

To allow permittees time to comply with the new requirements, the Division should delay the effective date of the monitoring as reasonably necessary to develop a program to implement the required monitoring.

**Request:** Delay the effective date of monitoring requirements to allow permittees to get into compliance. Remove the language in the draft permit at Part I.C.1 requiring monitoring to “begin immediately.”

## **16. Inspection frequency and requirements**

**Parts:** Permit Parts I.C.5, I.C.6, and I.H; Fact Sheet Part VIII.F

**Comment:** With limited exceptions, the draft general permit will require monthly inspections (and in some cases, more frequent inspections). If a permittee qualifies for an exception, they are still required to inspect six times a year.

The 6 to 12 times/year inspection frequency is much more frequent than the current permit, which only requires twice per year inspections for active mining operations (with an exception allowing once in two years in certain instances where it would be impracticable to conduct semiannual inspections), and once per year for inactive mining operations (with an exception allowing every 3 years in certain instance where it would be impracticable to conduct an inspection annually). EPA’s 2021 MSGP generally requires quarterly inspections of most facilities, and only annual inspections for inactive mines.

Also, there is no basis for requiring 6-12 times/year inspections for many of the mining sites, including of areas that are completed and finally stabilized. Conditions are unlikely to change that frequently.

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<sup>21</sup> See EPA, Industrial Stormwater Monitoring and Sampling Guide (Apr. 2021), [https://www.epa.gov/sites/default/files/2015-11/documents/msgp\\_monitoring\\_guide.pdf](https://www.epa.gov/sites/default/files/2015-11/documents/msgp_monitoring_guide.pdf)

In addition, it is unclear from the second row of this table in Part I.C.6 that it is actually an every other month, instead of monthly requirement, since it still says “Monthly facility inspection.”

Additional information is needed to support this increase in inspection frequency. Additional information is also needed to support the elimination of the “every 3 years” provision for certain inactive mines

It should be noted and understood that certain sites are simply inaccessible for more than half the year due to snowpack, meaning that many of these inspections could not occur at the required frequency. Inspections may not be feasible during winter. Even though there are exceptions for adverse weather conditions, these would need to also include inaccessible or not visible due to snowpack in and around the outfall location and due to safety concerns regarding avalanche danger. Also, permit certifications should not include monthly inspection requirement during winter months at locations where snowpack will generally limit ability to perform an inspection.

**Request:** The Division should reduce the inspection frequency to that required by the current permit, or by the 2021 MSGP permit-- twice per year or quarterly for active mines, and only once per year for inactive mines. The Division should also retain the current exception allowing an every-3-years frequency for inactive mines where annual inspections would be impracticable. Additionally, consideration for access and visibility of outfall locations throughout the year should be considered.

## 17. Special study for arsenic

**Parts:** Permit Part I.E.2, Fact Sheet Part X

**Comments:** CMA questions the appropriateness of applying the arsenic water quality standard to stormwater. Arsenic is naturally occurring in Colorado, and thus likely to naturally occur in stormwater. The current water+fish standard arsenic is 0.02 µg/L, which is below detection and below the limits of technology even for process water discharges. The current standard is also at least an order of magnitude lower than the anticipated revised standard that the WQCC may consider in 2024.

Stormwater permittees should not be required to perform arsenic studies and feasibility evaluations. The special study requirements for arsenic were never intended to apply to stormwater outfalls. Monitoring and source identification requirements were proposed by the Division as part of the 2019 temporary modification rulemaking hearing. Nowhere in that proposal did the Division contemplate that these requirements would be applied to stormwater outfalls. See Division’s Prehearing Statement, Ex. D.<sup>22</sup> Instead, the Division explained that the monitoring, source identification, and evaluation of source control and treatment options could be applied to a facility’s effluent, with no mention of

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<sup>22</sup> Available at: [WQCD - Google Drive](#). CMA notes that this is further evidence of information that the WQCC did not anticipate or consider in the basin rulemakings, as addressed in this comment letter.



their stormwater outfalls. For example, the Division indicated that monitoring would be in accordance with Water Quality Permits Policy 20, which does not apply to stormwater, and that sectors other than POTW should focus on factors that make no sense in the context of stormwater when conducting their source identification and characterization, including “influent & effluent monitoring to characterize variability and current/incidental removal, as well as influent monitoring for competing ions (e.g. TDS) and can proceed with evaluating flow management options (e.g. hydrologic controls to reduce the volume of source water, water treated, and water discharged), operational changes, treatment alternatives, and alternative discharge options.” *Id.* at p 8.

It is also likely that because the Commission did not consider stormwater discharges, there may not be temporary modifications on every “receiving segment” that the WQCD could apply in a certification. Some segments are also likely mis-classified as water+fish. The Division should delay these requirements to allow time for its standards unit to propose temporary modifications on all potential “receiving segments” for stormwater, and to examine whether the water+fish standard should be removed from certain segments.

Further, CMA believes these requirements are only appropriate for certain individual permits, not general permits. One example of the infeasibility of complying with this requirement is the table at Permit Part I.E.2, which requires submittal of a report “summarizing total recoverable and dissolved data to date; **influent** and effluent arsenic speciation . . .” (pg. 40). How is stormwater influent data gathered?

The table at Permit Part I.E.2 also requires the permittee to evaluate options to control arsenic such as ferric or alum, etc., but the permittee cannot use a chemical treatment without going through the chemical approval process. How is a permittee supposed to evaluate options and comply with this requirement?

It is not appropriate to explore and potentially require treatment for arsenic for stormwater, including where arsenic concentrations are higher than 3.0 ug/l. See Draft Fact Sheet, pg. 41. This would put the burden on metal mining facilities to remove naturally occurring pollutants. Moreover, the recognized potential treatment options include ferric coagulation with solid-liquid separation, ferric oxide-based adsorptive media, reverse osmosis or nanofiltration, and ion exchange; which are not appropriate technologies to apply to stormwater only discharges.

The table at Permit Part I.E.2 also fails to provide notice of how much time a permittee would have to meet the activities in this study. Therefore, issues related to timing for this study are not ascertainable at this time.

**Request:** Remove arsenic standards/limits, and remove the requirement for studies. Do not require treatment for arsenic for stormwater.

## 18. Compliance schedules

**Parts:** Permit Part I.F; Fact Sheet Part IX.D

**Comment:** The WQCD should explain why a general permit would include a compliance schedule, as these are site-specific determinations.

Also, the draft permit's example compliance schedule does not provide enough notice of what compliance schedules could be included in a certification under this draft general permit. CMA cannot adequately comment on this specific example compliance schedule since it may or may not apply to all or more parameters in a certification, and the time provided may or may not be sufficient for a specific permittee. See also Reg. 61.5(2)(b)(iii) (requiring draft permit to include interim dates for compliance schedules). CMA and its members reserve the right to further challenge compliance schedule requirements in this general permit and certifications issued under it, as there are likely issues of fact and law that are not ascertainable from this draft permit.

CMA is further concerned about the lack of notice and comment on a certification as it relates to compliance schedules, and the Division's stance that a certification is not entitled to administrative review, as more fully explained elsewhere in these comments.

**Request:** Provide additional information on the use of compliance schedules, and clarify whether the WQCD will consult with a certificate holder about the need for and duration of compliance schedules prior to issuing the certification.

## 19. Stormwater Management Plan requirements

**Parts:** Permit Part I.J; Fact Sheet Part VIII.H.

**Comments:** The Division has included a number of new requirements for developing and complying with a stormwater management plan ("SWMP"), as outlined in the draft permit at Part I.J. *Compare with* 2006 Permit Part I.B. The new requirements may overstep aspects that are part of "running a business" and not related to the Division's discharge permitting. The Division has also applied the same requirements to both active and inactive mines. These new requirements are likely to impose a significant administrative burden on mining facilities (especially for inactive sites) without an identified corresponding public health benefit.

The Division has included a short section in the fact sheet explaining some, but not all of these changes, but has failed to provide evidence supporting the changes to the SWMP requirements, contrary to C.R.S. § 25-8-503.5. These changes could also have significant economic and/or administrative burdens. In some cases, there is likely to only be one person responsible for the site. It is unclear how documented procedures to the extent required in the draft permit would benefit that person other than add a layer of administrative burden. The lack of supporting evidence is particularly true for combining the requirements for active and inactive mines.

Regarding the general SWMP requirements at Permit I.J.1 (and Fact Sheet Part VIII.H.1), CMA has the following questions/ comments:

- The draft permit only allows 180 days to update existing SWMPs. (Part I.J.1). This may not be enough time in every instance given the breadth of the new terms and conditions. The WQCD should provide additional time for permittees when warranted.
- The draft permit requires a permittee to prepare the SWMP prior to applying (Part I.J.1.b). It is unclear if the SWMP would be required to include the monitoring procedures as required by Part I.J.1.h, including those detailed at Part I.J.1.h.ii. It is unclear how this procedure could be developed ahead of the certification, since the general permit is unclear on what monitoring will be required in the certification, at what locations, and at what frequencies. Can the WQCD clarify what should be included in the SWMP, when the permittee will not know until it receives the certification where, what, or how often it must sample and inspect?
- The draft permit includes a new provision that allows the Division, upon determination that the discharge does not “or may not” achieve effluent limits, to require the permittee to develop and implement supplemental control measures (Part I.J.1.g.i.c.). The Division has not identified the factors it would use to determine that it “may not” achieve effluent limits. It is also unclear what supplemental control measures may need to be developed and implemented.
- Draft Permit Part I.J.1.g.ii.d requires modification of the SWMP within 72 hours after the change(s) in the field for a permittee-initiated modification due to changes in response to site conditions. This is not enough time to revise a SWMP and such a short timeframe is not justified.

There are also numerous new and more specific requirements for SWMPs at Permit Part I.J.2 (and Fact Sheet Part VIII.H.2) that need additional explanation and supporting information. These include but are not limited to:

- A new requirement that the facility map should also include the “[l]ocations or sources of run-on to the facility from adjacent property that contains significant quantities of pollutants.” (I.J.2.c.xii). It is not clear what constitutes “significant quantities of pollutants,” or what constitutes “run-on.”
- A new requirement to prepare an inventory of facilities activities and equipment, and new requirement to identify areas that could have in the past contributed to pollutants in stormwater. (Part I.J.2.d.i.). It is unclear what the basis for this is, and what constitutes a “facility activity,” particularly for an inactive mineral mine.
- A new requirement for a more detailed list of what must be identified as potential pollutant sources, including a requirement to look at areas not previously identified is required (including but not limited to roofs exposed to the air or

associated surfaces made of galvanized materials that may be mobilized by stormwater) (Part I.J.2.d.i.h-i). Such an inventory is difficult, time-consuming, and not justified.

- A new requirement to inventory materials that are handled anywhere on the site that could be exposed to precipitation or runoff (Part I.J.2.d.ii.). It is unclear what the basis is for this requirement.
- A new requirement to describe “any potential sources of pollutants from past activities, materials/commodity and spills” which could contribute pollutants to stormwaters (Part I.J.2d.ii.c), without clarification of how far in the past a permittee must look (other than requiring documenting if it was within the past 3 years). This requirement is unclear and should not be included.
- A new requirement to inventory “[a]ll chemical products in use at the facility.” (Part I.J.2.d.ii.d). While the “e.g.” explains this would include chemical products/additives, settling agents, flocculants, or other material proposed for use/treating stormwater, it is unclear if the permittee will be required to inventory chemical products on the mining site used for other purposes. It would be infeasible to develop and maintain a current list of all chemicals utilized at a facility. It also would not make sense to require a chemical inventory for chemical products that are not used within the capture area of stormwater outfalls. Further, any metal mine that uses chemical reagents is considered a Designated Mining Operation (“DMO”) by DRMS and these chemicals are regulated by DRMS. DMOs are also required to maintain sediment control features. This requirement is overreaching of DRMS jurisdiction. Also, it encroaches on EPA’s authority under the SPCC rules.
- A new requirement to document the design, installation and implementation specifications, including maintenance specifications, for each control measure used by the permittee to meet the effluent limitations (Part I.J.2.e). Stormwater control measures do not generally contain design, installation, and maintenance specifications, and requiring this would require a massive engineering effort that is not warranted. Moreover, this is an activity regulated by DRMS as part of its Environmental Protection Facility Rules. See C.R.S. § 25-8-202(7).
- A new requirement to document the schedules, procedures, and evaluation results of numerous items (see (Part I.J.2.f). The current permit requires that the SWMP identify these procedures but does not require documentation. The Division has not explained why the current SWMP requirements of identifying the procedures that must be followed is insufficient, or the relation of the new requirements to protecting water quality. Also, requiring preventative maintenance schedules for industrial equipment and systems (I.J.2.f.ii) is not clear enough to understand what would be included in its scope, and it also does not seem warranted, realistic, or feasible to include this in a SWMP.

- A new requirement to document procedures to performing facility inspections, identify the person performing the inspection, and the schedule for inspections. (Part I.J.2.g). The Division has not explained how a facility should document a schedule for inspections during a runoff event, which is often unpredictable.
- A new requirement that purports to require that *for every* exception to monthly inspections or runoff event inspections requirements to include in the SWMP a signed and certificated documentation to support this claim (“as required by I.H”). (Part I.J.2.g.iii). It is unclear whether this requirement would be triggered every month, considering that monthly inspections are likely impossible in many areas of the state during the winter months.
- A new requirement to document monitoring procedure (Part I.J.2.h). These requirements could be very onerous, and seem unwarranted. Since the general permit already specifies most of this, it is unclear why additional documentation that needs to be managed and updated needs to be developed.
- A requirement to identify procedures for sample collection and handling, including any deviations from sampling within the first 30 minutes of a measurable storm event (I.J.2.h.ii.c). It is unclear if the permit requires sampling for storm events, and it would not be feasible to sample more than one outfall within the first 30 minutes of a storm event. Also, at many sites, particularly for inactive, unmanned sites, it could take more than an hour to get to the “outfall,” so measuring any outfall within the first 30 minutes would be impossible. For both active and inactive sites, an entity may not know whether it is raining at the site since weather conditions are quite variable in the mountains. Compliance could require someone to be at the site at all times, which is not reasonable nor appropriate for many sites, including for inactive, and historic/legacy mine sites.
- A requirement to identify the “numeric control values” applicable to discharges from each outfall. (Part I.J.2.h.ii.f). Does this mean discharge permit limitations? A permittee would not know these until they receive a certification, so it is unclear how it could be prepared for the application which requires the SWMP.

**Request:** Provide additional explanation for these requirements, or, alternatively, remove to the extent that the requirements are duplicative or otherwise unnecessary. Engage in stakeholder discussions with CMA and potential certification holders to identify what is feasible for a SWMP, and to clarify what information the WQCD is actually seeking for the SWMP. Remove requirements that are already handled by DRMS, including for reagent usage and storage.

## 20. Reporting requirements

**Parts:** Permit Part I.L, Fact Sheet Part XI.B

**Comments:** The current permit (pp. 13-14) currently requires most permittees to submit an annual report, with inactive mining operations required to submit one report total. Those few certifications that have requirements to collect data require reporting on a quarterly basis.

The Division has now proposed monthly reporting for all facilities. The Division has not adequately explained the increase in reporting frequency to monthly. Moreover, monthly reporting may be impossible for parameters such as PFAS, where turnaround time for sample processing is 20-25 business days (see also comments above).

This section also must clarify the process for submitting PFAS data for those four compounds that do not have EPA codes to use the NetDMR system.

**Request:** Change reporting to quarterly for active mines, and annually for inactive mines. Clarify the process for the 4 PFAS compounds that do not yet have EPA codes.

## 21. Obtaining and maintaining authorization under this permit

**Parts:** Permit Parts I.A.3, I.A.5; Fact Sheet Part V.E

**Comments:**

- Permit Part I.A.3 (pg. 5): The draft permit says that a permittee may seek individual permit coverage “as appropriate and available.” (see also Draft Fact Sheet, Part V.E, pg. 9). This does not provide enough information for a permittee to determine if an individual or general permit should be obtained.
- Permit Part I.A.5.a.ii and iv (pg. 6): The timing and process for developing a SWMP is unclear. Subpart ii requires development of a SWMP prior to submitting an application, and then subpart iv says that a SWMP will be completed prior to discharge of stormwater (presumably after certification is approved). Also, there is the issue that a SWMP may not be able to be completed until certification is received so as to know all of the requirements in the certification.
- Permit Part I.A.5.a.iii (pg. 6): This subpart requires that an application form be provided to the Division at least 120 days before discharge. CMA is concerned that this will not be enough time, as it is unsure if permittees are aware of what the form will look like and what information will be required. Based on the scope of the general permit, this application form could be very time-consuming. Also, it is unclear if those permittees that have certifications already in administrative extension based on submitting renewal applications are supposed to submit an application 120 days before the effective date of this new general permit.

- Permit Part I.A.5.a.v (pg. 6): It is unclear if the electronic notification that the WQCD granted permit coverage will be provided in a timely manner.
- Permit Part I.A.5.b.ii (pg. 6): It is unclear in what situations the WQCD may “delay the authorization of discharge.” It is unclear what will happen if an authorization is delayed, but there is a precipitation event that causes stormwater runoff. Precipitation events cannot be controlled.
- Permit Part I.A.5.b.v (pg. 6): It is unclear in what instances the WQCD would deny authorization, what criteria the Division would use (despite requirements in Reg. 61.9(2)(d) that certification or denial must be “**based on criteria** established by the Division for the category”), and how this would be effectuated when stormwater is driven by unpredictable precipitation events.
- Permit Part I.A.5.c (pg. 7): The draft permit says that a permittee may request to be excluded from coverage under this general permit by applying for an individual permit, but then says the permittee must submit the individual application to the Division “at least 180 days prior to any discharge.” This appears to only refer to the process for a new permitted discharge. It is unclear what the process is for existing dischargers that currently have general and/or individual permit coverage.

**Request:** Clarification is needed on the application process, the communication with permittees, and the process for delay and denial of an application.

## 22. Permit termination procedures

**Parts:** Permit Part I.A.8

### **Comments:**

- Permit Part I.A.8.b.ii (pg. 8): If the permit incorrectly applies to historic, legacy mines, then these sites will unlikely have DMRS financial and performance warranties. Attaining final stabilization to terminate may be difficult to achieve, given the nature of the material and actual reclamation efforts may cause more harm than good.
- Permit Part I.A.8.b.ii.b (pp. 8-9): It is unclear how a pre-disturbance level of 70% for plant density was determined. Many historic sites have demonstrated natural stability over decades without any vegetative cover. Furthermore, there are cultural and historical concerns in causing disturbance to these historic features. It is unclear if the Division has solicited input from SHPO and Historical Societies, and whether the Division has considered the National Historic Preservation Act in developing these requirements. Much of the tourism in certain parts of Colorado is based upon our rich mining history, and these requirements could have significant economic impact.

**Request:** Provide additional information regarding termination procedures.

### **23. Chemical addition / evaluations**

**Parts:** Permit Part I.A.4; Fact Sheet Part V.C.5

**Comment:** CMA disagrees with the draft terms and conditions related to chemical use. A notification and approval process for use of chemical additions would be difficult to implement for stormwater. A permittee may not know if it needs to use a chemical to meet numeric limitations, as numeric limitations were not previously required for stormwater.

CMA is also concerned about the need for chemical addition to stormwater to meet numeric limits. The Division has not explained why it would be appropriate to chemically treat stormwater-only discharges. Such a decision would be contrary to EPA's determination in its 2021 MSGP.

If these provisions are removed, then it would make sense for the WQCD to provide a list of accepted chemicals for treatment use, rather than all permittees having to go through the same process, which seems more like something that should be required by an individual permit not in a general permit.

Although not clear in the permit documents, the WQCD has been denying compliance schedules for limitations related to chemicals that are used for treatment. It is unclear if WQCD will provide enough time for certification holders to meet limitations with or without chemical addition, and if the chemical addition will lead the WQCD to include new limitations (with or without a compliance schedule).

Also, it is unlikely that some sites (i.e., historic, legacy mines) would have the ability to have a certified operator for stormwater runoff.

**Request:** Provide additional explanation for these new terms and conditions. Explain when it would be appropriate to use chemicals for treatment of stormwater. Clarify what terms and conditions could be included if chemicals are needed, and the time that will be provided to meet these new terms and conditions.

### **24. Storm exemption at 40 CFR Part 440 Subpart L (40 C.F.R. § 440.131(b))**

**Parts:** Permit Part I.C.1.a; Fact Sheet Part VII.A.1.a.iii

**Comment:** The draft permit includes reference to a storm exemption from application of ELGs in 40 C.F.R. Part 440 for facilities permitted to discharge. See Draft Permit, pg. 10. The storm exemption is found in 40 C.F.R. § 440.131(b). The language of this exemption makes repeated reference to a designed/constructed facility for wastewater treatment, which would be constructed for process water (or stormwater commingled with process water), but not stormwater. The language further highlights that the Subpart C and J ELGs should not be applied to stormwater.



The WQCD should clarify how this storm exemption stormwater-only runoff.

**Request:** Remove consideration of the Subpart C and J ELGs to stormwater. If these are not removed, then clarify how the storm exemption in 40 C.F.R. § 440.131(b) would apply to a stormwater-only discharge when there is no wastewater treatment mechanism.

## **25. Non-numeric effluent limitations, terms, and conditions**

### **25.1 Generally**

**Parts:** Permit Parts I.C, I.G, I.H, I.I, I.J; Fact Sheet Part VIII.

**Comment:** CMA contests the application of numeric effluent limitations to stormwater. In the event that the WQCD continues to require numeric effluent limitations, then it should not also require the non-numeric limitations, terms, and conditions. These non-numeric effluent limitations, terms, and conditions proposed or referenced in Part VIII of the Fact Sheet (including corrective action, facility inspections, preparation of a SWMP, etc.) are legally, technically, and economically appropriate only in the absence of the detailed numeric WQBELs that might be applied to certain outfalls. Consequently, if WQCD chooses to continue to subject one or more outfalls in a certification to numeric WQBELs, such outfalls should not be subject to any additional non-numeric effluent limitations. Application of numeric WQBELs along with the proposed non-numeric effluent limitations is not justifiable.

**Request:** If numeric conditions apply, then these narrative conditions should not also apply to the same “outfalls.”

### **25.2 Narrative WQBEL**

**Parts:** Permit Part I.C.2, Fact Sheet Part VIII.A

**Comments:** The final permit should not include the first sentence in this subpart that states “Discharges authorized under this permit must be controlled as necessary to meet applicable water quality standards.” This sentence appears to require permittees “to comply with the law,” whatever that might be and however it may change in the future. As such, it is an unlawful provision because it does not provide fair warning about what behavior is prohibited (e.g., what specific limit in the discharge has to be achieved for the duration of the permits). See, e.g., *Wis. Res. Prot. Council*, 727 F.3d at 707 (“[I]t is ‘a cardinal rule of administrative law’ that a regulated party must be given ‘fair warning’ of what conduct is prohibit or required of it.”). As written, a permittee could be in violation of a certification through no fault of their own if, for example, there is a change in the water quality standard, or a change in the assimilative capacity of the receiving water or downstream segment (if applied) caused by a new upstream discharger or a new upstream water rights diverter, or a change in the Division’s methodology to develop WQBELs. Those changes, together with the proposed

requirement, could unfairly subject a permittee to a state, federal, or citizen suit enforcement action.

The draft permit includes this sentence as part of a “narrative water quality based effluent limitation.” An “effluent limitation” is defined by Regulation 61.2(26) as a “restriction or prohibition established under this article or Federal law on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into state waters . . . .” A permit may also include best management practices “when numeric effluent limitations are infeasible, when the practices are reasonably necessary to achieve effluent limitations and standards, or when authorized under 304(e) of the federal act for control of toxic pollutants and hazardous substances.” Reg. 61.8(3)(r). “Best management practices” are “schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of ‘state waters.’” Reg. 61.2(9).

The first sentence of this subpart is vague and does not appear to be either an “effluent limitation” or a “best management practice.” It does not provide a sufficiently specific restriction on quantities, rates, or concentrations of constituents. It also does not define any “management practices” to prevent or reduce pollution. Therefore, it is not authorized by Regulation 61.

The WQCD should revise this subpart to only include the second paragraph (“The division expects . . . as required (see CORRECTIVE ACTIONS).” This is appropriate because it is similar to the schedule of compliance approach the Division applies when a new numeric limit is included in a permit. Instead of having to immediately comply with an unknown limit to meet a water quality standard, the permittee should be given time to investigate and develop a plan for compliance with a specific limit that is necessary to meet a water quality standard.

**Requests:** Revise the Permit Part I.C.2 consistent with this comment. Corresponding changes are also needed in the Fact Sheet Part VIII.A.

### **25.3 BMPs for Gold Placer Mines**

**Parts:** Permit Part I.C.3, Fact Sheet Part VIII.C

**Comment:** If the WQCD includes ELGs (which CMA disagrees with), then it should only include these Best Management Practices (BMPs) ELGs for Gold Placer Mines in this section.

**Request:** Remove numeric limitations for gold placer mines and rely on BMPs.

### **25.4 Practice Based Effluent Limitations**

**Parts:** Permit Part I.C.4, Fact Sheet Part VIII.B

**Comment:** Consistent with the MSGP and the current permit, the WQCD should only include these types of limitations (i.e., practice-based effluent limitations, “PBELs”), as opposed to numeric effluent limitations and the like, in the discharge permit. However, CMA has some comments on the requirements included in the Permit Part I.C.4 regarding the practicability and jurisdiction of some of these PBELs:

- Permit Part I.C.4.a.(pg. 37): Minimize exposure- This subpart would require the permittee to minimize exposure of pollutant sources associated with manufacturing, processing and material storage areas to rain, snow, snowmelt, and runoff. This may not be practicable at all mining sites, and in any event, would fall within DRMS jurisdiction.
- Permit Part I.C.4.d (pg. 38) Spill prevention and response procedures: These could be duplicative or more onerous than DRMS requirements, and are more onerous than EPA requirements. The DRMS requirements should apply, where appropriate.
- Permit Part I.C.4.e (pg. 38): Erosion and sediment controls: These could be duplicative or more onerous than DRMS requirements. The DRMS requirements should apply, where appropriate.
- Permit Part I.C.4.f (pg. 38): Management of runoff. CMA agrees that management of runoff is an important PBEL. CMA requests that the WQCD comply with Regulation 61 and the CWA by properly exempting from permitting flows that have been channeled and managed to avoid contact, or contamination by contact, with certain listed materials. See, e.g., Reg. 61.3(2)(c). Also, to the extent that this is duplicative or more onerous than DRMS requirements, then the DRMS requirements should apply, where appropriate.
- Permit Part I.C.4.h (pg. 38): It is unclear what authority the WQCD has to dictate the training program employed by a company.
- Permit Part I.C.4.j (pg. 38): Dust generation and vehicle tracking of industrial materials. This may be duplicative of requirements under other environmental programs, such as the Air Pollution Control Division’s permitting program. Those requirements should apply where appropriate.

**Request:** Revise and/or clarify these PBELs, including to recognize existing DRMS requirements.

## **25.5 Visual monitoring requirements for stormwater**

**Parts:** Permit Part I.E.3, Fact Sheet Part VIII.D

**Comments:**

- It is unclear why this visual monitoring must be performed at every outfall (see CMA's comments regarding concerns about the number of outfalls that could be included in a permit).
- It is unclear in this subpart whether there are exceptions to visual monitoring (i.e., for adverse weather conditions, as provided in the MSGP).
- CMA notes that Fact Sheet Part VII.D was revised between the July 1 and July 13 versions to include the following sentence: "If the visual assessment indicates the control measures for the facility are inadequate or are not being properly operated and maintained, the permittee must conduct corrective actions consistent with the Corrective Actions section of the permit." This was not included in the July 1 noticed permit.

**Request:** Additional justification is required for the Division to include these visual monitoring requirements.

## **25.6 Control measures**

**Part:** Permit Part I.G.

**Comments:**

- It is unclear what the Division means by the requirement for "installation and implementation specifications for control measure."
- Many facilities are already required to comply with control measures under their DRMS permits (including those listed at I.G.2.c) and these DRMS requirements should apply instead, where appropriate.
- Requiring a site to document corrective actions and to revise a SWMP each time a new control measure is installed is not practicable.

**Request:** Additional justification is required for these control measures to be included in the general permit.

## **25.7 Corrective actions**

**Parts:** Permit Part I.I, Fact Sheet Part VIII.F

**Comments:**

- Permit Part I.I.2 (pg. 45): Condition that requires review and modification. Mining sites cannot change a design or conduct an activity that significantly changes the nature of pollutants discharged in stormwater without submitting either a formal permit amendment or technical revision to DRMS. DRMS must formally approve the amendment or technical revision prior to making such changes. DRMS inspects routinely to ensure compliance with its Permit conditions. Having duplicative requirements in the draft permit to regulated site modifications is unnecessary.
- Permit Part I.I.3 (pp. 45-46): Corrective action reports and deadlines. These requirements are likely duplicative of DRMS requirements. By including this requirement in the Draft Permit, the Division is regulating an activity that is already regulated by DRMS, the implementing agency.

**Request:** Clarify the corrective actions in light of existing DRMS requirements.

## **26. General Monitoring and Sampling Requirements**

**Part:** Permit Part I.K.

**Comments:**

- Permit Part I.K.2 (pg. 51): This section seems to apply more to water treatment facilities and outfalls and not to stormwater. This permit should not be requiring any “influent” sampling.
- Permit Part I.K.5 (pp. 53-54): Adverse weather conditions. Considering that stormwater sampling requirements are weekly or twice monthly, and that it’s possible, for example, there will be no discharge for 3-6 months during the winter (during freezing conditions), permittees would need to collect an unreasonable amount of “substitute” samples. This scenario could occur during dry summer months as well. This requirement is unreasonable and should be revised to be reported as “no discharge” with no substitute sampling requirement. CMA requests the WQCD revise this subpart to require reporting as “no discharge” with no substitute sampling requirements.
- Permit Part I.K.6.d.iii (pg. 54): This subpart requires grab samples be taken within the first 30 minutes of a measurable storm event and that all discharge samples be taken during the same storm event. It is unclear what sampling requirements there are during storm events. If storm event monitoring is required then it is not realistic to complete monitoring within the first 30 minutes of a

storm, and it is certainly not feasible to sample more than one location in the first 30 minutes. See also comments above. Note that certain facilities, particularly those that are inactive, are remote and do not have personnel available on site. Accessing them may take significantly longer than 30 minutes. And there are safety concerns with requiring this type of sampling (including but not limited to lightning, flash flooding, avalanches, etc.).

**Request:** Make changes and provide additional explanation as described in these comments.

## 27. Comments on Part II of the Permit

**Part:** Permit Part II

**Comments:** The Part II permit language deviates in many instances from Regulation 61, and effectively the Division improperly engaged in a rulemaking in revising this language in 2019 despite lacking the authority to promulgate rules. Nor did the Division pursue a rulemaking before the Commission to revise Regulation 61, as required by the State APA, C.R.S. § 24-4-103. More specific comments and corrections needed are listed below.

**Subpart A.1:** This subpart overstates the authority granted by the CWQCA, which provides that “[u]pon a finding and determination, after hearing, that a violation of a permit provision has occurred, the division may suspend, modify, or revoke the pertinent permit or take such other action with respect to the violation as may be authorized pursuant to the regulations promulgated by the commission.” C.R.S. § 25-8-604. The second sentence should be revised to more closely align with the Division’s authority under the CWQCA by replacing “is” with “may be.”

**Subpart I:** CMA disagrees with this provision as written since the Division and EPA have different authorizations with respect to inspections, such as warrants. CMA would propose the sections be revised to read as follows:

First paragraph of Subpart I: “In accordance with 40 C.F.R. § 122.41(i) and Regulations 61.8(3)(c) and (4)(g), the permittee shall allow the Division, the U.S. EPA, or their authorized representatives, upon the presentation of credentials and other documents, such as a warrant, as may be required by law, to:”

Subpart I.1: “Enter upon the permittee’s premises where a regulated facility or activity is located or conducted, or where records must be kept under the terms and conditions of this permit;”

Subpart I.2: “Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit;”

Subpart I.3: “Inspect at reasonable times any facility, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit; and”

**Subpart J.1:** Subpart J.1 cites 40 C.F.R. § 122.41(j)(1), but the language is not consistent with the EPA regulations. To be consistent with 40 C.F.R. § 122.41(j)(1), this section should be revised to state: “Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity.”

**Subpart J.3:** CMA suggests revising the last sentence in this paragraph to replace “shall” with “may” for consistency with federal and state regulations: “This period of retention may be extended when requested by the Division or Regional Administrator.”

**Subpart L.1:** The Division has no legal authority for the “reopener” provision in Part II, Subpart O. Therefore, the Division should delete reference to Part II.O. in this subpart.

**Subpart L.4.a:** While the language at this subpart mirrors that in the EPA regulation cited, it is different than the language included in Regulation 61. CMA asks that the Division revise this section for consistency with Regulation 61.8(4)(g)(i), as follows: “If the permittee monitors any pollutant at the approved monitoring locations listed in Part I more frequently than required by this permit, using approved test procedures as specified in this permit, the results of such monitoring shall be included in the calculation and reporting to the Division.”

**Subpart N.1:** The definition included for “upset” in Subpart N.1 cites Regulation 61.2(113). “Upset” is defined as “an exceptional incident in which there is unintentional and temporary noncompliance with **permit effluent limitations** because of factors beyond the reasonable control of the permittee.” (emphasis added) The draft Permit incorrectly says that an Upset is only “temporary noncompliance with **technology based** permit effluent limitations.” pg. 62 (emphasis added). The Commission expressly expanded the definition of “upset” in Colorado to include water quality-based effluent limitations. See Regulation 61.37 (Terms and Conditions of Permits). The words “technology based” should be deleted.

In addition, the “special notes” on pages 62 and 63 of the draft Permit should also be removed, but may be relocated to the Fact Sheet. The language in the “special note” does not include any permit requirement and does not modify the other permit requirements in Part II.N. CMA disagrees that Regulation 61.2(113) and 61.8(3)(j)(ii), when considered in the context of all requirements of Colorado water quality regulations, are less stringent than federal regulations. The regulation maintains consistency with federal regulations and ensures that the water quality standards are protected by placing the burden of proof on the permittee to demonstrate that water quality standards were achieved in the receiving water despite any upset based on water quality-based effluent limitations.

**Subpart N.2:** The last sentence in Subpart N.2 says it is “in accordance with Regulation 61.8(3)(j).” That provision does not include the concept discussed in this last sentence.

**Paragraph after Subpart N.2:** The paragraph claims that the provision is consistent with the definition of upset “as codified in Regulation 61.2(113).” This is not accurate; subpart N.1 remains inconsistent with Colorado’s definition of upset, and needs to be corrected.

**Subpart O:** CMA is not aware of any legal basis (in Colorado or Federal law or regulations) for including this Reopener Clause. The Division is authorized to modify, suspend, revoke, and reissue a permit, but not reopen a permit (except in limited circumstances that are not generally applicable to all permits). See Regulation 61.8(8). Moreover, every concept in this section is included in the Part II Permit Template through the reference to Regulation 61.8(8) in Part II.F. Therefore, the Division should delete this Subpart O.

**Request:** Revise Part II to be consistent with the CWQCA, State APA, and Regulation 61.

## 28. Comments on Permit Part III

**Part:** Permit Part III

### Comments:

- Part III, Appx. A, Tables I-IV (pp. 64-67): CMA questions the applicability of this appendix given that the testing and/or identification requirements referenced in these tables for organic toxic pollutants, other toxic pollutants (metals and cyanide) and total phenols, conventional and nonconventional pollutants, toxic pollutants and hazardous substances, should not be required for stormwater-only discharges.
- Part III, Appx. B, 18 (pg. 71): “inactive mining operations”
  - The definition says, “‘inactive mining operations’ are mining sites . . .” It is unclear how the Division is defining “mining site.”
  - The draft permit applies the term to include “facilities that have an identifiable owner/operator.” All mining sites have an identifiable owner, either a government or a private entity. If this is not the case, please define “identifiable owner. Does an identifiable owner/operator differ? What does the “/” imply?
  - As this definition exists, historic, legacy mines could possibly qualify as inactive mining operations and would be potentially subject to this permit. The draft permit is unclear on this matter. The number of legacy mines in Colorado is estimated to be in excess of 23,000. Is it the State’s intent to



permit all inactive mines sites in the state? The concept of an inactive mine likely contemplates a once active mine that is shut down (care and maintenance) with the future intent to restart and has an identifiable operator. Again, this notion does not capture historic, legacy mines. CMA does not believe that would be an appropriate interpretation to apply the permit to historic, legacy mines given the CWA, CWQCA, and applicable regulations.

- It may be more appropriate to only refer to “operator” instead of owner, and limit it to an entity that has actually “operated” as envisioned in the SIC codes contemplated by this permit. This would more clearly indicate that historic, legacy mines are not “inactive mining operations” as covered by this permit.
- Additional justification and basis is needed for this definition of “inactive mining operations.” CMA notes that the 2021 MSGP at Part 8.G.3.5 says that “Sites where mining claims are being maintained prior to disturbances associated with the extraction, beneficiation, or processing of mined materials and sites where minimal activities are undertaken for the sole purpose of maintaining a mining claim are not considered either active or inactive mining facilities and **do not require** an NPDES industrial stormwater permit.” See Attachment 4 (emphasis added).
- Part III, Appx. B, 19 (pg. 71): As used in this draft permit, the definition of “industrial activity” is overly broad. *Compare to* Reg. 61.3(2)(e)(iii)(C).
- Part III, Appx B., 23 (pg. 71): The WQCD should not be applying WET to stormwater as evident by this definition of “intermittent discharges” from the WET policy.
- Part III, Appx B: Please provide an appropriate definition of “surface water.”
- Part III, Appx. D (pp. 79-84): This appendix should be removed because it is not appropriate to include WET testing (especially not chronic) requirements in this permit. Also, the dilution series included may not be appropriate for all mines.

**Request:** Additional justification is needed in this Part III.

## 29. Pollutants of Concern

### Part: Fact Sheet III.C

#### Comments:

- A definition of “metal mining facilities” is required as this seems to imply an actual industrial activity.
- CMA disagrees with the determination of what may be “pollutants of concern.” For example, WET should not be considered a parameter of concern for all metal mining facilities, and WET testing should not apply to stormwater. See comments on WET.
- The Division’s approach to make facility-specific determinations as to whether other pollutants must be limited or monitored is concerning. The facility would not know whether a pollutant was limited or required until it receives its certification, which is not associated with a notice and comment period. Moreover, it is concerning given the Division’s stance that a certification cannot be appealed.
- This section also implies that a permit could include limits for PFAS. This is contrary to Policy 20-1. See comments on PFAS.
- Limiting parameters that can be discharged in stormwater to protect “the classified uses assigned to the receiving water” is likely overly restrictive. Numerous receiving waters are misclassified in this state, particularly those with a Water + Fish qualifier (Regulation No. 34 and 35). Many of these segments do not act as a water supply nor contain fish. Thus, a number of the standards are overly stringent to protect water quality, especially as applied to stormwater.
- It is unclear what is meant by discharging to a “receiving water.” Can the WQCD provide a source for defining receiving water, direct, indirect, and ultimate? Some of these terms were also used in requesting additional information from certificate holders earlier this year. The meaning of those terms was unclear, especially in light of the draft permit language.
- EPA may have identified pollutants of concern in these cited documents, but has never applied numeric effluent limits in permits for stormwater, including for the parameters listed in this paragraph (e.g., TSS, TDS, turbidity, pH, metals, benzene, trichloroethane, tetrachloroethylene, polyaromatic hydrocarbons, and solvents).
- EPA’s technical resource document for gold placer mines did not result in numeric effluent limits for metals.

**Requests:** Provide additional explanation. Remove numeric limits based on the “pollutants of concern” listed in this paragraph. Consider the legality and

appropriateness of making facility-specific determinations in certifications. Clarify that numeric limits for PFAS will not be applied.

### 30. Performance History

**Parts:** Fact Sheet Parts III.C.4, VI.

**Comments:** CMA is concerned that the draft Fact Sheet misrepresents permittees' compliance history with prior versions of this general permit. First, the Division states that there were DMR non-receipt violations for facilities with sampling requirements. Draft Fact Sheet, part VI.B. However, CMA does not believe this fully explains the requirements of the currently applicable version of this general permit issued on August 28, 2006. Under the current permit, in most certifications, sampling and testing of stormwater was "not required on a routine basis." Instead, the Division indicated that such sampling would be required on a case-by-case basis based on certain conditions. Indeed, there are over 75 permit certifications issued under the currently applicable general permit, with only 19 including monitoring requirements. Therefore, the majority of permittees had no obligation to submit regular DMR reports and instead were only generally required to file annual reports. CMA believes the Division should clarify the reporting requirements under the 2006 general permit.

CMA has additional comments on these subparts:

- Fact Sheet Part III.C.4 (pg. 14). The last paragraph in this subpart refers to permit noncompliance as grounds for denial of a permit renewal application. Since rain and snow cannot be controlled, it is unclear what happens when a discharger's application is denied. It would not be appropriate to consider this an illegal discharge when a permit was applied for, and storm events cannot be controlled.
- Fact Sheet Parts VI.A, VI.A.1:
  - WQCD has included data from two facilities in this subsection. WQCD appears to be relying on this data to include numeric WQBELs for a large suite of parameters at numerous types of facilities. CMA questions the representativeness of this data as well as its implications in developing the draft permit documents. To the extent that this data is being used to drive numeric WQBELs, this is inappropriate.
  - It is unclear which facilities (type) were required to monitor and report under the current COR040000 general permit, and what factors the WQCD will use to determine if other facilities are required to report.
  - It is unclear which certifications will require sampling under this new permit.

- The Division has not provided authority to include numeric effluent limits for these parameters (e.g., metals, radionuclides, sulfate, pH, TSS, and TDS).
- Fact Sheet Part VI.A, Table V-6. TVS values for selected hardness. This table only includes hardness through 150, although some mountain streams significantly exceed the 400 mg/L that is used as a cap in calculating most hardness-based standards. This table fails to provide adequate information about potential standards. CMA also encourages the Division to review this table to ensure accuracy.

**Request:** Provide additional explanation.

### **31. Determination of Total Maximum Daily Loads (TMDLs)**

**Part:** Fact Sheet Part VII.A.4.d

**Comment:** Additional information is needed on this subpart. It is unclear if the WQCD assessment unit develops waste load allocations (“WLAs”) for stormwater discharges, and if a permit in administrative extension would be reopened if there is a TMDL with a WLA for a stormwater discharger.

**Request:** Provide additional justification for this subpart.

### **32. Typos**

**Part:** Fact Sheet Part VI

**Comment:** The first table (VI-1) is properly labeled, the next 5 tables are incorrectly labeled as Tables V-2 through V-6. (see pp. 11-13).

**Request:** These should be corrected to VI-2 through VI-6.