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Part III

Environmental Protection Agency

Proposed Modification of National Pollutant Discharge Elimination System (NPDES) Storm Water Multi-Sector General Permit for Industrial Activities; Notice

ENVIRONMENTAL PROTECTION AGENCY

[WH–FRL–5912–3]

Proposed Modification of National Pollutant Discharge Elimination System (NPDES) Storm Water Multi-Sector General Permit for Industrial Activities

AGENCY: Environmental Protection Agency.

ACTION: Notice of proposed modification of NPDES general permits; notice of interpretation.

SUMMARY: Today's action proposes clarification of an interpretation of the technology-based effluent limitations applicable to point sources of ''mine drainage'' at ore mining and dressing operations, which was contained in a recently-issued NPDES general permit for storm water associated with industrial activity. With this notice, EPA intends to provide a more definitive interpretation of the applicability of those recently-issued general permits, specifically, as they apply to certain storm water discharges at ore mining and dressing operations. To incorporate today's proposed interpretation, EPA only proposes to modify the NPDES general permits issued by EPA Regions 1, 6, 9 and 10 because the Agency does not anticipate that the mining-related storm water discharges at issue occur in the other States where EPA is the NPDES permit issuance authority. The Agency, however, would take final action to modify the general permits applicable in the other States where EPA issues permits if public comments demonstrate the need to do so.

DATES: Comments on today's proposed interpretation and proposed modification must be received or post-marked by midnight no later than December 8, 1997.

ADDRESSES: Send written comments to: W–97–13, Comment Clerk, Water Docket (MC–4101), U.S. EPA, 401 M Street, SW, Washington, DC 20460. Please submit the original and three copies of your comments and enclosures (including references).

Commenters who want EPA to acknowledge receipt of their comments should enclose a self-addressed stamped envelope. No facsimiles (faxes) will be accepted. Comments may also be submitted electronically to: ow-docket@epamail.epa.gov. Electronic comments must be submitted as an ASCII file avoiding the use of special characters and forms of encryption. Electronic comments must be identified by the docket number W–97–13. Comments and data will also be accepted on disks in WordPerfect 5.1 format or ASCII file format. Electronic comments on this notice may be filed online at many Federal Depository Libraries.

The record for this action has been established under docket number W–97–13, and includes supporting documentation as well as printed paper versions of elctronic comments. The record is available for inspection from 9 a.m. to 4 p.m., Monday through Friday, excluding legal holidays at the Water Docket, Room M2616, U.S. EPA, 401 M Street SW, Washington, DC 20460. For access to docket materials, please call 202–260–3027 to schedule an appointment. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: For further information, contact Gary Hudiburgh, Office of Wastewater Management, Office of Water at (202) 260–4926 or the appropriate EPA Regional Office. For EPA Region 1, covering discharges in the State of Maine and Federal Indian reservations in Maine, in the Commonwealth of Massachusetts and Federal Indian reservations in Massachusetts, in the State of New Hampshire and Federal Indian reservations in New Hampshire, as well as Federal Indian reservations in the States of Vermont, Connecticut, and Rhode Island, and Federal facilities in Vermont, contact Thelma Hamilton at (617) 565–3569. For EPA Region 6, covering discharges in the State of Texas and Federal Indian reservations in Texas, in the State of New Mexico and Federal Indian reservations in New Mexico (except Navajo Reservation lands, which are covered by EPA Region 9 and Ute Reservation lands, which are covered by EPA Region 8 and were not covered by the Multi-Sector General Permit), as well as Federal Indian reservations in Oklahoma and Louisiana, contact Fred Humke at (214) 665–7503. For EPA Region 9, covering the State of Arizona and Federal Indian reservations in Arizona, and Federal Indian reservations in California and Nevada, as well as the Duck Valley, Fort McDermitt, Goshute Reservations and Navajo Reservations, each of which cross State boundaries, contact Eugene Bromley at (415) 744–1906. For EPA Region 10, covering the State of Alaska and Federal Indian reservations in Alaska, the State of Idaho and Federal Indian reservations in Idaho (except the Duck Valley Reservation, which is covered by EPA Region 9), Federal Indian reservations in Washington and Oregon (except the Fort McDermitt Reservation, which is covered by EPA Region 9), as well as Federal facilities in Washington, contact Steven Bubnick at (206) 553–5171.

SUPPLEMENTARY INFORMATION:

Authority

EPA issues NPDES permits under the authority of CWA section 402, 33 U.S.C. section 1342. Today's proposed modification would be based on an interpretation of rules published under the authority of CWA sections 301, 304, and 501(a), 33 U.S.C. sections 1311, 1314, and 1361(a). Today's action would modify a table that was initially published in conjunction with NPDES permits for storm water associated with industrial activity issued pursuant to CWA section 402, 33 U.S.C. section 1342.

In today's notice, EPA announces and invites public comment on its interpretation of the technology-based effluent limitations applicable to point sources of ''mine drainage'' at ore mining and dressing operations under the Clean Water Act (''CWA''). 33 U.S.C. 1251 *et seq.* This interpretation updates and replaces an earlier interpretation published in the fact sheet for the final National Pollutant Discharge Elimination System (''NPDES'') Storm Water Multi-Sector General Permit for Industrial Activities at 60 FR 50804 (Sept. 29, 1995)(''Multi-Sector Permit''). The interpretation in today's notice supplements EPA's interpretation in Table G–4 of the Multi-Sector Permit regarding the applicability of the ''mine drainage'' provisions of regulations found at 40 CFR part 440. 60 FR at 50897.

EPA has reviewed the administrative record supporting the Part 440 regulations, as well as Agency statements made during the course of litigation over those regulations, and is revising Table G–4 accordingly. In litigation challenging the Multi-Sector Permit, *National Mining Association* v. *EPA*, No. 95–3519 (8th Cir.), the National Mining Association (NMA) has argued that the regulatory interpretation contained in Table G–4 was overly expansive and not supported by appropriate economic and technological evaluation. To support its argument, NMA cited Agency statements made during the course of litigation approximately twenty years earlier. These statements were not raised and presented to the Agency during the public comment period of the permit. In response to NMA's arguments in the current litigation, EPA has re-evaluated the underlying record supporting the Part 440 regulations and is

supplementing its interpretation of the ''mine drainage'' provisions contained in Table G–4. Today's action supersedes the Agency interpretation contained in the Fact Sheet to the Multi-Sector Permit, as original issued.

Upon review of those documents, the Agency believes the documents (including judicial caselaw) speak for themselves. Therefore, the Agency is proposing to withdraw portions of the Table that discuss applicability of the part 440 regulations—i.e., those portions of the Table that do not specify applicability of the Multi-Sector permit. By today's action, EPA also proposes a slight expansion of the applicability of the Multi-Sector permit (consistent with the interpretation in today's notice) and, therefore, invites public comment.

The interpretation in today's notice provides clarification regarding the scope of the effluent guidelines initially promulgated in 1978. As explained more fully below, however, the Agency's communication of its 1978 intention was not fully clarified through publication in the **Federal Register** or other readily available documents. In addition to 1978 preamble statements in the **Federal Register** explaining the scope of the effluent guidelines, the Agency prepared other documents explaining the guideline's scope that were not published in the **Federal Register**. These other documents (including parts of the administrative record, the denial of an administrative petition for reconsideration, the Agency's litigation brief, and a guidance document for permit writers) contain statements about the applicability of the guidelines that NMA argued were inconsistent with Table G–4. Today's notice proposes to modify Table G–4 consistent with those statements and now would only address applicability of the Multi-Sector Permits.

I. Effluent Guidelines for Ore Dressing and Mining Point Source Category

A. Background

Congress enacted the Clean Water Act to establish a comprehensive program to ''restore and maintain the chemical, physical and biological integrity of the Nation's waters'' through the reduction, and eventual elimination, of the discharge of pollutants into those waters. CWA Section 101(a); 33 U.S.C. 1251(a). To achieve its objective, the CWA provides for a permit program to control ''point source'' pollution. The CWA point source permitting program is known as the National Pollutant Discharge Elimination System (''NPDES''), under which EPA or authorized States issue permits for point source discharges. Except in accordance with an NPDES permit, a point source discharge of a pollutant is unlawful. CWA Section 301(a); 33 U.S.C. 1311(a). All NPDES permits must, at a minimum, contain technology-based effluent limitations established in effluent guidelines or standards or, if no such guidelines have been established, limitations derived on the basis of best professional judgment.

Individual NPDES permits contain substantive restrictions, called ''effluent limitations,'' which are aimed at controlling the level of pollutants in point source discharges. CWA 402(a); 33 U.S.C. 1342(a). Effluent limitations may be ''technology-based'' or ''water quality-based.'' [1] For some industrial point source categories, EPA has published technology-based effluent limitations that apply on a nationwide basis, pursuant to CWA Sections 304(b) and 306(b)(1)(B); 33 U.S.C. 1314(b) and 1316(b)(1)(B). [2] These limitations are called national effluent limitations guidelines or standards. EPA has published best practicable control technology currently available (''BPT''), best conventional pollutant control technology (''BCT''), best available technology economically achievable (''BAT'') effluent guidelines, and new source performance standards (''NSPS'') for point sources in over fifty different industrial categories. Among the effluent guidelines and standards which EPA has established are those applicable to the ore mining and dressing industry. These guidelines are known as the ''Effluent Guidelines for the Ore Mining and Dressing Point Source Category'' (hereinafter referred to as the ''Guidelines''). The Guidelines are published at 40 CFR part 440.

EPA first published the Guidelines on an interim final basis on November 6, 1975. 40 FR 51722. On July 11, 1978, after substantially expanding the data base supporting the Guidelines, and after considering comments submitted since initial promulgation, EPA republished the Guidelines in modified form. 43 FR 29771 (July 11, 1978). Both the initial and republished Guidelines established BPT effluent limitations for discharges for ore mining and dressing operations.

[1] Water quality based effluent limitations are included in permits when necessary to assure compliance with water quality standards.

[2] If no such guidelines have been established, technology-based limits are developed on a case-by-case basis based on the best professional judgment of the permit writer.

B. Storm Water Regulation Under the Guidelines [3]

The Guidelines establish industry-wide effluent limitations for two types of mine discharges: (1) Mill discharges and (2) mine drainage. ''Mine drainage'' means ''any water drained, pumped, or siphoned from a mine.'' 40 CFR 440.132(h). A ''mine,'' in turn, 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, including secondary recovery of metal ore from refuse or other storage piles, wastes, or rock dumps and mine tailings derived from the mining, cleaning, or concentration of metal ores.

40 CFR 440.132(g) (emphasis added). An ''active mining area,'' in turn, is defined as:

> a place where work or other activity related to the extraction, removal, or recovery of metal ore is being conducted, except, with respect to surface mines, any area of land on or in which grading has been completed to return the earth to desired contour and reclamation work has begun.

40 CFR 440.132(a).

In statements in the administrative record supporting the Guidelines, EPA indicated an intent to include a broad range of discharges within the scope of the Guidelines. The 1975 Preamble to the Interim Final Guidelines expressly indicated that the Guidelines definition of the term ''mine'' was intended to be sufficiently broad ''to cover all point source pollution resulting from all the activities related to the operation of the mine including drainage tunnels, haul roads, storage piles, etc.'' 40 FR 51727. Consistent with this, in the 1978 Development Document (prepared by EPA before the Guidelines were republished in 1978), EPA stated that:

> A mine is an area of land upon which or under which minerals or metal ores are extracted from natural deposits in the earth by any means or methods. A mine includes the total area upon which such activities occur or where such activities disturb the natural land surface. A mine shall also include land affected by such ancillary operations which disturb the natural land surface, and any adjacent land the use of which is incidental to such activities; all lands affected by the construction of new roads or the improvements or use of existing roads to gain access to the site of such

[3] The definitions of and discussion of these terms in this notice are within the use of these terms under the NPDES program and the Clean Water Act. These definitions are not specifically applicable to the use of these terms under other federal environmental laws, including under the Resources Conservation and Recovery Act, 42 U.S.C. 6901, *et seq.* (RCRA) and its implementing regulations.

activities and for haulage and excavations, workings, impoundments, dams, ventilation shafts, drainage tunnels, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culmbanks, tailings, holes or depressions, repair areas, storage areas and other areas upon which are site structures, facilities, or other property or materials resulting from or incident to such activities.

1978 Development Document at 146.

1. Petition for Reconsideration

After EPA promulgated the Guidelines on July 11, 1978, a number of mining companies filed petitions for judicial review challenging the Guidelines. (The judicial challenges are discussed below.) During the pendency of its judicial challenge, one of those companies, Kennecott Copper Corporation (''Kennecott'') filed an administrative petition with EPA (dated September 26, 1978) requesting that the Agency reconsider and clarify the Guidelines. Kennecott amended its petition on November 9, 1978. Kennecott identified five areas of alleged deficiencies and concerns with the Guidelines. One of these issues related to the storm water runoff provisions of the Guidelines.

Kennecott objected to the storm water runoff provisions, which it argued were overly vague and capable of being interpreted in a manner that would violate applicable law. Among other things, Kennecott was particularly concerned about applicability of the Guidelines to what it referred to as ''non-process'' areas at mining operations. Kennecott further argued that the Guidelines, if applied in the manner suggested by Kennecott, would entail exorbitant costs not considered during the rulemaking. Kennecott presented EPA with cost estimates that Kennecott believed it would have to incur to comply with the Guidelines. Kennecott estimated costs to control storm water drainage flows from what Kennecott referred to as the ''process'' and ''non-process'' areas at two Kennecott mining operations, the Ray Mine and the Chino Mine. As discussed more fully below, the Agency's decision on Kennecott's petition is at the core of the NMA litigation over the Multi-Sector Permit.

In partial response to the Kennecott petition, EPA published a notice in the **Federal Register** that clarified the scope of the Guidelines' applicability to storm water runoff. 44 FR 7953–7954 (Feb. 8, 1979). That notice of clarification explained that the Guidelines applied only to point sources in the active mining area. The Notice clarified EPA's interpretation that the ''mine drainage'' provisions applied to ''water which contacts an active mining area and flows into a point source.'' *Id.* EPA further explained that mining operations are not required to ''collect and contain diffuse storm [water] runoff which would not otherwise be collected in or does not otherwise drain into a point source.'' *Id.* at 7954. In other words, diffuse storm water (from an active mining area) that was collected or contained in, or that naturally flowed into, a point source was subject to the Guidelines. Other storm water drainage flows were not subject to the Guidelines.

EPA denied Kennecott's petition on February 21, 1979. In doing so, EPA relied in part on the notice of clarification. The decision on the reconsideration petition discussed the applicability of the Guidelines to Kennecott's Ray Mine. For storm water drainage flows from what Kennecott called ''non-process'' areas at the Ray Mine, EPA concluded that Kennecott would incur no additional costs. Kennecott had, for the purposes of its petition, defined ''non-process'' area to mean ''overburden dumps, material too low in mineral content even to leach, and exposed benches at the mine.'' Citing to the notice of clarification, EPA concluded that the definition of ''mine drainage'' did not include diffuse storm water runoff from overburden dumps and material too low in mineral content to leach. As that notice of clarification explained, ''[a]ll water which contacts an 'active mining area * * *' and either does not flow, or is not channeled by the operator, to a point source, is considered runoff, and it is not the regulations' intent to require the mine operator to collect and treat such runoff.'' 44 FR at 7954. On the matter of storm water contacting the exposed benches, EPA could not determine whether such discharges would constitute point source discharges and thus, concluded that the issue would best be addressed by the permitting authority in the context of a permit proceeding.

After comprehensive review of these documents, there are several matters that are clear. EPA did not grant any portion of Kennecott's petition for reconsideration. In fact, EPA denied the petition and in so doing the Agency rejected Kennecott's cost estimates for what Kennecott called ''non-process'' areas because, based on the Ray Mine data submitted by Kennecott, EPA found that the Ray Mine would incur no costs with respect to runoff from those areas. Therefore, the Agency did not adopt or incorporate Kennecott's proposed distinction between ''process'' and ''non-process'' areas at mine sites. This conclusion alone, however, does not fully resolve all possible questions about applicability of the guidelines.

In responding to the portions of Kennecott's petition related to the Ray Mine, the Agency did not explain why the diffuse storm water runoff from ''overburden dumps and material which is too low [] to leach and other areas of the Ray Mine property where work or other activity related to the the [sic] extraction, removal or recovery of of [sic] metal ore is not being conducted'' was not subject to the Guidelines. These Agency statements merely repeated phraseology used in Kennecott's petition. Upon review of these statements, as well as re-review of Kennecott's original administrative petition, the Agency cannot determine with certainty, for example, whether the statement means that runoff was not subject to the Guidelines (1) because it was ''diffuse'' (i.e., nonpoint source), (2) because the drainage was already being contained at Ray Mine, (3) because the overburden at Ray Mine was outside of Ray Mine's active mining area, (4) because no activity related to the extraction, removal or recovery of metal ore was currently (or recently) being conducted at the Ray Mine site at that time as identified by Kennecott in its petition for reconsideration. The statements certainly, however, do not indicate that water which contacts overburden dumps in active mining areas is not subject to the Guidelines nor does any other subsequent Agency statement vacillate on this question. Runoff from overburden dumps within the active mining area is mine drainage subject to Guidelines.

2. Judicial Challenge

The Guidelines rule was ultimately upheld by the U.S. Court of Appeals for the Tenth Circuit. *Kennecott Copper Corp.* v. *EPA,* 612 F.2d 1232 (10th Cir. 1979). In affirming the Guidelines, the Tenth Circuit relied on the language of the Notice of Clarification and considered moot the Petitioner's challenges to storm water runoff provisions, which were based on the argument that the Guidelines were overbroad and included ''nonpoint'' as well as ''point sources.'' *Kennecott Copper Corp.,* 612 F.2d at 1242. The court further found that ''* * * EPA is entirely within its authority in regulating [discharges of] storm runoff that falls within [the definition of] a 'point source.' '' *Id.* at 1243. Additionally, the court reasoned that the determination of whether a particular discharge constitutes a point source is best made in the context of permit proceedings, guided by the broad

definition of ''point source'' provided in the CWA.[4] The Court recognized that it is ''unrealistic, if not altogether impossible'' to provide an ''absolute and unequivocal'' definition of ''point source'' and rule of applicability, further supporting case-by-case or site-specific determinations on applicability of the Guidelines.

Congress has purposefully phrased this definition broadly. This is as it should be given its contemplated applicability to literally thousands of pollution sources. To cast such definitions in absolute, unequivocal terms would be unrealistic, if not altogether impossible. As we observed in *American Petroleum Institute,* 540 F.2d at 1032: ''On the road to attainment of the no discharge objective some flexibility is needed.''

612 F.2d at 1243.

The court did not say anything further in response to Kennecott's arguments complaining that the Guidelines would improperly regulate nonpoint source discharges at mine sites. The court did not rely on or cite to any other references in the administrative record before it. In response to any remaining arguments before it, the court simply noted that ''careful examination of petitioner's remaining arguments has persuaded us that they are without merit.'' *Id.* at 1243. Thus, the court either summarily rejected Kennecott's arguments that the guidelines were vague and overbroad, or affirmatively upheld the regulations against Kennecott's challenges based on reasons explained in the decision.[5]

While, over the course of the intervening years, the federal courts have refined their interpretations of ''point source,'' EPA's conclusions about point sources at mining operations has remained constant. In upholding the Guidelines in *Kennecott Copper Corp.,* the Tenth Circuit specifically cited to one of the seminal cases upon which courts rely for the proposition that the term ''point source'' should be interpreted broadly, *United States* v. *Earth Sciences, Inc.,* 599 F.2d 368 (10th Cir. 1979). 612 F.2d at 1241, 1243. In the *Earth Sciences* case, the Tenth Circuit concluded that uncollected surface runoff was a point source, specifically, groundwater seeps from under a combination of sumps, ditches, hoses, and pumps in a closed ''heap leach'' gold mining operation. *Earth Sciences,* 599 F.2d at 374. Therefore, the court recognized that even seemingly ''uncollected runoff'' from point sources were and could be regulated under the CWA and subject to the Guidelines limitations.

3. Subsequent Agency Action

Apart from the Agency statements made during the course of the *Kennecott Copper Corp.* litigation, EPA staff has not been able to locate evidence of subsequent Agency action referring to those statements. In an undated guidance package (circa early 1980's) prepared by EPA Headquarters for EPA and State NPDES permit writers, the Agency interpreted the term ''active mining area'' broadly to exclude only areas unaffected by mining or milling. The document also identified parts of the ''active mining area'' to include the excavations of deep mines and surface mines; leach areas; refuse, middling, and tailings areas; tailings ponds, holding and settling basins; and other ancillary areas to a mine or mill. Additionally, that document also explains that an ''active mining area'' can include mine areas where there is actually no extraction, removal, or recovery of metal ore, including where mine drainage is removed from a deep mine to protect present and future working areas, pumping out and rehabilitation of a closed mine prior to reentry, and pumping of an adjacent mine to protect present and future workings in an active mining area. This document suggests that contemporaneous Agency intent was to include certain areas, such as waste rock piles, within the scope of the active mining area.

Since that time, EPA and authorized NPDES States have issued permits to a significant number of ore mining and dressing operations. No party has ever identified or presented any of the Agency litigation statements from the *Kennecott Copper Corp.* case as evidence that the Agency does not interpret the term ''mine drainage'' very broadly.

A subsequent judicial case, which EPA cited in the 1990 storm water regulations, further clarifies that storm water associated with industrial activity at mining sites may result in point source discharges. See *Sierra Club* v. *Abston Construction Co., Inc.,* 620 F.2d 41 (5th Cir. 1980); 55 FR at 47997. In that case, the court determined that whether a point source discharge was present due to rainfall causing sediment basin overflow and erosion of piles of discarded material, even without direct action by coal miners, was a question of fact. 620 F.2d at 45. The ultimate question was whether the discharge is from a ''discernible, confined, discrete conveyance,'' whether by gravitational or non-gravitational means. *Id.* It was irrelevant that operators did not construct the conveyances, so long as those conveyances were reasonably likely to be the means by which pollutants were ultimately deposited into a navigable body of water. *Id.* Conveyances of pollution formed either as a result of natural erosion or by material means may fit the statutory definition of point source. *Id.*

II. NPDES Storm Water General Multi-Sector Permit for Industrial Activities

A. Background

In 1987, Congress amended the CWA by adding, among other things, several provisions concerning the control of point source discharges composed entirely of storm water. In the 1987 amendments, Congress directed EPA to publish permit application regulations for ''discharges of storm water associated with industrial activity.'' CWA section 402(p)(4)(A), 33 U.S.C. 1342(p)(4)(A). On November 16, 1990, EPA published those regulations. In doing so, EPA defined ''storm water'' as storm water runoff, snow melt runoff, and surface runoff and drainage. It also defined ''[s]torm water discharge associated with industrial activity'' to mean the discharge of pollutants from any conveyance which is used for collecting and conveying storm water and which is directly related to manufacturing, processing, or raw materials storage areas at an industrial plant. See 40 CFR 122.26(b)(14). Included among these discharges were discharges from conveyances at mining facilities. 40 CFR 122.26(b)(14)(iii). Upon challenge, this part of the regulations was upheld by the U.S. Court of Appeals for the Ninth Circuit. *American Mining Congress* v. *EPA,* 965 F.2d 759 (9th Cir. 1992) (regulations upheld against industry challenge that the rules, among other things, imposed retroactive liability for storm water discharges from existing mine sites). The issues in that case are related to, but different from, the issues addressed in today's action. That case involved inactive mines; today's action involves active mining operations.

The NPDES regulations for storm water describe three mechanisms by which dischargers of storm water

[4] ''Point source'' is defined at Clean Water Act § 502(14) to mean ''any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. *See also* 40 CFR 122.2.

[5] In litigation over the Multi-Sector Permit, NMA now suggests that the 10th Circuit relied on the Agency statements concerning the status of storm water drainage flows at the Ray Mine to uphold the Guidelines and that the Agency cannot now conclude that the court independently found the storm water runoff provisions of the Guidelines acceptable. EPA disagrees. The court's decision never cites or discusses any of these statements.

associated with industrial activity could apply for permits. 40 CFR 122.26(c)(1). First, dischargers can apply for ''individual permits.'' Second (prior to 1992), dischargers could apply for permits through a ''group application.'' Third, dischargers can apply for coverage under an ''EPA promulgated storm water general permit.'' Dischargers from numerous industries applied for permits through the group application process. Among them were dischargers from the ore mining and dressing industry.

On March 10, 1993, EPA accepted group applications from ore mining and dressing industry applicants and began processing those group applications. On November 19, 1993, EPA proposed to issue a single ''general'' permit (for each State where EPA issues permits) based on all of the group applications accepted and received from group applicants in various covered industries. 58 FR 61146, 61236–61251 (November 19, 1993). EPA issued that set of general permits on September 29, 1995, and took subsequent action concerning these general permits on February 9, 1996, February 20, 1996 and September 24, 1996. These general permits are entitled the NPDES Storm Water Multi-Sector General Permits for Industrial Activities (hereinafter referred to in the singular as the ''Multi-Sector Permit''). The Multi-Sector Permit applies in most States, Territories, and Indian Country where EPA administers the NPDES permitting program.

The Multi-Sector Permit contains requirements that are specifically tailored to the types of industrial activity occurring at facilities represented by various industry groups applicants. Unlike much of the Ore Mining and Dressing Guidelines, the Multi-Sector Permit incorporates narrative effluent limitations for storm water discharges. These narrative effluent limitations are referred to as ''best management practices'' (''BMPs''). BMPs are designed to represent the pollution reductions achievable through application of BAT and BCT. Permits include BMPs to control or abate the discharge of pollutants when, for example, numeric effluent limitations are infeasible. 40 CFR 122.44(k).

B. Multi-Sector Permit Coverage of Mining Activity

By its terms, the Multi-Sector Permit provides authorization for some storm water discharges from ore (metal) mining and dressing facilities. Authorization is limited, however, to storm water discharges from or off of: topsoil piles; offsite haul/access roads outside the active mining area; onsite haul roads if not constructed of waste rock or spent ore (except if mine drainage is used for dust control); runoff from tailings dams/dikes when not constructed of waste rock/tailings and no process fluids are present; concentration buildings, if no contact with material piles; mill sites, if no contact with material piles; chemical storage areas; docking facilities, if no excessive contact with waste product; explosive storage areas; reclaimed areas released from reclamation bonds prior to December 17, 1990; and partially/inadequately reclaimed areas or areas not released from reclamation bonds.

The Multi-Sector Permit covers discharges composed of entirely storm water flows, as well as certain allowable non-storm water discharges. 60 FR at 51114; Part III.A. The Multi-Sector Permit does not authorize point source dry weather discharges, such as from mine adits, tunnels, or contaminated springs or seeps, which are not storm water. *Id.*; Part III.A.2.a.; 60 FR at 51155. Note that such dry weather discharges are not affected by today's clarification.

Under the Multi-Sector Permit at Part I.B.3.g., permit coverage is available for storm water discharges covered by some, but not all, of the various effluent guidelines that address storm water, including, for example, some of the storm water discharges under the Mineral Mining and Processing Guidelines at 40 CFR part 436. 60 FR at 51112. The Multi-Sector Permit does not, however, cover storm water discharges from point sources that are subject to the Ore Mining and Dressing Guidelines. 60 FR at 51155; Part XI.G.1.a.

Table G–4 of the Multi-Sector Permit, entitled ''Applicability of 40 CFR Part 440 Effluent Limitations Guidelines to Storm Water,'' identifies various discharge sources associated with ore mining and dressing operations. The Table then indicated EPA's view concerning standards of regulatory control for those discharges. The different standards of regulatory control include: ''mine drainage'' effluent limitations guidelines, found in the Guidelines; ''mill discharge process water'' effluent limitations guidelines, also found in the Guidelines; ''storm water,'' which could, for example, be found in the Multi-Sector Permit; and ''unclassified,'' indicating discharges not regulated under the Guidelines or the Multi-Sector Permit.

As EPA said in adopting the Multi-Sector Permit: ''Table G–4 clarifies the applicability of the Effluent Limitations Guidelines found in 40 CFR part 440. *This Table does not expand or redefine these Effluent Limitations Guidelines.*'' 60 FR at 50897 (emphasis added). EPAs intent in publishing Table G–4, therefore, was merely to reiterate the interpretation that EPA issued when it promulgated the Guidelines.

III. Legal Challenge Concerning Table G–4

On October 10, 1995, the National Mining Association (hereinafter referred to as ''NMA'' or the ''Petitioners'') petitioned the U.S. Court of Appeals for the Eighth Circuit for judicial review of the Multi-Sector Permit. Specifically, Petitioners challenged EPAs determination that storm water runoff from a number of ancillary mine sources identified in Table G–4 of the Multi-Sector Permit would constitute sources of ''mine drainage'' under the Guidelines. The particular mining activities of concern include overburden piles, haul roads made of overburden and other ancillary mine areas that fall within the Guidelines definition of ''mine drainage,'' or drainage from the active ''mining area.'' As noted above, EPA excluded storm water runoff from these sources from coverage under the Multi-Sector Permit. The Petitioners contended that this determination reflects a new, more expansive interpretation of the Guidelines.

NMA presented documents from the prior *Kennecott* litigation, namely: EPAs 1979 decision responding to Kennecott's petition for reconsideration of the Guidelines; a letter of EPA counsel which was attached to a decision responding to the Kennecott petition for reconsideration of the Guidelines; and a brief that EPA filed before the Tenth Circuit. NMA cited these documents to support its argument that EPA's interpretation prior to publishing the Multi-Sector Permit was that ''overburden'' (''waste rock/overburden piles'') would be outside the scope of the Guidelines. NMA asserted that certain entries in Table G–4 were incorrect to the extent that the table categorically identified discharges from overburden-related sources as covered by the Guidelines. NMA argued that, based on EPA statements made during the course of the *Kennecott* litigation, *no* overburden-related areas are covered by the Guidelines.

EPA has reviewed the Agency statements made during the 1979 litigation challenging the Guidelines rulemaking. While disagreeing with NMAs categorical conclusion that no overburden-related areas are covered by the Guidelines, EPA believes the earlier Agency statements reflect an EPA interpretation that storm water discharges from ''waste rock/overburden

piles'' would be subject to the Guidelines only if the ''waste rock/overburden piles'' are within the ''active mining area'' and the resulting storm water flows drain into a point source. This may include, but would not be limited to, such flows that combine with either process waters (i.e., mill drainage) or other mine drainage. This clarification was not obvious from the face of Table G–4 as presented in the Multi-Sector Permit.

NMAs challenge to the Multi-Sector Permit is currently under the advisement of the Eighth Circuit. Both parties have submitted briefs. A coalition of citizens interest groups, the Western Mining Action Project and Sierra Club Legal Defense Fund, also filed an *amicus curiae* brief with the Court. On March 10, 1997, the Eighth Circuit heard oral argument in *National Mining Association* v. *EPA*, No. 95–3519. At that time, counsel for EPA represented to the court that EPA intended to prepare a clarification of the Agencys interpretation of the technology-based effluent limitations applicable to point source discharges from various areas at ore mining and dressing operations. Todays notice provides that clarification and would revise the Table so that it reflects only sources to which the Permit would apply.

IV. Interpretation

Upon fuller review of the underlying record, EPA now believes that, in 1978–79, the Agency did not consider certain point source discharges of storm water associated with ''waste rock and overburden'' to be subject to the Ore Mining and Dressing Guidelines. Specifically, EPA did not conduct a complete economic and technological assessment of diverting drainage flows from ''waste rock or overburden'' outside the active mining area into the active mining area. Therefore, the Agency did not consider such discharges to be sources of mine drainage. First, discharges from ''waste rock/overburden piles'' would be outside the scope of the Guidelines if they consist ''entirely of diffuse runoff which contacts overburden piles, which did not either normally flow to, or by design drain to a point source.'' Such diffuse runoff would not even be subject to the NPDES permit program if it was not added to waters of the United States through a discrete, confined, discernable conveyance. *See* 44 FR 7953 (Feb. 8, 1979). Second, such discharges would be outside the scope of the Guidelines if storm water runoff from overburden-related sources was not within the ''active mine area.'' In light of the above, EPA believes that, to the extent that a reader could misinterpret the Table as categorically including all ''waste rock/overburden'' sources to be within the ''active mining area,'' Table G–4 did not accurately reflect the scope of the applicability of the Guidelines.

Todays action does not change in any way EPAs interpretation of the coverage of the Guidelines set forth in the 1979 Notice of Clarification, which provides that the Guidelines ''are not intended to require the operator to collect and contain diffuse storm water runoff which would not otherwise be collected in or does not otherwise drain into a point source.'' Todays notice articulates the 1979 interpretation to the fact situation contained in Table G–4 of the Multi-Sector Permit.

Discharges from overburden-related sources that are outside of the ''active mining area'' are not covered by the Guidelines. Like all ''point source'' discharges, however, these discharges require NPDES permit authorization to be in compliance with the CWA. If these discharges are entirely composed of storm water (and are not covered by the Guidelines), then they may be authorized under an EPA general permit for storm water (if it otherwise meets the eligibility provisions), or an individual permit with BPJ-based controls, which may include either numeric limitations and/or narrative limitations (in the form of BMPs).

Discharges from haul roads constructed of waste rock or spent ore are subject to the Guidelines only if the haul roads so constructed are within the ''active mining area'' and the resulting storm water flows drain into a point source. Such discharges would be outside the scope of the Guidelines if they are outside the ''active mining area.'' Point source discharges consisting entirely of storm water from haul road-related sources outside the active mining area would be addressed in the same manner as ''waste rock and overburden'' outside the active mining area (see above). As noted above, such discharges would be outside the scope of the NPDES program if they consist entirely of diffuse runoff which does not flow to a point source.

Though EPA notes that overburden piles (thus, runoff from overburden) are sometimes outside the ''active mining area,'' NPDES permit coverage is still required when such flows are channeled or drain to a point source. Under todays clarification, determinations about whether numeric effluent limitations similar to those in the Ore Mining and Dressing Guidelines should apply to discharges from overburden piles and haul roads outside the active mining area are ones to be made on a site-by-site basis based on the ''best professional judgment'' of the permit writer (according to regulations at 40 CFR § 125.3(d)). Such permits might include effluent limitations similar to the effluent limitations for ''mine drainage'' under the Guidelines. If determined feasible, EPA acknowledges that compliance with such limits may necessitate diversion of flows from such sources into the active mining area for treatment. EPA provides additional guidance below.

V. Guidance to Permit Applicants and Permit Writers

Based on the foregoing discussion, EPA is proposing Table G–4 in a revised form today. In its earlier form, Table G-4 could have been misinterpreted. Consistent with earlier EPA statements made in the preamble to the Guidelines, the Development Document, the Notice of Clarification and other documents discussed above, the Table G–4 references to discharges from ''waste rock/overburden'' and ''onsite haul roads constructed of waste rock or spent ore'' at active ore mining and dressing sites are hereby modified. The Agency does not consider those discharges to be subject to the Guidelines on a categorical basis unless they are within the ''active mining area'' and the resulting storm water flows drain into a point source. Although not compelled by the Guidelines, numeric effluent limitations may be appropriate for these discharges (i.e., point source drainage from outside the active mining area) if the permit writer so determines on a BPJ basis or if the discharge would cause or contribute to a violation of water quality standards.

The Agency still presumes that ''active mining area'' should be interpreted as broadly as the plain language of the regulations suggests; however, application of the definition may vary from mine to mine. As the Tenth Circuit recognized in the *Kennecott Corp.* case, ''to cast such definitions in absolute, unequivocal terms would be unrealistic, if not altogether impossible.'' 612 F.2d at 1243. The regulations define ''active mining area'' as ''a place where work or other activity related to the extraction, removal, or recovery of metal ore is being conducted, except, with respect to surface mines, any area of land on or in which grading has been completed to return the earth to desired contour and reclamation work has begun.'' 40 CFR 440.132(a). The Agency continues to reject any distinction between ''process'' and ''nonprocess'' areas at mining operations to determine the nature and

scope of the active mining area. Many areas that some might consider to be ''nonprocess'' areas do constitute part of the active mining area provided that work or other activity related to extraction, removal, or recovery of metal ore *is being* conducted (until the mining operation finishes recontouring and begins reclamation).

Today's proposed interpretation and guidance describe a distinct class of discharges that was not distinct from the face of Table G–4 when the Agency published the Multi-Sector Permit. Specifically, today's proposed interpretation identifies some discharges that could have been interpreted to be ''mine drainage'' under the plain language of the Guidelines and, therefore, within the applicability of the Guidelines and ineligible for coverage under the ore mining and dressing portion of the Multi-Sector General Permit (and under Table G–4) even though the Agency did not evaluate the technological feasibility and cost impacts of diverting drainage from those sources into the active mining area when it developed the Ore Mining and Dressing Guidelines. Based on today's proposed clarification, such an interpretation would be inaccurate because EPA did not require diversion of flows from outside the active mining area into the active mining area for treatment. For this distinct and limited class of discharges described by today's notice, i.e., those overburden/waste rock sources outside the active mining area, authorization under an EPA general permit for storm water may be available.

Note that the permit applicant bears the initial responsibility to determine whether its discharges are eligible for coverage under an EPA-issued general permit. Discharges of ''mine drainage'' from the ''active mining area'' are not eligible for authorization under either the NPDES Baseline General permit or the Multi-Sector Permit because such discharges are subject to the Guidelines. For this reason, EPA encourages permit applicants to contact the NPDES permit issuance authority if there is any doubt regarding the nature and scope of the ''active mining area'' at the site of their operations. In many cases, modifications to individual permits may be more appropriate for longer-term authorization of the storm discharges in question. Of course, as indicated in the Table, there may be other such point sources of drainage from within the active mining area that would not be ''mine drainage.'' Such discharges may be appropriately regulated under EPA general permits for storm water.

EPA also recommends that permit applicants contact the relevant NPDES authority for assistance in determining the appropriate permitting vehicle to address the class of discharges described in today's notice. Individual permits provide the opportunity to tailor controls appropriate for the discharge, for example, through the use of best professional judgment (BPJ) according to 40 CFR 125.3(d) or analogous State law, and where necessary to assure compliance with water quality standards. If the NPDES permitting authority has data, for example, which indicate that discharges outside the active mining area only present pollution concerns associated with solids (e.g., settleable solids or total suspended solids), the permit requirements for those discharges may be limited to controlling those solids. However, if discharges contain heavy metals, the permitting authority, using BPJ, should establish appropriate technology-based metals effluent limitations. Further, if the permitting authority has data to indicate a reasonable potential to cause or contribute to an excursion of water quality standards for other pollutants, including pH and/or heavy metals, then the permit must include those more stringent requirements to assure compliance with water quality standards. EPA recommends ongoing monitoring for both pH and metals because the complex geochemistry at many mine sites presents difficulty in predicting the quality of storm water into the future.

In cases where there is a dry weather discharge outside the scope of the Guidelines, EPA strongly recommends that the permitting authority issue an individual NPDES permit using BPJ to establish appropriate technology-based limits or more stringent limitations necessary to assure compliance with water quality standards. The permitting authority should consider the degree of pollutant discharges (especially, whether the discharge contains heavy metal pollutants) and must consider the impact on the receiving water when establishing appropriate water quality-based controls on the discharge.

Finally, the Agency cautions that today's interpretation should not be read as a license for mine operators to convert point source discharges into ''nonpoint'' sources in order to avoid regulation under the NPDES permit program. If a mining operation has a discernable, confined, discrete conveyance, any attempt to avoid regulation by intentional ''diffusion'' of that waste water stream, for example by spraying it over a hill side or inserting diffusing devices at the ends of drainage culverts, would still constitute a point source discharge if the waste water ultimately enters waters of the United States (as opposed to appropriate land application of such waste waters). While such diffusion may beneficially reduce the potential for erosion and instream sedimentation, it would not eliminate the need for treatment where necessary, for example, where the discharge contains metals contributing to a violation of State water quality standards.

VI. Regulation Assessment Requirements

A. Executive Order 12866

Under Executive Order 12866 (58 FR 51735; October 4, 1993), the Agency must determine whether the regulatory action is ''significant'' and therefore subject to OMB review and the requirements of the Executive Order. The Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more, or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Because the Agency takes the position that NPDES general permits are not ''rules'' or ''regulations'' subject to the rulemaking requirements of Administrative Procedure Act section 553, it has been determined that this rule is not a ''significant regulatory action'' under the terms of Executive Order 12866 and is therefore not subject to OMB review.

B. Regulatory Flexibility Act

The Agency has determined that the permit modification being published today is not subject to the Regulatory Flexibility Act (''RFA''), which generally requires an agency to conduct a regulatory flexibility analysis of any significant impact the rule will have on a substantial number of small entities. By its terms, the RFA only applies to rules subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act (''APA'')

or any other statute. Today's permit modification is not subject to notice and comment requirements under the APA or any other statute because the APA defines ''rules'' in a manner that excludes permits. See APA section 551 (4), (6), and (8).

APA section 553 does not require public notice and opportunity for comment for interpretative rules or general statements of policy. In addition to proposing modification of the general permit, today's action repeats an interpretation of existing regulations promulgated almost twenty years ago. The action would impose no new or additional requirements.

C. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), P.L. 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year.

For reasons explained in the discussion regarding the Regulatory Flexibility Act, the UMRA only applies to rules subject to notice-and-comment rulemaking requirements under the APA or any other statute. Today's permit modification is not subject to notice and comment requirements under the APA or any other statute because the APA defines ''rules'' in a manner that excludes permits. See APA section 551 (4), (6), and (8).

Today's proposed permit modification contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, or tribal governments or the private sector. Today's proposed modification merely announces an Agency interpretation of existing regulations. EPA has determined that this permit modification does not contain any Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. Therefore, today's proposed permit modification is not subject to the requirements of section 202 of the UMRA.

Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements. Because today's proposed modification is based on an interpretation of existing regulations and because EPA anticipates that extremely few, if any, small governments operate mining operations, EPA has determined that this action contains no regulatory requirements that might significantly or uniquely affect small governments.

D. Paperwork Reduction Act

The proposed permit modification contains no requests for information and consequently is not subject to the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

Signed this 26th day of September, 1997.

Patricia L. Meany,

Acting Regional Administrator, Region 1.

Signed this 26th day of September, 1997.

Jerry Clifford,

Acting Regional Administrator, Region 6.

Signed this 25th day of September, 1997.

Deborah Jordan,

Acting Regional Administrator, Region 9.

Signed this 25th day of September, 1997.

Philip S. Millam,

Acting Regional Administrator, Region 10.

1. For the reasons set forth in this preamble, the table published on September 29, 1995, at 60 FR 50897 would be modified to read as follows:

TABLE G–4.—APPLICABILITY OF THE MULTI-SECTOR GENERAL PERMIT TO STORM WATER RUNOFF FROM ACTIVE ORE (METAL) MINING AND DRESSING SITES

Discharge/source of discharge	Note/comment
Piles (seepage and/or runoff):	
Waste rock/overburden	If not in active mining area and composed entirely of storm water. See Note below.
Topsoil	
Roads constructed of waste rock or spent ore:	
Onsite haul roads	If not in active mining area and composed entirely of storm water. See Note below.
Offsite haul/access roads	If outside of the active mining area.
Roads not constructed of waste rock or spent ore:	
Onsite haul roads	Except if ''mine drainage'' is used for dust control.
Offsite haul/access roads	
Milling/concentrating:	
Runoff from tailings dams/dikes when constructed of waste rock/tailings.	Except if process fluids are present and only if not in active mining area and composed entirely of storm water. See Note below.
Runoff from tailings dams/dikes when not constructed of waste rock/tailings.	Except if process fluids are present.
Concentration building	If storm water only and no contact with piles.
Mill site	If storm water only and no contact with piles.
Ancillary areas:	
Office/administrative building and housing	If mixed with storm water from the industrial area.
Chemical storage area	
Docking facility	Except if excessive contact with waste product that would otherwise constitute ''mine drainage.''
Explosive storage	
Fuel storage (oil tanks/coal piles)	
Vehicle/equipment maintenance area/building	
Parking areas	But coverage unnecessary if only employee and visitor-type parking.

TABLE G–4.—APPLICABILITY OF THE MULTI-SECTOR GENERAL PERMIT TO STORM WATER RUNOFF FROM ACTIVE ORE (METAL) MINING AND DRESSING SITES—Continued

Discharge/source of discharge	Note/comment
Power plant	
Truck wash area	Except when excessive contact with waste product that would otherwise constitute ''mine drainage.''
Reclamation-related areas:	
Any disturbed area (unreclaimed)	Only if not in active mining area.
Reclaimed areas released from reclamation bonds prior to Dec. 17, 1990	
Partially/inadequately reclaimed areas or areas not released from reclamation bond	

Storm water runoff from these sources are subject to the NPDES program for storm water unless mixed with discharges subject to the 440 CFR Part 440 that are not regulated by another permit prior to mixing. Non-storm water discharges from these sources are subject to NPDES permitting and may be subject to the effluent limitation guidelines under 40 CFR Part 440.

Note: Discharges from overburden/waste rock and overburden/waste rock-related areas are subject to 40 CFR part 440 if the source of the drainage flows is within the ''active mining area'' and the resulting storm water flows drain to a point source. For such sources outside the active mining area, coverage under this permit would be available if the discharge is composed entirely of storm water and not subject to 40 CFR Part 440, as well as meeting other eligibility criteria contained in Part I.B. of the permit. Permit applicants bear the initial responsibility for determining the applicable technology-based standard for such discharges. EPA recommends that permit applicants contact the relevant NPDES permit issuance authority for assistance to determine the nature and scope of the ''active mining area'' on a mine-by-mine basis, as well as to determine the appropriate permitting mechanism for authorizing such discharges.

2. The third sentence in the first paragraph in permit eligibility provision for Storm Water Discharges Associated with Industrial Activity from Metal Mining (Ore Mining and Dressing), Section XI.G.1. (introductory language), previously published on September 29, 1995, at 60 FR 51155, would be modified and a fourth and fifth sentence would be added to read as follows:

1. Discharges Covered Under This Section

* * * All storm water discharges from inactive metal mining facilities and storm water discharges from the following areas of active, and temporarily inactive, metal mining facilities are the only discharges covered by this permit: waste rock/overburden piles outside the active mining area; topsoil piles; offsite haul/access roads if outside of the active mining area; haul/access roads constructed of waste rock/overburden if outside of the active mining area; onsite haul/access roads not constructed of waste rock/overburden/ spent ore except if mine water is used for dust control; runoff from tailings dams/dikes when not constructed of waste rock/tailings and no process fluids are present; runoff from tailings dams/dikes when constructed of waste rock/tailings and no process fluids are present if outside the active mining area; concentration building if no contact with material piles; mill site if no contact with material piles; office/administrative building and housing if mixed with storm water from industrial area; chemical storage area; docking facility except if excessive contact with waste product; explosive storage; fuel storage; vehicle/equipment maintenance area/building; parking areas (if necessary); power plant; truck wash areas except when excessive contact with waste product; unreclaimed, disturbed areas outside of active mining area; reclaimed areas released from reclamation bonds prior to December 17, 1990; and partially/inadequately reclaimed areas or areas not released from reclamation bond. Note: Discharges from overburden/waste rock and overburden/waste rock-related areas are subject to 40 CFR part 440 if the source of the drainage flows is within the ''active mining area'' and the resulting storm water flows drain to a point source. For such sources outside the active mining area, coverage under this permit would be available if the discharge is composed entirely of storm water and not subject to 40 CFR part 440, as well as meeting other eligibility criteria contained in Part I.B. of the permit.

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