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Water Docket
U.S. Environmental Protection Agency
Mail Code: 2822T
1200 Pennsylvania Avenue NW
Washington, DC 20460

ATTENTION: Docket ID Number EPA-HQ-OW-2010-0782
Delivery via email to ow-docket@epa.gov

Dear US Environmental Protection Agency Personnel:

Thank you for the opportunity to review and comment on the draft National Pollutant Discharge Elimination System (NPDES) General Permit for Stormwater Discharges From Construction Activities (CGP). The Montana Department of Transportation (MDT) and/or our contractors routinely obtain NPDES CGP coverage for transportation projects that occur within our state's seven Indian Reservations. The following comments are offered in an effort to facilitate our mutual goal of environmental stewardship in a streamlined and efficient manner. For ease of review, the majority of our comments have been organized in accordance with corresponding sections of the proposed CGP.

General Comments

As discussed in greater detail below, linear transportation projects present unique challenges to permit compliance. These projects often include multiple crossings of waters of the United States, are subject to right-of-way constraints, and require that public access be maintained through the project site during active construction. Many of the comments below address proposed requirements that are often impracticable or infeasible in light of the circumstances unique to linear facilities. *In an effort to develop a more understandable and uniform CGP, MDT suggests developing a separate general permit for linear transportation facilities.* Doing so would help streamline environmental requirements and result in a more understandable and easily enforceable permit. It would also help alleviate the undue regulatory burden placed on transportation agencies to demonstrate infeasibility in many common instances.

In regard to the proposed turbidity limitation, MDT acknowledges that once Effluent Limitation Guidelines and New Source Performance Standards are established, they must be incorporated into NPDES permits. However, without knowing the actual turbidity limitation proposed, it is problematic to review and adequately consider the implications of the proposed permit conditions. *MDT requests that all possible legal avenues be explored to allow further public involvement of the permit conditions related to the turbidity effluent limitation.*

Additionally, some of the conditions in the proposed CGP appear to duplicate and/or expand upon other federal regulations (e.g. Endangered Species Act, Spill Prevention Control and Countermeasure (SPCC) requirements, etc.). *MDT questions the reasonableness of including*

these provisions as Clean Water Act permit conditions, especially in instances where authority is being expanded outside of the current regulatory framework. For example, if the SPCC requirements are not adequate to address spill prevention, those requirements should be modified separately from the CGP within existing regulatory framework.

Section 1.2 Person(s) Responsible for Obtaining Permit Coverage

As specified in 40 CFR 122.21, when a facility or activity is owned by one person, but operated by another, it is the operator's duty to obtain an NPDES permit. While MDT agrees that it is useful to further define "operator" within the CGP, MDT is concerned with both the proposed definition, as well as the requirement that all operators obtain permit coverage.

In the last year, MDT has worked cooperatively with the EPA Region VIII office to determine the appropriate entity responsible for obtaining permit coverage on our public transportation projects. In accordance with public contract law, our contracts must be structured in a manner that allows for open and competitive bidding, so that taxpayer dollars are expended in the most cost-effective manner. Activities that do not affect the end product are an important variable in contract bidding. As such, MDT does not dictate construction methodologies, sequencing, equipment, etc. As a result, our ability to exert the operational control necessary to ensure permit compliance is limited. Instead, our control is primarily associated with permanent structures and facilities. Because of this issue, the EPA Region VIII, Helena Office, has expressed a preference for the contractor to be the sole permittee under the CGP for our transportation projects. This permitting scenario has been successfully implemented on MDT projects covered under the state's Montana Pollutant Discharge Elimination System storm water construction general permit. Specifying the contractor as the sole permittee eliminates potential for "finger-pointing," which can hamper actions to bring a facility into compliance in the most expeditious manner possible and complicate enforcement actions. For that reason, *MDT recommends modifying the definition of "operator" to clarify that the operational control over construction plans and specifications, including the ability to make modifications, must include the control necessary to ensure compliance with permit conditions. In addition, flexibility should be allowed in the permit for determining the appropriate permit holder in each situation.*

Section 1.5.2 How to Submit Your NOI

While MDT generally supports the use of an e-NOI system, tribal application submittals are not addressed in this proposed CGP. *MDT encourages EPA to work cooperatively with the Tribes to develop a streamlined electronic submittal process that includes all entities.*

Section 1.5.3 Deadline for Submitting your NOI

MDT notes that the time for 'existing permitted dischargers' and 'previously permitted new sources' to submit an NOI for coverage under the renewed CGP is 90 days. This time is not reasonable given the substantial changes proposed in the CGP. Storm Water Pollution Prevention Plans (SWPPPs) will need to be updated; additional and/or different controls may need to be implemented in order to comply with the proposed effluent limitations; design changes will need to be explored; and contract amendments will need to be negotiated and issued. *MDT strongly encourages EPA to consider a longer period of time for existing discharges to obtain permit coverage under the renewed CGP, perhaps a year or more.*

Section 1.5.4 Your Official Start and End Dates for Permit Coverage

MDT notes that the time for obtaining permit coverage after submittal of a complete and accurate NOI has increased from 7 days to 30 days. This increased waiting period may result in costly delays in project construction and delivery. MDT is of the understanding that EPA has proposed this increased waiting period to allow for additional administrative time to address compliance with such laws as the National Historic Preservation Act and the Endangered Species Act. *In the interest of environmental streamlining, MDT suggests incorporating an expedited review time for federal agencies that are able to submit their own demonstration of compliance with these Acts similar to the US Army Corps of Engineers' Clean Water Act Section 404 Nationwide Permits.*

Section 1.6 Requirement to Post a Notice of Your Permit Coverage

The proposed CGP requires a sign or other notice to be posted conspicuously near the main entrance of the construction site. The posting of additional signs on linear transportation projects can present considerable safety risks both by placing additional obstacles within the clear zone (total roadside border area available for safe use by errant vehicles) and by changing driving behaviors whereby drivers un-expectantly slowdown in order to read the sign. Additionally, in a semi-arid state such as Montana, there can be a substantial amount of time from the end of active construction to final stabilization. Maintaining a sign for long periods after construction has ended and stabilization measures have been implemented does not seem warranted, as it will not lead to any water quality improvements and can present safety hazards within roadside clear zones. *MDT suggests exploring other methods for informing the public, such as a more robust EPA website. If a sign must be posted, it should be required during active construction periods only.*

Section 2.1.1.1 Mark Off Any Sensitive Areas

This proposed permit condition would require specified sensitive areas to be delineated and clearly marked, including areas of federally listed critical habitat for endangered and threatened species and historic properties. *MDT believes these specific areas should be regulated by the agencies with jurisdiction, and that these areas are not appropriate as Clean Water Act permit conditions. If these conditions must remain, MDT suggests limiting them to only those areas that will not be disturbed.*

Section 2.1.1.2 Avoid Steep Slopes

MDT acknowledges that the new Effluent Limitation Guidelines require the disturbance of steep slopes to be minimized. However, MDT does not believe that slopes of 15% or greater should be considered “steep”. Unlike building construction and subdivision development, linear transportation projects present unique challenges. The disturbance of steep slopes is often required in order to provide necessary access to transportation networks, as well as balance the earthwork needed to construct a project. Under the proposed threshold, greater right-of-way acquisition would likely be required, resulting in displacement of homes and businesses, farmland conversion, increased project costs, etc. Montana’s topography is such that avoiding the disturbance of slopes 15 % or greater would be infeasible in many cases. As such, a substantial amount of time and money would be spent demonstrating infeasibility in those instances.

Generally, MDT projects will involve disturbance to slopes greater than 15%. MDT's road design standards developed to comply with the Federal Highway Administration's requirements for protection of public safety, typically specify ditch and fill slopes ranging from 6:1 (16.7%) to 1.5:1 (66.7%). Steeper slopes are considered when necessary to avoid and minimize impacts to sensitive resources, such as wetlands, historic properties, endangered species habitat, right-of-way acquisition, etc. In terms of MDT design, slopes of 15% are considered gentle slopes allowing complete recoverability for errant vehicles. In following our design standards, which were developed with public safety in mind, MDT would have to provide an extraordinary amount of documentation to demonstrate that the disturbance to steep slopes is infeasible, as well as implement additional (sometimes unwarranted) control measures on the vast majority of projects. It has been MDT's experience that slope steepness is only one variable influencing the likelihood for erosion. Other influences, such as soil types, distance traveled, etc. need to be considered as one metric is not appropriate. *As a result, MDT does not believe a specific slope should be specified. If one must be specified, MDT recommends substantially increasing the proposed 15% threshold, as well as allowing additional considerations for linear transportation projects.*

Section 2.1.2 Protection of Surface Waters: Natural Buffers and Equivalent Sediment Controls

MDT supports the proposed compliance alternatives for protection of surface waters. It is often infeasible in linear transportation projects to provide an undisturbed naturally vegetated buffer between the disturbed portion of the site and waters of the United States. Additionally, specified buffer widths alone fail to account for site-specific conditions that influence water quality. As such, compliance flexibility is necessary and warranted.

Section 2.1.2.2(b) Stabilization Requirements

MDT does not believe it is reasonable to require more stringent timelines for stabilization in buffer areas. The new Effluent Limitation Guidelines already specify that soil stabilization measures must be initiated on disturbed areas where activities have temporarily ceased and will not resume for a period exceeding 14 calendar days. A more stringent timeframe was not found to be economically achievable; as such the proposed technology based limit is unsupported. Also, the proposed compliance timeframes do not account for seeding timing requirements.

Section 2.1.3.1 General Design Requirements

MDT supports the inclusion of a design storm standard for stormwater controls, including criteria that addresses snow melt. Specifying a certain design storm standard would greatly simplify design and would increase uniformity and application of storm water controls. The 2-year, 24-hour storm event seems reasonable given its use in the Effluent Limitation Guidelines.

Section 2.1.3.2 General Installation Requirements

The proposed permit condition requires the installation of all stormwater controls before commencing earth-disturbing activities in any portion of the site. This requirement is overly burdensome and is not feasible in many instances. Linear transportation projects are dynamic

and require flexibility. Erosion and sediment controls that are necessary at the beginning of a project change as construction progresses and final stabilization commences. Additionally, linear transportation projects are often constructed in phases, and in fact, phased construction is explicitly encouraged in the new Effluent Limitation Guidelines. It does not seem reasonable to require the placement of storm water controls for portions of the site that are not and will not be disturbed for some time. *This proposed condition places an undue burden on the regulated community, without any benefit to water quality. As such, MDT requests that additional flexibility be provided.*

Section 2.1.3.4 Good Housekeeping Requirements

The proposed permit condition requires the removal of track-out sediment by the end of the same workday in which the track-out is discovered. Again, this condition fails to account for the unique challenges presented for linear transportation projects. Disturbed areas must be kept open for the traveling public even when construction is not actively occurring. This can result in track-out sediment into areas outside of the project limits. The proposed timeframes also do not account for times when active construction is no longer occurring such as winter shut down. It would be impracticable for our maintenance forces to implement these requirements once active construction is over and stabilization measures have been implemented. Additionally, no consideration is provided for rural areas where dirt roads are common. *MDT requests that more reasonable timeframes be provided and that exceptions be included for sites that have been temporarily or permanently stabilized and/or must remain open to public travel.*

Section 2.1.3.4.b Control Discharges From Sediment or Soil Piles

The proposed permit condition requires cover or other stabilization measures to be provided for all soil piles. *This condition fails to address times when the piles are being actively handled. MDT recommends incorporating additional flexibility into this condition, including timeframes for implementation.*

Section 2.1.3.7 Entrance and Exit Points

The proposed permit condition requires all construction entrance and exit points to be stabilized for a minimum of 50 feet from the point of entry/exit so that no soil is left exposed. As discussed above, this requirement fails to account for the unique challenges presented for linear transportation projects. No consideration is provided for rural areas where dirt roads are common, the many access points that must be maintained within project limits, or the necessity to keep disturbed areas open for the traveling public. All of these factors present challenges in implementing such a condition. Additionally, it is not clear to MDT which entrances and exits are subject to this requirement. *As such, MDT recommends defining "construction" entrances/exits, as well as providing greater flexibility for linear constraints.*

Section 2.1.4.3 Storm Drain Inlet Protection

When constructing storm drainage systems, it is common practice to use manholes as catch basins during construction and then to clean them out before placing into service. *To allow greater operational flexibility, the proposed inlet protection measures should be restricted to "in-service" inlets only.*

Section 2.1.4.5 Chemical Treatment

With the incorporation of a turbidity limitation in this permit, MDT anticipates the need to provide chemical treatment for compliance purposes. At this time, chemical treatment has not been used in the state of Montana for construction storm water controls. *MDT is concerned that the inclusion of residual testing and/or a maximum dosage rate would be problematic to implement and would drive up costs, likely discouraging the use of these innovative technologies. That said, MDT sees value in testing to ensure Montana's waterways are not damaged.*

Section 2.2.1 Deadlines for Initiating and Completing Stabilization

MDT does not believe it is reasonable to require more stringent stabilization timelines for sensitive areas. The new Effluent Limitation Guidelines already specify that soil stabilization measures must be initiated on disturbed areas where activities have temporarily ceased and will not resume for a period exceeding 14 calendar days. A more stringent timeframe was not found to be economically achievable; as such the proposed technology based limit is unsupported. In addition, disturbance in these sensitive areas already requires implementation of additional controls. More stringent stabilization measures seem unwarranted.

Section 2.2.2 Criteria for Stabilization

MDT supports the inclusion of both options for stabilization: vegetatively stabilizing exposed portions of the site and the new C-factor value approach. Especially in arid and semi-arid areas, flexibility must be provided to reach final stabilization.

Section 2.2.3 Use of Site Stabilization to Reduce Disturbed Acres Counted Towards Application of Numeric Turbidity Limit

MDT supports the use of temporary and final stabilization measures to reduce the acres counted towards application of the numeric turbidity limit. Inclusion of such a provision will greatly encourage the use of phased construction, which has been shown to substantially reduce the amount of sediment present in storm water discharges.

Section 2.3.2.1 Fueling and Maintenance of Equipment or Vehicles

The proposed permit condition requiring secondary containment structures be provided for all fueling and maintenance activities is impracticable. Exemptions need to be included for portable fuel distribution where it is necessary to carry fuel to grading equipment located large distances from fixed fuel storage locations. Secondary containment requirements are already addressed under existing SPCC regulations. Inserting additional and/or contradictory requirements within the CGP creates potential for regulatory confusion and would more appropriately be addressed by updating SPCC rules. Additionally, MDT is unsure of the specific equipment intended to be subject to this condition. As such, *MDT recommends addressing SPCC deficiencies through SPCC rulemaking efforts. If this condition must remain, MDT requests that greater flexibility, such as the use of spill kits as suggested, be provided in the permit, as well as a specific listing of the equipment subject to this condition and a threshold (i.e. gallons) above which this condition is triggered.*

Section 2.3.2.3 Staging and Storage Areas

Permanent staging areas are not typical for long, linear transportation projects. Also, right-of-way constraints can make location of the staging areas outside of buffer areas infeasible. As such, *MDT requests greater flexibility be provided to account for linear constraints.*

Section 2.3.4 Fertilizer Discharge Restrictions

The proposed permit condition prohibits the application of fertilizer to stormwater conveyance channels. The stormwater conveyance channels for most MDT projects are roadside swales that are re-vegetated in order to function as long-term stormwater BMPs. It is routine practice to apply fertilizer to roadside swales and ditches when seeding to help establish vegetation. *This restriction should be eliminated as it would not allow MDT to effectively stabilize projects sites, thereby adversely affecting water quality.*

Section 3.3.2 Sampling Frequency

The requirement that 3 grab samples be collected when a discharge occurs, with the first sample collected within the first hour that the discharge begins is impracticable. First, it is difficult to predict when a discharge will occur. Every rain event will not necessarily result in a discharge. Additionally, the discharge does not usually occur at the same time the precipitation event begins since some of the rainfall is infiltrated and/or diverted. It is also impossible to predict how long a discharge will occur, making infeasible the requirement to distribute the 3 samples in such a way that the beginning, middle, and end of the discharge are represented. While MDT understands the need to demonstrate compliance with the proposed turbidity limit by collecting representative samples, the nature of the discharge needs to be considered. Unlike traditional wastewater treatment systems that experience a controlled discharge, storm water discharges are highly variable and are not easily predictable. Given the magnitude of changes proposed in this CGP, MDT strongly encourages EPA to provide greater flexibility to demonstrate permit compliance. *The proposed sampling frequency cannot be reasonably implemented. Instead, MDT suggests that only one representative grab sample be required, with no specification as to the time that the sample be collected (i.e. first hour the discharge begins; beginning, middle, and end of discharge; etc.)*

Section 3.3.5 Sampling Protocols

MDT suggests including a provision specifying when sample collection is not feasible. It has been MDT's experience that water depths less than 1" do not allow for representative sample collection. It should also be noted that the provisions specified in Section 3.3.5.2(c) do not apply to automatic samplers.

Section 3.3.8 Actions Required if You Violate Numeric Turbidity Limit

MDT does not believe that additional notification requirements are reasonable for high turbidity levels. The standard permit conditions listed in Appendix L already contain 24-hour reporting requirements for any noncompliance that may endanger health or the environment. Also, the proposed permit requires the implementation of corrective actions if the numeric turbidity limit is violated, as well as monthly reporting. As such, MDT questions the usefulness of additional reporting. Immediate notification of every high turbidity level would be overly burdensome to the regulated community, with no actual water quality benefit.

Section 3.3.9 Reporting Turbidity Sample Results to EPA

MDT strongly supports the allowance for quarterly reporting. *MDT feels that quarterly reporting is appropriate for all sites, and that annual reporting is justified for sites where no exceedances have occurred.*

Section 4.2.2.1 Water Quality Benchmark Monitoring

MDT questions the utility of benchmark monitoring. Although the permit requires corrective actions to be taken if benchmark values are exceeded, it is unlikely that these actions would be realized when rainfall is sporadic. Especially in arid or semi-arid states such as Montana, corrective actions would not be triggered until several days after the discharge occurs. This is due to the lag time between sample collection and lab analysis. *MDT believes benchmark monitoring should be eliminated from the permit. If benchmark monitoring must be included, MDT believes the disturbance threshold should be set higher and consideration should be given for the likelihood of another storm event occurring.*

Section 4.2.2.3 Site Inspection Requirements

The proposed inspection frequencies are overly burdensome and not practicable, especially in instances where active construction is complete. *MDT recommends reducing these proposed inspection frequencies, with provisions for greater reductions during winter months when the ground is frozen and discharges are unlikely to occur, as well as periods when active construction has ended and temporary or final stabilization measures have been implemented.*

Section 5.1.1 Person(s) Responsible for Inspecting Site

MDT supports the proposed definition for “qualified” personnel. Existing certification programs have not been standardized and are not readily available in all states. As such, flexibility is necessary for permit compliance.

Section 5.1.2 Frequency of Inspections

As discussed above, MDT does not believe the proposed inspection frequencies are practicable, especially in instances where active construction is complete. *Inspections within 24 hours of a discharge generated by snowmelt would be overly burdensome in Montana.* Daily inspections would be required for months at a time in order to ensure compliance with this condition. The proposed inspection frequencies should be reduced.

Sections 5.1.3 Reductions in Inspection Frequency

MDT believes an additional provision should be included to allow for a reduction in inspection frequency during winter months when the ground is frozen and a discharge is unlikely to occur. Consider using temperature thresholds for winter months.

Section 5.1.4 Requirements for Inspections

MDT believes representative inspections should be allowed for linear transportation projects, which can involve storms that only affect a portion of the site. Requiring inspections of the entire site is not always feasible or reasonable.

Section 8.1.2 Person(s) Responsible for Developing SWPPP

MDT does not believe it is appropriate to designate property owners as responsible for developing the SWPPP. As discussed above, MDT's ability to dictate construction methodologies, sequencing, equipment, etc., which are necessary elements of the SWPPP, is limited. *As such, the CGP should not specify which party is responsible for SWPPP development in multiple operator situations.*

Section 9.2 Conditions for Terminating Permit Coverage

Section 9.2.1.3 of the CGP requires removal of all stormwater controls that were installed and maintained during construction, except those that are intended for long-term use. *MDT would like clarification as to what constitutes "long-term" use. Additionally, provisions should be included to allow biodegradable controls to be left in place.*

Section 9.4 Deadline for Submitting NOTs

The proposed permit condition requires submittal of an Notice of Termination (NOT) within 30 days of any trigger event listed in the permit being realized. This timeframe is not always practicable for MDT forces, nor does it seem necessary to force permit termination within a specified timeframe. *As such, MDT does not believe a deadline should be specified for submitting NOTs.*

Appendix I 2-Year, 24-Hour Storm Frequencies

Appendix I specifies national standards for rainfall intensity at specified frequencies and durations. MDT's hydraulics analyses often includes more refined, site-specific data. *MDT requests clarification on the acceptability of using our own data.*

Thank you again for the opportunity to review and comment on the proposed CGP. If you have any questions or concerns regarding these comments, please contact me at 406.444.0879.

Sincerely,



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