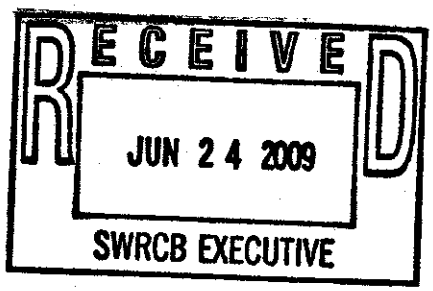
Public Comment
Dft. Construction Gen. Permit
Deadline: 6/24/09 by 5:00 p.m.

HUNTON& WILLIAMS



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June 24, 2009

By E-mail (commentletters@waterboards.ca.gov)

Ms. Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

Comments on California State Water Resources Control Board NPDES General Permit for Stormwater Discharges Associated with Construction and Land Disturbance Activities

Dear Ms. Townsend:

Attached are the comments of the Utility Water Act Group on the California State Water Resources Control Board's NPDES General Permit for Stormwater Discharges Associated with Construction and Land Disturbance Activities.

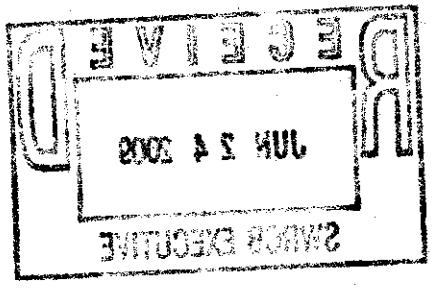
Please call me if you have any questions.

Sincerely,

Brooks M. Smith

Attachment

UWAG
Utility Water Act Group©



COMMENTS OF THE UTILITY WATER ACT GROUP ON CALIFORNIA STATE WATER RESOURCES CONTROL BOARD NPDES GENERAL PERMIT FOR STORMWATER DISCHARGES ASSOCIATED WITH CONSTRUCTION AND LAND DISTURBANCE ACTIVITIES

June 24, 2009

The Utility Water Act Group (UWAG)[1] appreciates this opportunity to comment on the State Water Resources Control Board's draft NPDES general permit for stormwater discharges associated with construction and land disturbance activities (also known as the construction general permit or CGP). Several UWAG members with operations in California will be directly impacted by the CGP. Other members are interested in how this proceeding will influence related proceedings in other states and at the federal level, including EPA's forthcoming effluent limitations guidelines and standards for the construction and development point source category (C&D ELGs). UWAG is particularly concerned about the aspects of the CGP described below that depart from established Clean Water Act practice and precedent.

1. The Board has not properly derived the proposed technology-based numeric effluent limitations.

The CGP contains technology-based numeric effluent limitations (NELs) for pH and turbidity. The pH NELs were derived using the best professional judgment (BPJ) of Board staff, based on "calculating three standard deviations above and below the mean pH of runoff from highway construction sites in California." (*see* CGP Fact Sheet at pp. 14-15). The turbidity NELs were also derived using BPJ, based on "an ecoregion-specific dataset developed by Simon et al. (2004) and Statewide Regional Water Quality Control Board Enforcement Data." (*see* CGP Fact Sheet at pp. 15-17). The inherent problem with these BPJ determinations is that the Board's rationale is wholly inadequate to explain or justify the proposed NELs using the required Clean Water Act factors.

As a threshold matter, we question whether the data used by the Board are representative of the different types of conditions and activities that will ultimately be governed by the CGP. We also question whether the Board performed any environmental or economic analyses to support its BPJ determinations. Providing answers to these questions, as well as providing interested stakeholders, like UWAG, with an opportunity to review and comment on them, is a fundamental procedural requirement. We urge the Board not to proceed until it fulfills this requirement.

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[1] UWAG is an ad hoc group of 208 individual energy companies and three national trade associations of energy companies, the Edison Electric Institute, the National Rural Electric Cooperative Association, and the American Public Power Association. The individual energy companies operate power plants and other facilities that generate, transmit, and distribute electricity to residential, commercial, industrial, and institutional customers. The Edison Electric Institute is the association of U.S. shareholder-owned energy companies, international affiliates, and industry associates. The National Rural Electric Cooperative Association is the association of nonprofit energy cooperatives supplying central station service through generation, transmission, and distribution of electricity to rural areas of the United States. The American Public Power Association is the national trade association that represents publicly owned (municipal and state) energy utilities in 49 states representing 16 percent of the market. UWAG's purpose is to participate on behalf of its members in EPA's rulemakings under the CWA and in litigation arising from those rulemakings.

These procedural issues underscore a critical defect in the proposed CGP -- the Board has failed to meet its BPJ obligation. The authority for BPJ is reflected in § 402(a)(1) of the Clean Water Act, which authorizes the inclusion of "such conditions as the Administrator determines are necessary to carry out the provisions of this Act" prior to taking the necessary implementing actions, such as the establishment of effluent guidelines. BPJ is a valuable tool, but its flexibility is not unbounded. As EPA has explained:

> Inherent in this flexibility ... is the burden on the permit writer to show that the BPJ is reasonable and based on sound engineering analysis. If this evaluation of reasonableness does not exist, the BPJ condition is vulnerable to a challenge by the permittee. Therefore, the need for and derivation of the permit condition, and the basis for its establishment, should be clearly defined and documented. References used to determine the BPJ condition should be identified. In short, the rationale for a BPJ permit must be carefully drafted to withstand the scrutiny of not only the permittee, but also the public and, ultimately, an administrative law judge.

(EPA NPDES Permit Writers' Manual at p. 69). As described below, EPA's regulations define what is required to meet this burden.

First, the permit writer must determine the need for additional controls beyond existing effluent guidelines (40 CFR §125.3). Here, EPA has proposed C&D ELGs and is under a court-ordered deadline to finalize them by December 2009. The Board's proposed NELs are fundamentally inconsistent with EPA's proposed NELs, both in terms of how they were derived and what they will require of permittees. At a minimum, the Board must defer action on its CGP until after EPA finalizes its C&D ELGs. Only then will the Board be in a position to determine the need for additional controls. This is precisely the course of action that EPA has taken with respect the federal CGP, which has been extended until 2010 so that EPA may properly harmonize the federal permit and the new C&D ELGs. *See* 73 Fed. Reg. 28454 (May 16, 2008).

Second, the permit writer must consider the following specific factors:

- The total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application (for BPT limits).
- The age of equipment and facilities involved (for BPT, BCT and BAT limits).
- The process employed (for BPT, BCT and BAT limits).
- The engineering aspects of the application of various types of control techniques (for BPT, BCT and BAT limits).
- Process changes (for BPT, BCT and BAT limits).
- Non-water quality environmental impact including energy requirements (for BPT, BCT and BAT limits).

- The reasonableness of the relationship between the costs of attaining a reduction in effluent and the effluent reduction benefits derived (for BCT limits).

- The comparison of the cost and level of reduction of such pollutants from the discharge of POTWs to the cost and level of reduction of such pollutants from a class or category of industrial sources (for BCT limits).

- The cost of achieving such effluent reduction (for BAT limits).

(40 CFR §125.3; EPA NPDES Permit Writers' Manual at p. 70). EPA has underscored the importance of these factors to deriving permit limits that are both technically sound and reasonable. In this context, "technically sound" means limits that "are achievable with existing technology" and "reasonable" means limits that "are achievable at a cost that the facility can afford." (EPA NPDES Permit Writers' Manual at pp. 70-71).

For this CGP proceeding, the Board has not provided the public with access to its record of evaluation. Instead, it has only provided a conclusory summary. (*see* CGP Fact Sheet at pp. 3, 13-17). This is inadequate to give interested stakeholders, like UWAG, an opportunity for meaningful review and comment. *See Connecticut Light & Power Co. v. NRC*, 673 F.2d 525, 530-31 (D.C. Cir. 1982) ("In order to allow for useful criticism, it is especially important for the agency to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules. To allow an agency to play hunt the peanut with technical information, hiding or disguising the information that it employs, is to condone a practice in which the agency treats what should be a genuine interchange as mere bureaucratic sport. An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary.").

The Board suggests that "[c]onsiderations related to the processes employed and the changes necessitated by the adoption of the [NELs] have been assessed throughout the stakeholder process (*e.g.*, the Blue Ribbon Panel and the March 2007 preliminary draft) and are discussed in detail in Section I.C of this Fact Sheet." (*see* CGP Fact Sheet at p. 14). We respectfully dispute this suggestion. We note, in particular, that the data reviewed by the Blue Ribbon Panel were drawn from national repositories, such as the National Storm Water Quality Database, not California. Even using these data, the Panel's findings were far from unqualified. The Panel concluded that active treatment technologies *could* make numeric limits technically feasible for turbidity, but the panel qualified this conclusion by acknowledging that those technologies "have as yet only been applied to larger construction sites, generally five acres or greater," that "toxicity has been observed at some locations" and that "the cost [at smaller sites] may be prohibitive" (Blue Ribbon Panel Report at pp. 15-16). The panel also offered a series of 13 "reservations and concerns" related to the actual feasibility of numeric limitations for construction sites. The Board has not addressed these reservations and concerns in any meaningful way. Moreover, the "stakeholder process" has thus far been inadequate, since the Board has not officially responded to comments on any of the earlier drafts of the CGP. Unless and until the Board does so, stakeholders cannot meaningfully understand the basis for the Board's determinations.

We urge the Board to share its full record of evaluation before finalizing the CGP. On the basis of this record, we also urge the Board to revisit its conclusions about the technical soundness and reasonableness of its proposed NELs. For those conclusions to be defensible, they must be based on relevant data and information specific to California, representative of the full range of conditions and activities, and responsive to the reservations and concerns raised by the Blue Ribbon Panel. At present, they are not.

2. The land use restriction contained in the CGP is unlawful.

The CGP includes a novel land use restriction that reads:

> This General Permit includes performance standards for post-construction that are consistent with State Water Control Board Resolution No. 2005-2006, "Resolution Adopting the Concept of Sustainability as a Core Value for State Water Board Programs and Directing its Incorporation," and 2008-0030, "Requiring Sustainable Water Resources Management." The requirement for all construction sites to match pre-project hydrology will help to ensure that the physical and biological integrity of aquatic ecosystems are sustained.

(*see* CGP Part I.L.71). The specific condition related to this restriction reads:

> The discharger shall, through the use of non-structural and structural measures as described in Appendix 4, replicate the pre-project water balance (for this permit, defined as the amount of rainfall that ends up as runoff) for the smallest storms up to the 85th percentile storm event (or the smallest storm event that generates runoff, whichever is larger).... For projects whose disturbed project area exceeds two acres, the discharger shall preserve the pre-construction drainage density (miles of stream length per square mile of drainage area) for all drainage areas within the project area serving a first order stream or larger stream and ensure that post-project time of runoff concentration is equal or greater than pre-project time of concentration.

(*see* CGP Part XIII.A.3 and 4).

While the Board's focus on the "post-construction landscape" is understandable, UWAG does not believe that the Board has authority to regulate this landscape under the Clean Water Act. Nor do the cited state resolutions appear to carry any force of law with respect to the particular post-construction performance standards at issue here.

The Clean Water Act only conveys authority to regulate, through NPDES permits, discharges of pollutants from point sources. 33.U.S.C. §1342(a). In the stormwater context, this authority is further limited to discharges *from and during* certain defined activities, including construction. 33 U.S.C. §1342(p); 40 CFR §122.26.

So, for example, an NPDES permit is required for the discharge of stormwater during construction activity, provided that the activity occurs on a site greater than one acre and provided further that the discharge occurs through a point source. An NPDES permit is no longer required after the activity, the discharge or the point source ends. By way of simple

example, the construction of a commercial building may trigger the need for an NPDES permit if the construction activity occurs on a site greater than one acre and if the discharge of stormwater during construction is channeled through a point source. After construction, however, the commercial building no longer triggers the need for a permit.

NPDES authority is also specifically limited to the discharge. So, for example, an NPDES permit may regulate the quality of the discharge from a construction activity, or a municipal or industrial plant, but not the activity or plant itself. *See, e.g., NRDC v. EPA*, 859 F.2d 156 (D.C. Cir. 1987) ("EPA can properly take only those actions authorized by the CWA -- allowing, prohibiting, or conditioning the pollutant discharge. And, contrary to EPA's assumption, ***the CWA does not empower the agency to regulate point sources themselves; rather, EPA's jurisdiction under the operative statute is limited to regulating the discharge of pollutants. Thus, just as EPA lacks authority to ban construction of new sources pending permit issuance, so the agency is powerless to impose permit conditions unrelated to the discharge itself.***") (emphasis added).

With this as background, the Board may legitimately assert Clean Water Act authority to regulate the discharge of stormwater *from and during* a regulated construction activity (*i.e.*, above the acreage threshold and through a point source). By contrast, the Board may not regulate the activity itself or the discharge after the activity ends.

Here, the Board's proposed post-construction performance standards fall outside of the Board's legitimate statutory authority, because they attempt to: (1) regulate the activity instead of the discharge; and (2) extend past the point at which a permit is even required (*i.e.*, after the construction phase). Just as the Board may not dictate what goes on in a municipal or industrial plant, it may not dictate the landscape of a construction project. Likewise, just as the Board may not regulate a municipal or industrial plant after the plant closes, it may not regulate a construction activity after that activity ends.

For these reasons, we urge the Board to remove the proposed post-construction performance standards.

3. The electronic filing of stormwater pollution prevention plans by applicants/permittees is neither appropriate nor required.

Under the CGP, applicants are required to electronically file all "Permit Registration Documents" with the State. These Permit Registration Documents are defined to include the Stormwater Pollution Prevention Plan (SWPPP). The Board explains that the filing of the SWPPP is required as a result of recent federal court cases involving EPA's permits for municipal separate storm sewers and concentrated animal feeding operations. But this explanation is misleading, since another federal court case involving EPA's permit for construction activity (the only one that is directly analogous here) specifically upheld EPA's decision *not* to require the filing of a Stormwater Pollution Prevention Plan. *See Texas Independent Producers and Royalty Owners Association v. EPA*, 410 F.3d 964 (7th Cir. 2005). The Board dismisses this case as "not binding or controlling" in a footnote (*see* CGP Fact Sheet at p. 2), but fails to meaningfully acknowledge its persuasive effect -- being the only one of the

three cited cases to arise in the exact same factual context as here (*i.e.*, the public availability of SWPPPs under CGPs).

In the *Texas* case, EPA determined, and the court agreed, that the CGP itself was the proper focus of public notice and comment, not the various documents required to be developed or submitted by applicants in order to qualify for permit coverage. There, like here, the development process for the CGP provided interested stakeholders adequate opportunity to comment on the particular details of the permit. Providing a second opportunity to comment on individual registrations or plans would be both redundant and inconsistent with the general permitting scheme, which is designed to standardize rather than individualize the particular permit requirements.

In short, the *Texas* case is the case most relevant here and the one that least supports the Board's proposed approach. If the Board persists in requiring the filing of a plan, then it will need to offer some other legal justification for doing so.

Even if such justification were available, we urge the Board to qualify the requirement to electronically file SWPPPs for homeland security reasons. Under the CGP, a permittee's SWPPP must identify a number of sensitive site details, including the location of bulk chemical storage areas, access points and access controls. To minimize homeland security risks, the Board should give permittees some meaningful opportunity to protect these types of details from disclosure to the public (*e.g.*, by submitting redacted or confidential versions of their plans).

4. The Board's approach to construction stormwater discharges in TMDL watersheds appears to be workable but needs to be clarified.

The CGP provides:

> Dischargers located within the watershed of a CWA §303(d) impaired waterbody, for which a TMDL has been approved by the USEPA, shall comply with the approved TMDL if it identifies "construction activity" or land disturbance as a source of the pollution.

(*see* CGP Part VI.D). The Board provides further explanation about this requirement in the administrative record (*see* CGP Fact Sheet at p. 17).

UWAG believes that the Board's approach to TMDL situations is both sensible and appropriate. Consistent with applicable regulations, guidance and agency practice, it recognizes that (1) TMDLs are not self-implementing (a fundamental precept of EPA's TMDL program); (2) TMDL wasteload allocations may affect construction sources in different ways, if at all; and (3) existing or enhanced BMPs may be adequate to implement any required TMDL wasteload allocations. It also provides a specific process for separate Regional Water Board action or consultation, where necessary.

Our only concern involves the possible misinterpretation of the phrase "within the watershed." We believe that the Board's approach is suitable for all discharges within, but not outside, an impaired segment subject to a TMDL. To better reflect this scope of application, we request that the Board revise CGP Part VI.D to read as follows:

Dischargers located within ~~the watershed of~~ a CWA §303(d) impaired waterbody, for which a TMDL has been approved by the USEPA, shall comply with the approved TMDL if it identifies "construction activity" or land disturbance as a source of the pollution.

Thank you for the opportunity to provide these comments. Please feel free to contact our counsel, Brooks Smith (804-787-8086 / bsmith@hunton.com), with questions or for additional information.