Federal StormWater Association

Public Comment
Industrial General Permit
Deadline: 10/22/12 by 12 noon

#6

October 22, 2012

RECEIVED
10-22-12
SWRCB Clerk

Via Electronic Mail
Ms. Jeanine Townsend
Clerk of the Board
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Re: Federal StormWater Association Comments on California's Draft Industrial General Permit; NPDES No. CAS000001

Dear Ms. Townsend and Members of the SWRCB:

On behalf of the Federal StormWater Association (FSWA), I am submitting the following comments regarding the revised draft California industrial general stormwater permit (draft CA IGP) that the SWRCB released on July 16, 2012. FSWA encourages the Board to take appropriate steps and associated revisions to the draft to ensure that industrial sources subject to the permit are provided the necessary flexibility to ensure cost-effective and appropriate stormwater controls to be implemented based on their own site-specific assessments, while recognizing the challenges of a broad-based general permitting scheme.

FSWA is a group of industrial, municipal, and construction-related entities that are directly affected, or which have members that are directly affected, by regulatory decisions made by federal and state permitting authorities under the Clean Water Act (CWA or the Act). FSWA member entities or their members own and operate facilities located on or near waters of the United States. Many conduct operations in California that generate "stormwater associated with industrial activity" as defined at 40 CFR § 122.26(b)(14) and are subject to permitting pursuant to California's industrial general permit.[1] Individual members of FSWA may have additional concerns with various aspects of the draft Industrial General Permit, which they will be filing separately.

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[1] A copy of FSWA members is available upon request.

1

In general, FSWA believes that the State should more closely tailor its industrial general permit approach to that set forth by the U.S. Environmental Protection Agency's (EPA) *Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity* (MSGP).[2] The MSGP provides an effective approach to industrial stormwater general permitting, relying extensively on non-numeric technology-based effluent limits, compliance with water quality-based effluent requirements, corrective actions, documentation, and reporting. The MSGP also provides industry-specific requirements in its 29 different "sectors." EPA's comprehensive, multi-tiered approach represents a well-considered balance of regulatory mandates and permitting authority oversight with site-specific flexibility, and rightfully represents the leading model for industrial stormwater general permitting across the country.

The following specific comments address individual issues in the draft CA IGP and FSWA encourages the SWRCB to make appropriate permit modifications.

Detailed Comments on Proposed *Numeric Action Level* Approach

Ultimately, with the development of properly derived and statistically valid numeric effluent limits for stormwater discharges, FSWA could support a stormwater permitting approach with more emphasis on numeric effluent limits or action levels than is currently found in EPA's MSGP. But developing appropriate numeric limits has proven difficult to achieve, permitting strategies that have proven successful in the industrial wastewater program are not easily replicated in the industrial stormwater program, and FSWA does not anticipate that any new significant developments to establish stormwater-specific water quality criteria are immediately forthcoming. Two recent unsuccessful efforts to establish numeric effluent limits for specific stormwater discharges are illustrative – EPA's Construction and Development Effluent Limitations Guidelines (C&D ELG) rulemaking and the SWRCB Construction General Permit NEL.

After 10 years of research and rulemakings, EPA's efforts to establish a numeric turbidity limit through the C&D ELG proved unsuccessful. Despite its efforts to address a single pollutant for a single industry, EPA ultimately admitted to errors in calculating the 280 NTU ELG standard it promulgated in 2009, then issued a stay of that standard, and has not made any progress in promulgating a new standard. Litigation regarding EPA's C&D ELG likely will be settled soon, requiring modifications to the C&D ELG and the Agency's formal withdrawal of the numeric standard. Similarly, litigation over California's NELs for turbidity and pH in its Construction General Permit resulted in removal of those numeric limits.[3] Our purpose for examining these attempts to implement numeric limits through general permits or in ELG standards is merely to recognize how difficult the challenges are in achieving the goal of moving towards more

[2] 73 Fed. Reg. 56,572 (Sept. 29, 2008).

[3] See *CA Building Ind. Assoc., et al. v. State Water Resources Control Bd,* CA Superior Ct. (Sacramento County) (Case No. 34-2009-80000338) (Dec. 2, 2011), finding, for example, that the CWA requires that the Board determine the degree of effluent reduction attainable through the application of the BCT technology; that at a minimum, the Board must identify available technologies, gather data characterizing the performance of the technologies under various site conditions, and then base a NEL consistent with performance data; and that the SWRCB cannot properly base a NEL on theory and inferences drawn from limited or inconclusive studies of BCT performance using best professional judgment.

numerically-based stormwater permits. However, these recent cases help demonstrate that there are no shortcuts on that pathway and EPA (and states like California) will need to invest in new research and studies to more fairly and accurately establish stormwater-specific water quality standards or criteria before relying more extensively on any numerically-based permitting approaches.

The SWRCB's draft CA IGP borrows aspects from the MSGP, including benchmark monitoring requirements, but then over-inflates their importance by focusing on those benchmarks as Numeric Action Levels (NALs). While FSWA does not believe that sufficient technical and scientific analyses have been performed to establish NELs (*see* FSWA April 29, 2011 comments, attached), FSWA recognizes the limited role that benchmark monitoring plays in the larger MSGP permitting scheme ("benchmark thresholds used for monitoring are not effluent limits, but rather information that is primarily for the use of the industrial facility to determine the overall effectiveness of the control measures and to assist in understanding when corrective action(s) may be necessary." 73 Fed. Reg. at 56,574, Sept. 29, 2008). To the extent that the SWRCB approach overemphasizes benchmark-type monitoring and underemphasizes other key tools (*i.e.,* visual monitoring, the effects of background or natural pollutants, or the broader regulatory scheme EPA set forth in the MSGP), FSWA believes that the draft CA IGP should be modified to more closely mirror EPA's established MSGP approach.

1

The Clean Water Act and EPA regulations are silent with regard to the concept of "action levels." FSWA is not making a legal determination regarding their defensibility. We defer to the SWRCB to defend their use, but we caution the SWRCB to state clearly that "action levels" are never intended to be converted into compliance-based NELs or be the sole focus for asserting any permit non-compliance. Neither EPA nor the SWRCB have developed legally defensible NELs on a broad general permitting basis. EPA has promulgated a few limited stormwater-related ELG standards for specific industrial stormwater discharges, and those industries must comply with those ELG standards. But those are very isolated instances and not at issue here.

2

The draft CA IGP converts EPA's benchmarks into "Annual NALs" and, in the process, alters their function and impact within the general permitting scheme. For background, EPA's benchmarks are listed in the monitoring section of the MSGP, Section 6.2. The MSGP contains a Corrective Action section that defines responses to various conditions. It requires, among other things, that if an average of four quarterly samples exceeds one of the benchmarks specifically identified as relevant to each industry sector, facilities review the selection, design, installation, and implementation of control measures to determine if corrective actions are appropriate. (MSGP § 3.2.)

Under the MSGP, facilities must document any benchmark exceedances and their response, including either: (1) the corrective action(s) taken; (2) a finding that the exceedance was due to natural background pollutant levels; or (3) a finding that no further pollutant reductions were technologically possible, or economically practicable and achievable in light of best industry practice consistent with Part 6.2.1.2 of the MSGP. (MSGP § 5.4.) (Not all industry sectors must perform benchmark monitoring; each remaining sector only compares results to specific benchmarks identified by EPA as required for that industrial sector.)

The MSGP specifically allows contributions from natural background sources to be considered. As a result, if repeated efforts to attain benchmark values through corrective actions prove unsuccessful, water quality concerns remain, and natural background or other unregulated sources of the pollutants are not contributing factors (as examples), EPA reserves the authority to mandate additional site-specific requirements or an individual permit (see Parts 2.2.1 and 1.6, respectively).

2 In the MSGP, EPA states unequivocally that the benchmarks are not NELs, and that they serve as just one of multiple mechanisms for quantifying BMP and stormwater program effectiveness. Similarly, in the draft CA IGP, the SWRCB recognizes that exceeding a NAL (whether a NAL in Table 5 or an alternate NAL) will not result in a permit violation. However, given the draft CA IGP's more extensive reliance on NALs and other significant differences with EPA's MSGP, FSWA encourages the SWRCB to make abundantly clear that exceeding any NAL cannot be the sole basis for a permit violation in the absence of specific (and previously established) ELG numeric standards.

In a number of respects, particularly in the Exceedance Response Actions (ERAs) for Level 2, the draft CA IGP uses the Annual NALs differently than EPA uses benchmarks in the MSGP. Beyond the normal benchmark monitoring, the SWRCB establishes an "instantaneous" NAL that it equates to an earlier SWRCB "Blue Ribbon Panel" recommendation that "upset values" could be set at a level that clearly justifies additional site-specific investigations. Perhaps that approach helps to illustrate that nominal benchmark exceedances often are rather inconsequential (especially because "benchmarks" are not properly derived numeric criteria but best guesses to start with), particularly for TSS and oil and grease (which along with pH make up the three parameters establishing the instantaneous NAL analysis).

But the concept of instantaneous NALs conflicts with the basic premise that stormwater discharges are highly variable and even an "upset value" does not necessarily mean that a facilities BMPs or BMP implementation are inadequate or deficient. The concept also conflicts with the idea that benchmarks are one of many tools used to assess facility performance and should not represent a subjective compliance assessment because of the degree to which a benchmark is exceeded. It is highly foreseeable that monitoring results under certain circumstances may significantly exceed benchmarks without having to cause an entire revamping of one's SWPPP.

2 Hence, if the SWRCB maintains its proposed instantaneous NAL approach, it must incorporate some mechanism to better account for the variable nature of stormwater discharges. One method would be to rely upon a geometric mean calculation to determine compliance with all NALs instead of a simple arithmetic mean. Such an approach would not add complexity to the regulated community (how to calculate a geometric mean) because the calculation mechanism could be programmed directly into SMARTS so that when a facility uploaded its sampling results over time, the SMARTS system could immediately calculate geometric means for all parameters sampled.

In addition, the SWRCB must make clear that any NAL calculations should apply only to the precise outfall previously monitored. The State should not be attempting to assess BMP performance by comparing facility-wide data or different outfall data, but

rather should be able to trace sample results directly back to specific pollutant sources and BMP implementation. Any other method would make a mockery of the State's efforts to improve sample data and meaning. FSWA also believes that data from storm events that exceed final design storm standards established for the permit (FSWA supports CASQA's related comments) should not be used for NAL assessments.

The SWRCB's Blue Ribbon Panel also recommended that the State improve the quality of data from its permit program and to focus, as appropriate, on industry-specific comparisons. The draft CA IGP certainly will result in additional data generation, including not only discharge data, but also storm size and storm intensity data. Collection practices also likely will improve with more training. Ultimately, FSWA would encourage the SWRCB to allow industry sectors to use such data to assess BMP performance for that industry and establish more defensible instantaneous NALs or targeted benchmarks, recognizing that they may well exceed any current benchmark numbers but will be based on more reliable data and justification.

Comments Addressing the Proposed "BAT/BCT Compliance" Assessment

In the draft CA IGP, the SWRCB requires permittees that exceed NALs (and move from "Baseline" to Level 1 or 2 controls) to file reports that describe how the regulated site is complying with BAT/BCT standards. This is impossible because only permitting authorities have the discretion to determine the BAT/BCT standards that would apply to the permittee. The SWRCB must remove this mandate on permittees. 3

Technically, actual industry-specific BAT/BCT/BPT standards can only be established through a specific process set forth in the Clean Water Act Effluent Limitations Guidelines requirements (CWA § 304(b)), and EPA has promulgated such ELGs for only a limited number of specific stormwater discharges. Those specific ELG-based limits have been added to the draft CA IGP and FSWA does not object to that mandate. EPA's MSGP asserts compliance with BAT/BCT/BPT standards, more-or-less as a collective analysis of all of the MSGP mandates (including BMPs provided for under the authority of 40 CFR § 122.44(k)). EPA explains its ability to satisfy BAT/BCT/BPT through the permit requirements as a whole, through a combination of the Agency's Best Professional Judgment (BPJ) and discretion afforded it under the CWA. The bottom line is that the requirements of draft CA IGP, as a whole – not a discharger's choice of specific BMPs – satisfies BAT/BCT/BPT, so sites cannot be expected to make "BAT/BCT/BPT determinations" for individual sites, and even the State Water Board cannot make BAT/BCT/BPT determinations for individual sites through a general permit approach.

Facilities should be able to propose an alternative NAL approach based on the their own assessment as to whether they have "reduced pollutant discharges to the extent achievable using control measures (including best management practices) that are technologically available, and economically practicable and achievable in light of best industry practice" This is the standard that EPA has adopted in the MSGP (*see* MSGP Section 2, introduction, and Section 6) and its Construction General Permit and, while subject to interpretation, this language affords the permittee with the ability to compare its pollutant control practices to those that are pervasive and reasonable within that

particular industry. This approach also would encourage more industry-wide analyses and considerations, possibly encouraging more industry-specific permitting approaches in the future. As a backstop, FSWA reminds the SWRCB that it always retains the authority to require additional site-specific controls for water quality issues or mandate an individual permit.

Water Quality-Based Effluent Limitations Comments

FSWA endorses the SWRCB Findings 36-41 and the proposed TMDL Requirements in Section VII.A. FSWA also agrees that many existing TMDLs do not provide sufficient detail to provide industrial stormwater dischargers with absolute clarity regarding any obligations that they would mandate. The draft CA IGP would provide a mechanism in which such TMDLs would be further clarified and described by the Regional Water Boards in accordance with the process outlined in Finding 38. FSWA would support a simplified and fair process through which industrial stormwater-related TMDL-specific requirements would first be incorporated into the permit before those requirements are enforceable against permittees, as prescribed by Section VII.A. However, the draft CA IGP Effluent Limitation V.C. is in direct conflict with Findings 38-40 and TMDL Requirements Section VII.A. by requiring blanket incorporation by reference and immediate compliance with existing and/or future approved TMDLs in violation of Water Code sections 13000 and 13263.

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In the alternative, FSWA supports the MSGP approach that addresses TMDL compliance and consistency in the permit eligibility and Notice of Intent processes. EPA's MSGP requires sites that are applying for coverage under the permit to certify that the site is in compliance with any applicable TMDLs for any local water bodies. If a facility cannot make such a certification, then it cannot obtain coverage. This approach, along with other narrative standards that prohibit causing a violation of a water quality standard, helps to simplify the MSGP permitting approach and reduce complexities associated with attempting to implement site-specific water quality controls in a general permitting scheme. EPA has invested significant time and energy into developing and establishing an approach that works for both the Agency and the regulated community.

EPA's approach sets up a more balanced shifting burden from permittee to permitting authority and appears to provide more reassurance against third party actions attempting to interpret and enforce less than precise TMDLs. FSWA is concerned that the language included in Section V.C. exposes permittees to premature and inappropriate administrative or third party actions to enforce TMDL requirements before the TMDLs are clarified for application to specific industrial stormwater dischargers, and before those refined requirements are incorporated into the CA IGP, several years after it would be adopted. Further Section V.C. is not supported by the express findings of the permit, or the evidence in the administrative record.

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In addition, the language in Section VI.A should not include the phrase "or contribute," based on the same reasoning EPA relied upon to eliminate those words in promulgating the 2008 MSGP; that phrase is not required by regulations but comes from the threshold that simply shows "reasonable potential" triggering the need to simply have an effluent limit.

Comments Regarding Visual and Analytical Monitoring Requirements

Sections XI.A.1 and 2 of the draft CA IGP set forth a complex expansion of the current permits dry weather (non-stormwater) and wet weather (storm event) inspection programs. In particular, the SWRCB has proposed a "pre-precipitation" inspection scheme that would require permittees to constantly monitor NOAA weather data, assess when there is a 50 percent chance of precipitation, and perhaps enter a "do-loop" of redundant inspections in anticipation of rain even if no precipitation actually occurs in any given month. Given that NOAA might update weather predictions several times over a 24-hour period, the requirement raises many questions about how a permittee might demonstrate compliance if the prediction for rain increased after being viewed by the permittee, as well as creating a records-keeping nightmare.

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FSWA has always supported a robust visual inspection program and believes that more useful information can be obtained during visual inspections during both dry and wet weather than any data collected through sampling of stormwater discharges. As a compromise approach, FSWA suggests that the SWRCB merely mandate monthly dry weather and wet weather inspections. The dry weather inspection can serve as both a check for illicit discharges as well as a "pre-precipitation" inspection of BMPs in case it rains later that month. If it rains, the permittee then would conduct a wet weather inspection to assess BMP performance. This would significantly reduce reporting and paperwork issues, as well as simplify the overly complex proposed approach.

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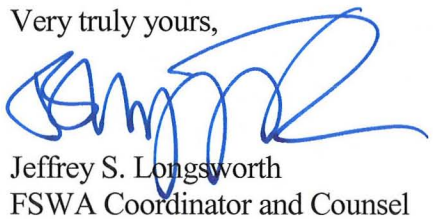
For analytical monitoring requirements relating to NAL assessments, permittees should be empowered to reduce the number of outfalls that they sample if a few outfalls are generally representative of the facility as a whole. The draft CA IGP is unclear how a facility would utilize a sample location reduction, but the State should allow significant flexibility and site-specific control over sample collection locations, as long as each sampled storm event has a consistent sample approach.

Existing facilities with a consistent sampling history also should be able to use past sample results to help justify a reduction in sample frequency under any new CA IGP.

CONCLUSION

FSWA appreciates the opportunity to provide these comments on the draft CA IGP. Please call or email with questions.

Very truly yours,



Jeffrey S. Longsworth
FSWA Coordinator and Counsel

cc: FSWA Membership

Enclosure (FSWA April 29, 2011 Comments)

Federal StormWater Association

April 29, 2011

Via Electronic Mail
Ms. Jeanine Townsend
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State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Re: Federal StormWater Association Comments on California's Draft Industrial General Permit

Dear Ms. Townsend and Members of the SWRCB:

On behalf of the Federal StormWater Association (FSWA), I am submitting the following comments regarding the draft industrial general stormwater permit that the SWRCB released on January 28, 2011. While individual members of FSWA may have additional concerns with various aspects of the draft Industrial General Permit, these comments focus on the State's proposed use of numeric values (benchmarks) from the U.S. Environmental Protection Agency's (EPA) *Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity* (MSGP)[1] and an unsupported declaration that such values should be adopted as both Numeric Actions Levels (NALs) and technology-based Numeric Effluent Limits (NELs).

In general, FSWA believes that the State should continue to rely upon an enhanced non-numeric technology-based effluent limitations approach coupled with a firm reliance upon the State's Total Maximum Daily Load (TMDL) program to ensure compliance with water quality-based effluent limitations.

FSWA is a group of industrial, municipal, and construction-related entities that are directly affected, or which have members that are directly affected, by regulatory decisions made by federal and state permitting authorities under the Clean Water Act (CWA or the Act). FSWA member entities or their members own and operate facilities located on or near waters of the United States. Many conduct operations in California that generate "stormwater associated with industrial activity" as defined at 40 CFR § 122.26(b)(14) and are subject to permitting pursuant to California's industrial general permit.[2]

[1] 73 Fed. Reg. 56,572 (Sept. 29, 2008).
[2] A copy of FSWA members is available upon request.

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FSWA OPPOSES NUMERIC ACTION LEVELS AND NUMERIC EFFLUENT LIMITS UNTIL THE STATE PROVIDES INDEPENDENT TECHNICAL, COST-BENEFIT AND LEGAL JUSTIFICATIONS.

The draft Industrial General Permit Section XVII sets forth a stringent sequence of corrective actions that would be triggered if a facility's monitoring data exceed certain concentrations listed in Table 4, titled "Numeric Action Levels." Section XVII.D.1 of the Draft Industrial General Permit converts Level 2 corrective actions into NELs in various circumstances, stating that the "applicable NAL(s) *become NEL(s), effective October 1 of the following compliance year.*" Draft Fact Sheet Section K explains that the "*corrective action Level 3 requirements, where NALs become NELs, constitute technology-based numeric effluent limitations.*" Both the NEL process itself and the State's technical and legal bases for such process are inappropriate and legally deficient.

There are significant consequences for the regulated community associated with the State's proposed approach, if it were to become law. Exceeding NELs would result in strict liability under the Clean Water Act subject to State, USEPA and citizen suit enforcement, including substantial penalties up to $37,500 per day, per violation (federal Clean Water Act Section 1319) or $25,000 per violation per day plus $100 per gallon (California Water Code Section 13385). In addition, any facility that reached Level 3 would be forced to sample during each and every storm throughout the year.

Therefore, the stakes are high for creating a defensible and fair permit compliance scheme, and the State Water Board has not provided appropriate legal, technical or cost-benefit justifications for adopting such a scheme to date. Before it can adopt a NAL or NEL permitting approach, the State Water Board must adhere to its regulatory obligations and provide appropriate analyses for public comment.

A. The Legal Bases For Imposing Numeric Technology-Based Effluent Limits Must Be Met.

The Clean Water Act ("CWA") and its implementing regulations establish a defined and rigorous process for developing NELs and for translating such NELs into NPDES permits as enforceable numeric requirements. (CWA §§ 301, 304(b) and 402(a)(1); 40 C.F.R. §§ 122.44(a)(1), 125.3.) These processes must be followed to develop and implement legally valid technology based effluent limitations ("TBELs").

Properly developed numeric TBELs establish performance-based levels of pollutant controls to achieve the applicable technology-based standards of BPT, BCT or BAT. Properly developed numeric TBELs aim to prevent pollution by requiring a minimum level of effluent quality that is, *inter alia, attainable* using *demonstrated technologies* for reducing discharges of pollutants. While there is a certain level of discretion afforded EPA or States in establishing broadly applicable technology standards pursuant to CWA Section 304(b), there also are a number of minimum factors that the State Water Board must analyze and consider before adopting such standards.

More simply, the CWA requires EPA to develop effluent limitations guidelines (ELGs) for certain classes of industries, which are set forth at 40 CFR Parts 405 to 671.

If EPA has not developed an ELG for a particular industrial category or type of discharge, then it uses a case-by-case approach to developing TBELs (*i.e.*, best professional judgment or BPJ). Whether through an ELG or BPJ approach, EPA or the permitting authority must consider similar factors, including:

- The age of equipment and facilities involved
- The processes employed
- The engineering aspects of the application of various types of control techniques
- Process changes
- Non-water quality environmental impact including energy requirements
- The appropriate technology for the category class of point sources of which the applicant is a member, based on all available information
- Any unique factors related to the applicant
- The cost of achieving such effluent reduction

USEPA has not promulgated effluent limitations guidelines for most stormwater discharges "associated with industrial activity" subject to the draft Industrial General Permit. Because a BPJ approach is essentially a "site-specific" analysis, one could question whether a BPJ analysis is appropriate for use in a general permitting scheme. In any event, the Draft Industrial General Permit and related Fact Sheet are devoid of any evidence or analysis to support adopting NELs (or NALs) as technology-based numeric effluent limitations. The State Water Board has not set forth specific data, other technical basis or legal authority imposing numeric TBELs in this Permit, nor has it specifically considered any of the required factors set forth in CWA Section 304 or implementing regulations pursuant to 40 C.F.R. 122.44(a)(1) and 125.3. The Draft Industrial General Permit and Draft Fact Sheet therefore fail to establish the legally required basis for imposing NELs.

The only basis the State Water Board identified for "justifying" NELs is EPA's use of "benchmarks" contained in EPA's MSGP. However, EPA's position is uncontroverted: benchmarks are not effluent limitations. In its 2008 MSGP, EPA confirms:

> The benchmark concentrations are not effluent limitations; a benchmark exceedance, therefore, is not a permit violation. Benchmark monitoring data are primarily for your use to determine the overall effectiveness of your control measures and to assist you in knowing when additional corrective action(s) may be necessary to comply with the effluent limitations in Part 2.

2008 MSGP at Part 6.2.1. This statement is even more strongly supported in EPA's Response to Comments document.

In light of EPA's unequivocal statements and position, its benchmarks have never and cannot now legally serve as NELs without appropriate CWA-based analyses and justifications. For these reasons, Finding 42 in the Draft

Industrial General Permit is particularly objectionable, asserting that "[t]he State Board finds that the USEPA benchmarks serve as an appropriate set of technology based effluent limitations that demonstrate compliance with BAT/BCT." Such an unsupported statement cannot substitute for an appropriate effluent limitations development process, nor could such a statement be further from EPA's clear regulatory conclusions or intent regarding the purpose of the benchmarks.

B. The Draft Industrial General Permit NEL Approach is Inconsistent with State Law and Unworkable.

In addition to lacking legal support, the NELs in the Draft Industrial General Permit would create unintended consequences, and the attempted "off ramps" to provide relief from inappropriate application of the NELs would not be workable. The Draft Industrial General Permit and Draft Fact Sheet underestimate the number of dischargers who would be unable to meet these legally unsupported NELs, even after attempting costly treatment -- the only possible option for many under the corrective action scheme. Such dischargers would be subject to regulatory and third-party enforcement.

The draft Industrial General Permit's NEL scheme would also be inconsistent with the mandates of Water Code Section 13300 for reasonableness in water quality regulation, and the mandates of Water Code Section 13263 for permitting to consider the "balancing factors" in Section 13241. Even if the balancing factors may not be required to be explicitly addressed in detail where a permit imposes minimum requirements under the Clean Water Act, the draft Industrial General Permit's failure to discuss any of these factors represents a departure from the water quality regulatory policies codified in State law. Furthermore, the draft Industrial General Permit would be demonstrably more stringent than minimum Clean Water Act requirements, for example, in showing much more stringency than EPA's MSGP.

C. The SWRCB's Blue Ribbon Panel And USEPA Both Concluded That Numeric Limits Are Not Feasible And Are Not Required.

In 2006, the SWRCB convened a "Blue Ribbon Panel" that concluded that establishing numeric limits for industrial sites required a reliable database describing current emissions by industry types or categories, and performance of existing BMPs. The Blue Ribbon Panel concluded that the current industrial permit had not produced such a database.

In 2008, EPA similarly concluded in the MSGP that it was infeasible to establish numeric effluent limits because "variability in the system and minimal data generally available make it difficult to determine with precision or certainty actual and projected loadings for individual dischargers or groups of dischargers" as required by 40 C.F.R. 122.44(k)(3). EPA reached this conclusion after a detailed review of monitoring data, after which EPA was unable to determine whether benchmark value exceedances provide any useful indicators of control measure inadequacies or potential water quality problems. (MSGP Fact Sheet, p. 96.)

Through its NPDES permit regulations, EPA has interpreted the CWA to allow BMPs to take the place of numeric effluent limitations to control or abate the discharge of pollutants when: (1) "[a]uthorized under section 402(p) of the CWA for the control of stormwater discharges"; or (2) "[n]umeric effluent limitations are infeasible." 40 C.F.R. § 122.44(k). EPA cited that regulation and the ample case support for non-numeric limits when finding numeric limits infeasible and choosing to include only non-numeric limits in the 2008 MSGP.[3]

The Draft Industrial General Permit and Draft Fact Sheet provide no evidence that anything has changed since the Blue Ribbon Panel's 2006 conclusions or EPA's 2008 conclusions regarding the lack of data to support the development of NELs. Obviously, the variability of stormwater discharges has not changed. Absent such evidence, the draft Industrial General Permit's inclusion of NELs is inconsistent with the conclusions of the Blue Ribbon Panel and EPA.

For the reasons expressed above, currently available data are insufficient to support NEL development or implementation. Until such data exist, and until the State Board follows the legally required method for developing NELs, the final Industrial General Permit should not include NELs.

D. FSWA Supports The Continued Use Of Non-Numeric Effluent Limitations.

The CWA defines "effluent limitation" as "any restriction" on the amounts of pollutants discharged, not just a numerical restriction. (CWA Section 502(11).) The technology based standards of BAT and BCT can be implemented through BMPs instead of NELs. (40 C.F.R. § 122.44(k).) As recognized by EPA in the MSGP, "[b]ecause of the nature of stormwater dischargers, it is infeasible to use numeric effluent limits to demonstrate the appropriate levels of controls. In such situations, the CWA authorizes EPA to include non-numeric effluent limits in NPDES permits." (See 2008 MSGP at 35.) EPA indicated its general expectation that compliance with such non-numeric

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[3] EPA explained its decision in detail in the MSGP Fact Sheet, concluding on page 53 as follows:

> "While EPA continues to study the efficacy of various types of pollution prevention measures and BMPs, EPA at this time does not have a record basis for developing numeric limits that would reasonably represent a well-run application of BMPs. Because the flow and content is so variable, if EPA were to try to base numeric limits on a few sites, it is likely that any number it would develop would not be technologically available and economically achievable by all well-run facilities.
>
> "These factors create a situation where, at this time, it is generally not feasible for EPA to calculate numeric effluent limitations, with the limited exception of certain effluent limitations guidelines that have already been established through national rulemaking. For example, covering exposed areas where feasible and cleaning them regularly where they are not covered may be an effective way of significantly reducing stormwater pollutant discharges, but the degree of pollutant reduction will be highly site-specific and cannot be generally quantified. Therefore, EPA has determined that it is not feasible for the Agency to calculate numeric, technology-based limits for many of the discharges covered under this permit and, based on the authority of 40 CFR 122.44(k), has chosen to adopt non-numeric effluent limits."

technology-based effluent limitations "will control discharges as necessary to meet applicable water quality standards." (2008 MSGP, Part 2.2.1.)

Consistent with EPA's findings, FSWA supports the continued use of non-numeric effluent limitations as the proper approach to the regulation of stormwater dischargers. The nature of such stormwater dischargers has not changed since 2008, and EPA's conclusion that the use of numeric effluent limits to demonstrate the appropriate levels of controls is infeasible remains as true today as it was in 2008.[4]

E. "Benchmarks" Or "Action Levels" For Individual Pollutants May Be Justified in Limited Circumstances, But They Cannot Serve As Or Be Converted Into NELs.

The CWA and its implementing regulations do not recognize or define the term "action level." While EPA's MSGP relies upon monitoring program benchmarks to help in the evaluation of SWPPP effectiveness, the EPA benchmarks in the MSGP are not called "action levels" and are not applied in the way described under any of Levels 1, 2 or 3 in the draft Industrial General Permit. The MSGP contains a Corrective Action section that defines responses to various conditions. It requires, among other things, that facilities evaluate whether corrective actions are necessary, if an average of four quarterly samples exceeds one of the benchmarks specifically identified as relevant to each industry sector. But not all sectors require monitoring, so benchmark-related corrective actions are not universally applicable across the scope of the MSGP.

Facilities that must perform corrective actions must summarize them in an annual report. If it is infeasible to modify control measures either due to limited available technology or financial constraints, facilities may discontinue benchmark monitoring and record their rationales in their SWPPP. The MSGP also recognizes natural background pollutant levels and allows them to be considered.

EPA also cautions against anyone looking solely at benchmarks to assess overall effectiveness of any particular sites stormwater management program, because benchmarks are merely one of many mechanisms for quantifying effectiveness. Of course, EPA (as would the State Water Board under a MSGP-type approach) always retains its authority to demand that any particularly problematic site cease discharging under the MSGP and apply for an individual permit, where more site-specific effluent limits may be developed. However, as a general permitting scheme, EPA has refused to adopt any approach similar to that which the State Water Board is proposing.

Because the use of "action levels" is not built upon a firm legal basis, use of numeric values as benchmarks or "action levels" must be very carefully and clearly defined in an NPDES permit. Such numeric values cannot serve as or be converted into NELs. NELs can only be established and implemented through the legally required procedures for the developing NELs and including NELs in NPDES permits.

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[4] EPA recently requested comments on guidance regarding when numeric or non-numeric effluent limits might be appropriate for stormwater discharges relating to TMDLs. FSWA will be commenting in response to EPA's request. FSWA will provide the SWRCB with a copy of its comments at the same time that they are submitted to EPA (the current deadline is May 17, 2011).

FSWA recommends that the SWRCB review EPA's use of benchmarks in the monitoring section of its MSGP. Adopting a similar approach would serve as a first step for California to adopt a more industry-specific (sector) approach to stormwater permitting and corrective action. To be consistent, the State Water Board would have to state clearly that the benchmarks are not numeric effluent limitations, and serve as just one of many mechanisms for quantifying BMP and stormwater program effectiveness. It also should appropriately recognize and consider natural background pollutant levels and long-term averages. Finally, it must provide a clear statement that any exceedance of a benchmark value is not a violation of the permit or the CWA, but is a tool to be used to improve site-specific performance and SWPPP review.

F. TMDL's Satisfy Water Quality-Based Requirements in the MSGP.

EPA's MSGP requires sites that are applying for coverage under the permit to certify that the site is in compliance with any applicable TMDLs for any local water bodies. If a facility cannot make such a certification, then it cannot obtain coverage. This approach, along with other narrative standards that prohibit causing or contributing to a violation of a water quality standard, helps to simplify the MSGP permitting approach and reduce complexities associated with attempting to implement site-specific water quality controls in a general permitting scheme. To compliment the technology-based effluent limitations above, the State Water Board should review and analyze EPA's approach in the MSGP. EPA has invested significant time and energy into developing and establishing an approach that works for both the Agency and the regulated community.

CONCLUSION

FSWA appreciates the opportunity to provide these comments on the draft Industrial General Permit. FSWA encourages the State Water Board to rewrite its current draft permit consistent with these comments and then to seek additional public comments on a new draft Industrial General Permit. Please call or email with questions.

Very truly yours,

/s/

Jeffrey S. Longsworth
FSWA Coordinator and Counsel

cc: FSWA Membership

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