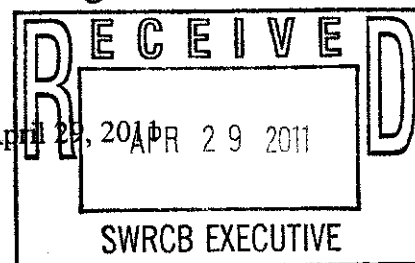


## Federal StormWater Association



**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**

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)<sup>1</sup> 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.<sup>2</sup>

<sup>1</sup> 73 Fed. Reg. 56,572 (Sept. 29, 2008).

<sup>2</sup> 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.<sup>3</sup>

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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<sup>3</sup> 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.<sup>4</sup>

**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.

<sup>4</sup> 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.

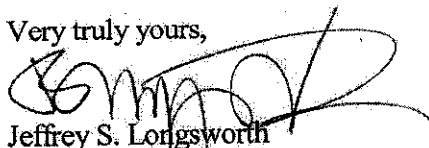
**F. TMDL's Satisfy Water Quality-Based Requirements in the MSGP.**

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,

  
Jeffrey S. Longworth  
FSWA Coordinator and Counsel

cc: FSWA Membership

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