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By E-Mail

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c/o Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street
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Subject: Draft Statewide General National Pollutant Discharge Elimination System (NPDES) Permit For The Discharge Of Storm Water Associated With Industrial Activities (Industrial General Permit)

Dear Board Members:

On behalf of some facilities that would prefer to remain anonymous, I am writing to make four points about the draft general industrial stormwater permit:

1. Industrial facilities whose stormwater flows into municipal stormwater systems are not dischargers regulated by the Clean Water Act. The draft fact sheet should be revised to clarify that these facilities do not need permit coverage.

2. All numeric limits should be removed from the general industrial stormwater permit because the State Board does not have authority to impose numeric limits. The Clean Water Act and EPA regulations require a permit writer to consider specific factors before including the numeric technology-based limits known as "BAT" and "BCT" in a permit. The State Board has not considered these factors, and therefore cannot establish BAT or BCT—that is, numeric—limits.

3. Nor can the State Board circumvent the requirements of the Clean Water Act by referring to the proposed numeric limits as best management practices ("BMPs"). The Clean Water Act does not authorize numeric BMPs. Technology-based limits such as BAT and BCT (which are numeric limits) are distinguished from BMPs (which are "practices" or "controls"). The State Board's authority under the Clean Water Act is limited to BMP-only permits.

4. The State Board cannot rely on California authority for the numeric limits in the Draft Permit, or for any other provisions beyond those required by the Clean Water Act, because it has not complied with Water Code §§ 13263 and 13241.

1. Industries Whose Stormwater Flows Into Municipal Sewers Do Not Need NPDES Permits

Recent cases have changed long-held beliefs about municipal stormwater systems. Many municipalities thought of their municipal separate storm sewer systems ("MS4s") not as point-source dischargers, but merely as conduits for those persons and industries who discharged pollutants, through the MS4s, into waters of the United States. Several recent cases, however, have rejected this concept, and held that MS4s are themselves point sources that discharge municipal stormwater into waters of the United States—regardless of who generated the stormwater pollutants that are being discharged. Industries whose stormwater flows into MS4s are therefore *not* Clean Water Act dischargers, and do not need to be covered by NPDES permits.

The most important of the recent cases is the Supreme Court's decision in the *Miccosukee* case. (*South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004).) In *Miccosukee*, a water management district argued that it did not need an NPDES permit because it did not generate any of the pollutants being discharged; it merely pumped water from a canal, over a levee, into a lake. The Supreme Court rejected this argument and held that the Clean Water Act regulates those persons who discharge, even if they do not generate the pollutants being discharged:

> [T]he District argued that the NPDES program applies to a point source "only when a pollutant originates from the point source," and not when pollutants originating elsewhere merely pass through the point source. This argument mirrors the question presented in the District's petition for certiorari: "Whether the pumping of water by a state water management agency that adds nothing to the water being pumped constitutes an 'addition' of a pollutant 'from' a point source triggering the need for a National Pollutant Discharge Elimination System permit under the Clean Water Act." . . . .

> This initial argument is untenable . . . . A point source is, by definition, a "discernible, confined, and discrete *conveyance*." (emphasis added). That definition makes plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to "navigable waters," which are, in turn, defined as "the waters of the United States." Tellingly, the examples of "point sources" listed by the Act include pipes, ditches, tunnels, and conduits, objects that do not themselves generate pollutants but merely transport them. In addition, one of the Act's primary goals was to impose NPDES permitting requirements on municipal wastewater treatment plants. But under the District's interpretation of the Act, the NPDES program would not cover such plants, because they treat and discharge pollutants added to water by others. We therefore reject the District's proposed reading of the definition of "'discharge of a pollutant'" contained in [33 USC] § 1362(12). That definition includes within its reach point sources that do not themselves generate pollutants.

(*Miccosukee* at 104-105 (citations omitted).) Of particular interest here is the Supreme Court's reference to municipal wastewater-treatment plants. No one seriously contends that an NPDES permit is needed for pollutants that flow into municipal *sanitary* systems, through sewage-treatment plants, and then into waters of the United States. EPA regulations confirm that "[t]he following discharges do not require NPDES permits: . . . (c) The introduction of sewage, industrial wastes or other pollutants into publicly owned treatment works by indirect dischargers." (40 CFR § 122.3.)[1] After *Miccosukee*, can there be any regulatory difference between water flowing into sanitary sewers and water flowing into storm sewers?

There is, of course, a factual difference between sanitary sewers and storm sewers: Water flowing into *sanitary* sewers goes first to a sewage treatment plant (where it is treated) and

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[1] The draft fact sheet acknowledges that permits are not needed for "discharges" to sanitary sewers and to combined sewers—which, the draft fact sheet suggests, "do not enter waters of the United States". (Draft fact sheet at 12-13.) But, on the contrary, water flowing into sanitary sewers and combined sewers *does* enter waters of the United States, either directly as a combined-sewer overflow or indirectly as a discharge from a sewage-treatment plant. (*See* 40 CFR § 122.2 (defining an "indirect discharger" as a nondomestic discharger introducing pollutants to a publicly owned treatment works).)

then to waters of the United States, whereas water flowing into *storm* sewers goes directly to waters of the United States. Even so, if *Miccosukee* means that the discharge to be regulated occurs at the point where a pollutant enters waters of the United States, then there is no apparent reason why MS4s should be regulated differently from sanitary sewer systems.

Just last month, the Ninth Circuit held that the regulated discharge occurs when stormwater flows out of MS4 outfalls into waters of the United States:

> The discharge from a point source occurred when the still polluted stormwater flowed out of the concrete channels . . ., through an outfall, and into the navigable waterways.

(*NRDC v. County of Los Angeles*, 2011 U.S. App. LEXIS 4647 at *49 (9th Cir. Mar. 10, 2011).) The municipalities argued, as the district had in *Miccosukee*, that they did not generate the pollutants discharged:

> Defendants contend that the "District does not generate any of the pollutants in the system, but only transports them from other permitted and non-permitted sources."

(*Id.* at *45-46.) But the argument was not successful. Instead, the Ninth Circuit concluded that Congress intended to regulate municipalities *rather than* regulating the individual sources of the stormwater flowing into MS4s:

> Rather than regulate individual sources of runoff, such as churches, schools and residential property (which one Congressman described as a potential "nightmare"), and as regulations prior to 1987 theoretically required, Congress put the NPDES permitting requirement at the municipal level to ease the burden of administering the program.

(*Id.* at *33.)

In the words of the Second Circuit, "A pipe from a factory draining effluent into a navigable water is a point source, but the factory itself is not." (*Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 493 (2d Cir. 2001) ("'point source' refers *only [to] the proximate source* from which the pollutant is directly introduced to the destination water body", emphasis supplied).)

Whatever we may think of these cases, they have established the principle that the Clean Water Act regulates the pipes that introduce pollutants to waters of the United States, not the sources of those pollutants. The draft fact sheet should therefore be modified to make clear that industries whose stormwater flows into MS4s—as contrasted with those who discharge stormwater directly to waters of the United States—do not need to files notices of intent to be covered by a general industrial stormwater permit, or by any other stormwater permit.

2. The Numeric Limits In The Draft Permit Do Not Comply With Clean Water Act Requirements

The Clean Water Act does not authorize the State Board to impose numeric limits in an NPDES permit merely because the State Board thinks numeric limits are a good idea. Numeric limits can only be imposed if they are technology-based limits consistent with Clean Water Act § 304(b), which specifies the factors that must be considered for the technology-based limits known as "best available technology economically achievable" ("BAT") and "best conventional pollutant control technology" ("BCT"). For stormwater, however, BAT or BCT limits have been established only for a few industries. (*See* 40 CFR § 400 et seq.)

Numeric limits can also be imposed case-by-case. EPA regulations authorize a permit writer to establish technology-based limits in an individual permit, based on a consideration of specified factors. These case-by-case limits are known as "Best Professional Judgment" or "BPJ" limits. (40 CFR § 125.3(a)(2).) But the State Board has not considered the specified factors or otherwise complied with the applicable requirements. As a result, the State Board is not authorized by the Clean Water Act to impose numeric limits in the draft general industrial stormwater permit.

When developing BAT limits for an industry and discharger, the Clean Water Act requires that EPA and permitting agencies "shall take into account" specified factors, including the age of the facilities, the process involved, and the cost of achieving effluent reduction:

> Factors relating to the assessment of best available technology shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate[.]

(Clean Water Act § 304(b)(2)(B).) When developing BCT limits, EPA and permitting agencies "shall take into account" specified factors, including the reasonableness of the relationship between costs and benefits, and the comparative cost of removing the pollutant by a publicly owned treatment works ("POTW"):

> Factors relating to the assessment of best conventional pollutant control technology (including measures and practices) shall include consideration of the reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived, and the comparison of the cost and level of reduction of such pollutants from the discharge from publicly owned treatment works to the cost and level of reduction of such pollutants from a class or category of industrial sources, and shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate.

(Clean Water Act § 304(b)(4)(B).)

EPA has explained that it must calculate costs per pound of pollutant removed to pass the statutory tests related to BCT:

> To "pass" the POTW test, the cost per pound of conventional pollutant removed by industrial dischargers in up-grading from BPT to the candidate BCT must be less than the cost per pound of conventional pollutant removed in up-grading POTWs from secondary treatment to advanced secondary treatment.
>
> Candidate technologies must also "pass" the industry cost-effectiveness test. For each industry subcategory, EPA computes a ratio of two incremental costs. The first is the cost per pound removed by the BCT candidate technology relative to BPT; the second is the cost per pound removed by BPT relative to no treatment . . . .

(EPA Final Rule, Best Conventional Pollutant Control Technology; Effluent Limitations Guidelines, 51 FR 24974, LEXSEE 51 FR 24974 at 5 (July 9, 1986).)

EPA regulations require a permit writer to impose technology-based limits either by applying the technology-based limits EPA has promulgated, or by developing them on a case-by-case basis:

> (c) *Methods of imposing technology-based treatment requirements in permits.* Technology-based treatment requirements may be imposed through one of the following three methods:
>
> (1) Application of EPA-promulgated effluent limitations . . . .
>
> (2) On a case-by-case basis under section 402(a)(1) of the Act, to the extent that EPA-promulgated effluent limitations are inapplicable. The permit writer shall apply the appropriate factors listed in §125.3(d) and shall consider:
>
> (i) The appropriate technology for the category or class of point sources of which the applicant is a member, based upon all available information; and
>
> (ii) Any unique factors relating to the applicant.
>
> [Comment: These factors must be considered in all cases, regardless of whether the permit is being issued by EPA or an approved State.]
>
> (3) Through a combination of the methods in paragraphs (d) (1) and (2) of this section.

(40 CFR § 125.3(c) (italics and square brackets in original).) When developing technology-based limits on a case-by-case basis, the permit writer must consider the same statutory factors that EPA considers when establishing BAT and BCT:

> (d) In setting case-by-case limitations pursuant to §125.3(c), the permit writer must consider the following factors:
>
> . . . .

(2) For BCT requirements: (i) The reasonableness of the relationship between the costs of attaining a reduction in effluent and the effluent reduction benefits derived;

(ii) The comparison of the cost and level of reduction of such pollutants from the discharge from publicly owned treatment works to the cost and level of reduction of such pollutants from a class or category of industrial sources;

(iii) The age of equipment and facilities involved;

(iv) The process employed;

(v) The engineering aspects of the application of various types of control techniques;

(vi) Process changes; and

(vii) Non-water quality environmental impact (including energy requirements).

(3) For BAT requirements: (i) The age of equipment and facilities involved;

(ii) The process employed;

(iii) The engineering aspects of the application of various types of control techniques;

(iv) Process changes;

(v) The cost of achieving such effluent reduction; and

(vi) Non-water quality environmental impact (including energy requirements).

(40 CFR § 125.3(d).)

Has the State Board considered these factors? No. Obviously, a great deal of work would be required to gather sufficient data for a real consideration of these factors as applied to the wide range of facilities that the draft general industrial stormwater permit is intended to cover. The draft fact sheet recognizes that "The State Water Board must consider a number of factors including the cost of achieving effluent reductions in relation to the effluent reduction benefits", and reports that "This analysis and rationale is still under development at this time and will be completed prior to adoption." (Draft fact sheet, page 8.) But by admitting that these factors have not yet been considered, the draft fact sheet admits that the numeric limits in the draft permit *cannot be* legitimate BAT and BCT limits.

Because the required consideration has not yet been done, the consideration cannot be the foundation on which the State Board bases numeric limits. In other words, the fact sheet is admitting that the consideration of the required Clean Water Act factors, when it is completed, will be an impermissible post hoc rationalization. (*See Save Tara v. City of West Hollywood*, 45 Cal.4th 116, 130 (2008) ("at a minimum an EIR must be performed before a project is approved, for "[i]f postapproval environmental review were allowed, EIR's would likely become nothing more than post hoc rationalizations to support action already taken"), quoting *Laurel Heights Improvement Association v. Regents of University of California* 47 Cal.3d 376, 394 (1988), square brackets in original.)[2]

Nor has EPA performed the required considerations. Although EPA developed numeric "benchmarks", it has made clear that the benchmarks are not effluent limits and should not be used as effluent limits:

> The benchmark concentrations are not effluent limitations and should not be interpreted or adopted as such. These values are merely levels which EPA has used to determine if a storm water discharge from any given facility merits further monitoring . . . ."

(EPA, Final Reissuance of National Pollutant Discharge Elimination System (NPDES) Storm Water Multi-Sector General Permit for Industrial Activities, Part II, 65 FR 64746, 64767.)

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[2] By not providing the rationale for the numeric limits, the draft fact sheet violates several notice-and-comment requirements, including the provisions of 40 CFR § 124.8 and § 124.56, especially § 124.56(a) ("NPDES fact sheets shall contain . . . (a) Any calculations or other necessary explanation of the derivation of specific effluent limitations . . .").)

The draft fact sheet, reporting on the conclusions of a blue-ribbon panel, recognizes "the inadequacy of current monitoring data sets" and the need for "improved monitoring data" for establishing numeric limits. (Draft fact sheet, page 3.) Having admitted that the data sets are inadequate for establishing numeric limits, the State Board *cannot* legitimately set BAT and BCT limits.

As a result, none of the numeric effluent limits in the draft general industrial stormwater permits comply with the Clean Water Act. They should therefore be removed.

3. The State Board Cannot Circumvent The Clean Water Act By Establishing "Numeric BMPs"

The draft fact sheet asserts that EPA regulations provide authority for numeric effluent limits "and/or" BMPs:

> EPA authorizes the use of numeric effluent limitations and/or BMPs to meet BAT/BCT (40 C.F.R. 122.44(k)).

(Draft fact sheet, page 7.) But the section cited, 40 CFR § 122.44(k), *does not* authorize numeric effluent limits. Numeric effluent limits, otherwise known as technology-based effluent limits, are covered by § 122.44(a)(1), and that section specifies that these limits are to be developed "in accordance with § 125.3 of this chapter". (40 CFR § 122.44(a)(1).) As explained above, § 125.3 requires the permit writer to consider factors that the State Board has not considered.

The section cited by the State Board, § 122.44(k), does indeed refer to BMPs, and specifies that BMPs may be used "to control or abate the discharge of pollutants when . . . (3) Numeric effluent limitations are infeasible". That is the case here.[3]

Note the language in § 122.44(k): BMPs are authorized when *numeric limits* are infeasible. This language clearly implies that BMPs are *not numeric limits*. If the State Board is taking the position that § 122.44(k) authorizes "numeric BMPs", then the State Board is wrong.

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[3] 40 CFR § 122.44(k) also allows BMPs to be used when "The practices are reasonably necessary to achieve effluent limitations", but all effluent limitations are subject to the consideration requirements of Clean Water Act § 304(b) and 40 CFR § 125.3. In this case, BMPs cannot be used to achieve effluent limitations for stormwater, because no legitimate effluent limits have been established.

The Clean Water Act provides that technology-based limits are to be specified "in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants". (Clean Water Act § 304(b)(2)(A) (requiring EPA to specify BAT limits), § 304(b)(4)(A) (requiring EPA to specify BCT limits).) Note that although BAT and BCT include the word "technology", EPA does not specify *technologies* when promulgating regulations defining these terms. Instead, it sets *numeric limits* based on the available technologies. (*See* 40 CFR Subpart N (specifying BAT, BCT, and other technology-based limits in numeric terms).) The numeric limits established by EPA are *based on* available technologies; that's why they are called technology-based limits. But Congress did not want EPA to specify technologies, because it believed that American know-how would develop new technologies that could meet the numeric limits more cost-effectively.

BMPs, in comparison, are not to be specified "in terms of amounts". They are practices, just as their name implies. The Clean Water Act refers to BMPs as "controls", and provides that EPA may issue regulations establishing BMPs "to control plant site runoff, spillage and leaks", among other things. (Clean Water Act § 304(e).)

Congress plainly intended BMPs to provide a supporting role, particularly when a numeric effluent limit would not be effective. For example, on-site spills of dry chemicals do not readily lend themselves to effluent limits. BMPs provide for non-numeric controls: When there is a spill, the industry should sweep it up.

Nothing in the Clean Water Act suggests that a permit writer can bypass the required considerations necessary for establishing numeric limits. The State Board should therefore remove any references to numeric requirements in the draft general industrial stormwater permit.

The State Board should also remove references, in the draft fact sheet, to BMPs that "attain" BAT or BCT, or that serve as "compliance" with BAT or BCT. The following statement, in particular, is wrong:

> The minimum BMPs, in combination with additional facility specific BMPs, serve as the basis for discharger compliance with BAT and BCT.

(Draft fact sheet at 5.)

As explained above, BMPs are distinct from BAT and BCT. A proper analysis would lead to the following three conclusions:

- First, that EPA has not established technology-based numeric limits for most stormwater discharges.

- Second, that the State Board has not considered the factors required for case-by-case numeric limits for BAT and BCT, and has in fact determined that numeric limits for BAT and BCT are infeasible. As a result, it does not have authority to include numeric limits in a permit.

- Third, as a result of the first two conclusions, the State Board can only issue a BMP-only permit.

The draft fact sheet seems to recognize that the concept "BMPs that constitute BAT and BCT" is too vague for regulatory use: "Regional Board staff . . . discovered significant variation among each discharger's interpretation of what BMPs constitute BAT and BCT." (Draft fact sheet, page 18.) Because of this vagueness, a permit that required unspecified attainment of BAT or BCT would violate due-process protections. (*See BMW of North America v. Gore*, 517 U.S. 559, 574 (1996) ("[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the conduct that will subject him to punishment").) References to BMPs that "achieve" or "constitute" BAT and BCT should be removed.

4. The State Board Cannot Rely On The Authority Provided By California Law

Because it cannot comply with the Clean Water Act requirements, the State Board may be tempted to say that the numeric limits are authorized under California law. But California law imposes additional requirements that the State Board has not met. Numeric permit limits are, therefore, not authorized under either federal or California law, and should be removed from the general industrial stormwater permit.

The State Board must comply with Water Code §§ 13263 and 13241 when "pollutant restrictions set out in the permits . . . exceed the requirements of the federal Clean Water Act." (*City of Burbank v. State Water Resources Control Board*, 35 Cal.4th 613, 627 (2005).) Plainly, if the State Board decides to impose numeric requirements not authorized by the Clean Water Act, it must comply with sections 13263 and 13241.

Water Code § 13263 specifies that permit requirements "shall take into consideration . . . the provisions of Section 13241." Water Code § 13241 specifies six factors to be considered:

(a) Past, present, and probable future beneficial uses of water.

(b) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto.

(c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.

(d) Economic considerations.

(e) The need for developing housing within the region.

(f) The need to develop and use recycled water.

The State Board has not considered these factors, and therefore is not authorized to impose numeric limits in the general industrial stormwater permit.

Although the fourth of these factors, economic considerations, often gets the most attention, the State Board should also take very seriously the third of these factors, which requires consideration of "[w]ater quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area." The State Board should consider, for example, whether the sediment control BMPs to be required by the draft permit will make any real difference to the environment.

The State Board surely knows that the sediment concentrations in California rivers are dependent on the velocity of the stream and the erodability of its bed and banks. It is difficult to imagine that sediment controls imposed by the permit would make any real difference to ambient sediment concentrations in many areas. Even if the industries were to release perfectly sediment-free water, that water will pick up sediment from the channels in which it flows. Water not carrying its full load of sediment is sometimes referred to as "hungry" water, no doubt because it eats the beds and banks downstream. Hungry water, in other words, causes downstream erosion that is likely to be detrimental to public improvements and to the environment. What is the point of requiring industries to pay for sediment removal when that sediment removal is likely only to exacerbate downstream erosion problems?

When considering this factor, the State Board should remember the *Herminghaus* case, which (although no longer good law) is instructive on the current factual issues. Ms. Herminghaus was, like the State Board, interested in sediment—but her concern was that she wasn't getting enough of it. During spring runoff, "the augmented natural flow . . . flowed naturally out and over the plaintiffs' said lands and saturated the same and deposited thereon a very fertile silt which enriched said land and caused an abundant growth of grasses thereon as the same". (*Herminghaus v. Southern California Edison Co.*, 200 Cal. 81, 93 (1926).) She sued because of the concern that upstream dams would cut off the high river flows that dumped so much good, fertile sediment on her land. She won, and the dams were enjoined. Times have changed, and there are now more than 100 significant dams and reservoirs within California. (R. Martin & R. Hanson, Reservoirs In The United States, US Geological Survey Water Supply Paper 1838 (1966).) These reservoirs cut off the high flows that would otherwise eat the beds and banks downstream, and as a result the concentrations of sediment are undoubtedly *lower* in many places than they were naturally. In many places, the beds and banks are no longer natural, and their reconfiguration has also affected sediment concentrations. When so much causation is attributable to dams and levees, and the remainder to conditions of flow and geography, and when sediment BMPs seem trivial and insignificant— what exactly is the State Board hoping to accomplish with its draft permit?

Thank you very much for the opportunity to comment, and please call with any questions.

Sincerely,

Lawrence S. Bazel