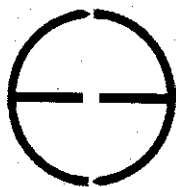


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Public Comment
Draft IGP
Deadline: 4/29/11 by 12 noon

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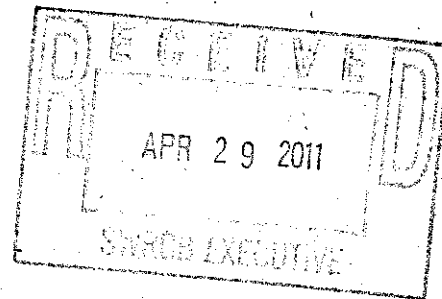
RE: Comment Letter – Draft Industrial General Permit

The California Council for Environmental and Economic Balance (CCEEB) is a non-partisan, non-profit coalition of business, labor and public leaders that advances strategies for a strong economy and a healthy environment. On behalf of CCEEB, we want to thank the State Water Resources Control Board (SWRCB) for this opportunity to comment on the Preliminary Draft Industrial Storm Water General Permit (Preliminary Draft or IGP).

CCEEB supports the re-issuance of this general permit and a robust public process to thoughtfully develop this permit regardless of arbitrary timelines. However, this draft contains many conditions that are identical to those in the 2005 draft and it appears that the stakeholder's comments from that review were not taken into consideration in this current draft. CCEEB has major concerns that this draft still contains overly prescriptive and economically unsound requirements and concepts that were previously determined to lack the necessary scientific and legal justification. Additionally, no economic, environmental, or cost-benefit analysis has been performed to substantiate such a major shift in this permit.

CCEEB's major concerns are:

- 1) an inadequate procedure and requirements for a Draft Permit
- 2) the inclusion of Numeric Action Levels and Numeric Effluent Limits;
- 3) an increase in inspections and monitoring without a clear correlation as to how these new requirements will improve water quality;
- 4) the methodology for establishing Industrial Qualified SWPPP Developers and Qualified SWPPP Practitioners;
- 5) accounting for atmospheric deposition, natural sources, offsite run-on, and activities that are "non-industrial";
- 6) Incorporation of Total Maximum Daily Loads;
- 7) the elimination of group monitoring; and
- 8) Enforcement should be fair, equitable, and even-handed.



Procedure and Requirements for a Draft Permit

On January 28, 2011 the SWRCB released a Notice of Public Hearing for the Draft Statewide General National Pollutant Discharge Elimination System (NPDES) Permit for the Discharge of Storm Water Associated with Industrial Activities for March 29, 2011. In this notice it is clearly stated that, "The draft Industrial General Permit is currently not in its complete form. When the final substantive changes are made, it will be re-circulated to the public for review and another public hearing will be held." However, it was not brought to our attention that this was a preliminary draft until several hours into public comments at the March 29, 2011 public hearing.

CCEEB expects the SWRCB to follow Federal and State statutes that govern updating permits and ensuring an open public process. Law requires:

Excerpt from 40 CFR § 124.6(d) Contents required in a Draft Permit:

If the Director [permitting agency] decides to prepare a draft permit, he or she shall prepare a draft permit that contains the following information:

- (1) All conditions under §§ 122.41 and 122.43 (NPDES);
- (2) All compliance schedules under §§ 122.47 (NPDES);
- (3) All monitoring requirements under §§ 122.48 (NPDES); and
- (4) For: (v) NPDES permits, effluent limitations, standards prohibitions, standards for sewage sludge use or disposal, and conditions under §§ 122.41, 122.42, and 122.44.

SWRCB staff has acknowledged that this draft will change significantly prior to adoption. Strict adherence to the law as stated should allow comment and reply on that draft prior to opening the official adoption proceedings. The process relied upon to date for this permit does not fit the procedure adopted in statute. SWRCB is also responsible for conducting analyses to accompany the draft regulations. Though staff has assured stakeholders that these analyses will be completed prior to adoption of the permit, it appears that the practices prescribed in Federal and State law would require these analyses to accompany a complete draft, which this version is not. In order for stakeholders to fully participate in the public process all analyses, along with a complete and fully applicable draft permit should be available. At this point, comments cannot address many of the intricacies of the new policy because the draft permit is incomplete. Additional confusion is created by the many conflicts between the preliminary draft language and information provided in the fact sheet. CCEEB is concerned that analyses being conducted concurrently with the stakeholder process may be used to justify a predetermined policy direction regardless of stakeholder input.

Concerns about the process of this permit moving forward persist as the record has not been corrected and the public notices still call this a draft permit. CCEEB asks that after reviewing stakeholder comments and revising this preliminary draft to reflect the legal, financial, economic, environmental, and scientific concerns of permit holders, a complete draft will be released with a full comment period that does not restrict comments or public hearings to discussions of only the revisions and/or new additions.

Numeric Action Levels and Numeric Effluent Limits

CCEEB believes that NAL/NEL scheme is not appropriate, the SWRCB should delete the "corrective action level scheme" - it is not consistent or appropriate with an iterative BMP approach recommended by CCEEB. Due to the variability of storm water, appropriate, scientifically-based numeric limits are infeasible to calculate without further data collection and methodology development. Establishment of numeric limits as "never to exceed limits" in this permit would place a significant, potentially unattainable burden on many industrial facilities, without commensurate environmental benefit. Numeric limits should not be inserted until the data and scientifically defensible methodology to properly calculate numeric limits are collected and developed.

§13372 of the California Water Code states that the SWRCB should "...ensure consistency with the requirements for state programs implementing the Federal Water Pollution Control Act" however, the establishment of Numeric Effluent Limits is **not** consistent with the Federal laws or regulations, unless specifically included in EPA Effluent Limitations Guidelines.

The Multi-Sector General Permit benchmark levels were not intended by USEPA to function as technology-based effluent limitations, but rather to serve as a point of reference for dischargers seeking to evaluate the effectiveness of BMPs. In originally developing the benchmarks, EPA stated:

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 to ensure that the facility has been successful in implementing a SWPPP.

(Preamble to Final Multi-Sector General Permit, 65 Fed. Reg. 64746, 64767, October 30, 2000; emphasis added).

In its 2008 Multi-Sector General Permit (section 6.2.1), USEPA reiterated:

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.

Neither USEPA nor the State Board has assessed whether or not available treatment and control technologies are capable of meeting the benchmarks imposed as NELs. In fact, the Fact Sheet for the draft IGP (p. 8, emphasis added) acknowledges 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, the age of the equipment and facilities, the processes employed and any required process

changes, engineering aspects of the control technologies, non-water quality environmental impacts (including energy requirements), and other such factors ...
This analysis and rationale is still under development at this time.

This list from the Fact Sheet recites the legally required considerations for the development of technology-based effluent limitations implementing BAT and BCT in the first place. Clean Water Act section 304(b); 40 C.F.R. § 125.3(d)(2), (3). In theory, that process, consistent with law and the 2006 Blue Ribbon Panel's recommendations, could ultimately result in a supportable set of NELs as the outcome. Yet what the draft IGP proposes is the opposite procedure — to develop a future analysis and rationale as an after-the-fact justification for the decision arbitrarily to designate the USEPA benchmarks as BAT and BCT. Indeed, it is perplexing that the State Board has already identified the NELs in this Draft IGP, yet later intends to develop the analysis and rationale that should have been used to determine them. This retroactive approach fails for at least three reasons: the benchmark NELs (i) have already been identified and (ii) are purportedly technology-based, yet are simply copied from water quality and other non-technological criteria, (iii) without any survey of technologies or consideration of the required factors including costs, energy requirements and non-water quality environmental impacts.

In 2006, the State Water Board appointed Blue Ribbon Storm Water Panel (Panel) that published a report citing specific recommendations regarding the establishment of numeric limits.¹ To date, this preliminary draft permit has not addressed any of these recommendations. Among their recommendations, the Panel:

- recognized the inadequacy of current monitoring data sets and recommended improved monitoring to collect data useful for establishing Numeric Limits and Action Levels.
- required parameters for future monitoring should be consistent with the type of industrial activity (i.e., monitor for heavy metals when there is reasonable expectation that the industrial activity will cause greater heavy metals concentrations in the storm water) instead of the current parameters.
- preferred the use of California data (or National data if it can be shown to be applicable to CA) in setting Numeric Limits and Action Levels and further
- recognized that economies of scale exist for large facilities and large groups of single facilities.
- concluded, regardless of Action Levels or Numeric Limits, the permittees should implement a suite of minimum BMPs – good housekeeping, employee training, preventing materials from exposure to rain, etc.
- recognized this is a large task and recommends prioritizing the implementation of this approach to achieve the greatest reduction of pollutants statewide.
- recognized that increasingly, a number of industries have moved industrial activities indoors, preventing storm water pollution and these facilities should be granted some regulatory relief from industrial Numeric Limits or action levels.

¹ "The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities," June 19, 2006.

Additionally, the Panel concluded, "...the need to make progress in monitoring and reducing storm water discharge from industrial facilities, but urges the Board to consider the total economic impact and not unduly penalize California industries with respect to industries outside of California."

The move towards Numeric Limits in this Preliminary Draft Permit, much like the push for Toxicity testing, is not supported by scientific research and data. It is disconcerting that during one of the worst economic times in California history the SWRCB staff insists on promoting unproven, untested, and unjustified policies with significant testing costs and mitigation costs, in the absence of any cost-benefit analysis that could justify or warrant these expenditures.

CCEEB supports the approach of iterative BMPs and benchmarks, but only as applied in a manner consistent with USEPA's guidelines to regulate industrial storm water discharges. The present approach of this preliminary draft permit is not consistent with USEPA or the State's own guidance on storm water. Storm water discharges are very different from traditional process wastewater discharges. It varies significantly in timing, duration, quality, quantity, and flow. It is difficult to monitor and its source is not subject to the control of the discharger.

Grab samples of storm water discharge can vary an order of magnitude in concentrations of constituents due to factors such as variability within a storm, variability between storms, and variability in sampling locations. The proposed Preliminary Draft should be amended so that the use of benchmarks consider this variability and allow flexibility and consideration of other indicators, consistent with the USEPA guidelines.

CCEEB believes that NAL/NEL scheme is not appropriate, the board should delete the "corrective action level scheme" - it is not consistent or appropriate with an iterative BMP approach recommended by CCEEB.

Increased Inspections and Monitoring

CCEEB is opposed to the burdensome and unjustified increase in inspections and monitoring in this Preliminary Draft. To date, the SWRCB has not justified the increase in inspections and monitoring that will dramatically increase compliance costs nor correlated these requirements with an improvement in water quality. Potential cost increases are estimated to range from a 90% to over 2000% increase per facility without providing environmental protection.

CCEEB would request operating hours being defined for sampling qualifying storm as limited to business hours (0700 to 1600). While some facilities may have personnel 24/7, the crew is usually smaller in numbers inadequate to respond to onset of qualifying storm event. While 24-hour samplers and consultants can be utilized, it is best to sample when the owner, operator, or decision makers are present.

CCEEB believes the SWRCB should do a cost-benefit analysis prior to imposing these onerous requirements. CCEEB also recommends limiting inspections and monitoring during the dry season unless there is a qualifying storm event.

Establishment of Industrial Qualified SWPPP Developers and Qualified SWPPP Practitioners

CCEEB is concerned about the limitation of the QSD to certain professions. There is no reason to limit qualified and experienced SWPPP developers and increase the cost of SWPPP development. Geologists, landscape architects, hydrologists, or engineers may have expertise in specific components required to be included in SWPPPs but may not individually possess the knowledge of industrial operations and pollution control necessary to properly develop all aspects of a SWPPP. Other qualified professionals should be considered to qualify as QSDs.

Accounting for Atmospheric Deposition, Natural Sources, Offsite Run-on, and Activities that are "Non-industrial"

In many cases, pollutants from atmospheric deposition, off-site run-on and activities that are non-industrial or natural processes may be the primary source of metals and other constituents in storm water runoff from facilities with industrial activities. In many cases, isolating the facilities from these natural or site/offsite sources is impossible. These are sources that are beyond the control of the discharger, and it is unreasonable and impractical, to require compliance with conditions beyond the discharger's control. As explained by staff, background conditions will not be accounted for until a facility was in the third level of corrective action. These conditions need to be accounted for in each level of correction action.

Applying the same action levels and effluent limits to all storm events will result in required actions and consequences based on unrepresentative samples. The first storm of the year essentially characterizes water after potentially 6 months of dry weather, during which much deposition can occur from surrounding natural conditions. Despite facilities undertaking extensive housekeeping and BMP improvements, sampling the first storm may not fairly characterize facility efforts. Any numeric action levels or limits imposed should allow for such conditions.

At many sites, storm water from industrial and non-industrial sources (such as roofs, parking lots, and similar structures) is co-mingled. As confirmed by SWRCB staff in several of the workshops, the pollutants in the storm water from non-industrial sources should not be considered in determining compliance with the permit. Segregation would require extensive retrofits and conveyance modifications. Depending on the size and types of facilities, such structural changes could result in large capital costs and would create an unfair financial disadvantage for many California businesses. This is exclusive of, and in addition to, the financial impacts of monitoring. The permit needs to provide a means to account for these non-industrial sources.

Incorporation of Total Maximum Daily Loads

CCEEB is concerned with the insufficient explanation of the relationship of Total Maximum Daily Loads (TMDLs) to the Preliminary Draft in the Findings section. This section should explain TMDLs and how the Order is consistent with applicable Waste Load Allocations (WLAs) and Load Allocations in approved TMDLs. The findings should acknowledge that

federal regulations require that NPDES water quality-based effluent limitations (WQBELs) must be consistent with the assumptions and requirements of TMDL WLAs.

The findings should also acknowledge that nothing in federal regulations nor in EPA guidance mandates that permits express TMDL WLAs as numeric WQBELs. Furthermore, the findings should reiterate that the State has the authority to express WQBELs in the form of BMPs for storm water discharges from MS4s, small construction sites, and industrial sites.

The Preliminary Draft permit requirements should specify that industrial sites will comply with TMDL WLAs through source control and, when necessary, the implementation of treatment control BMPs. To that end, if the discharger is subject to a TMDL for a specific constituent, the IGP should provide that implementation of TMDLs will be determined by TMDL implementation plans and implementation schedules, and no additional BMPs or other implementation measures should be required to reduce or prevent pollutants in storm water discharges in compliance with BAT/BCT. In this case, consistent with the Expert Panel findings, the NAL/NEL in the IGP should be suspended in favor of the TMDL requirements.

Enforcement should be fair, equitable, and even-handed.

Strict liability, combined with mandatory penalties associated with violation of the numeric limits within this draft do not allow cited entities to defend themselves and challenge the infractions. Arbitrary numeric limits and the inability to challenge the data will expose permittees to litigation. Without scientifically justified limits the exposure for infractions and potential lawsuits adds to an already stringent regulatory burden and hostile business environment in California

Conclusion

Many issues on storm water remain outstanding or vague, including guidance on when numeric limits should be developed, methodology for how to develop numeric limits, how to sample storm water, how to analyze whether the storm water discharge is impacting the receiving water, etc. SWRCB needs to initiate the development of the statewide storm water policy. Such a policy is crucial to ensure that storm water will be managed in a consistent and scientifically sound manner across the many different programs, including this Preliminary Draft General Permit, Ocean Plan, TMDLs, and NPDES permits.

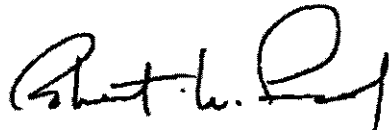
Expanding the scope of the permit beyond the types of facilities already covered is unnecessary from an environmental standpoint, would be overly burdensome from a regulatory standpoint, and would place economic hardship on local economies. Furthermore, discharges from most industrial activities not covered under the General Permit are regulated by MS4s.

SWRCB should also conduct an economic, environmental, and cost-benefit analyses prior to substantially increasing cost for both sampling and corrective actions. These analyses could indicate a more cost-effective and environmentally sound permit than currently proposed in this draft. As witnessed in the State of Washington a permit with NEL/NALs and tiered corrective actions does not work.

CCEEB urges the Board to adopt a General Permit for Industrial Activities based on the approach of iterative BMPs and benchmarks, only when applied in a manner consistent with USEPA's and the State's own guidelines and proceed with a sense of urgency on the development of a storm water policy. CCEEB and other industry organizations would be willing to participate in the further dialogue regarding this draft permit starting with the preparation of a statewide storm water policy.

Thank you for considering our comments. If you wish to discuss this matter further, please contact Bob Lucas at 916-444-7337.

Sincerely,



Robert W. Lucas
Waste & Water Quality Project Manager



Gerald D. Secundy
President

cc: Governor's Office
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