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

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

Comments on California State Water Resources Control Board NPDES General Permit for Stormwater Discharges Associated with Construction Activity

Dear Ms. Townsend:

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

Please call me if you have any questions.

Sincerely,

Brooks Smith IV

Brooks M. Smith

Attachment

UWAG
Utility Water Act Group©

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

June 11, 2008

The Utility Water Act Group (UWAG)[1] appreciates this opportunity to comment on the State Water Resources Control Board's draft NPDES general permit for stormwater discharges associated with construction activity (also known as the construction general permit or CGP). Several UWAG members with operations in California will be directly impacted by the CGP. Other members are interested in how this proceeding will influence related proceedings in other states and at the federal level. UWAG is particularly concerned about the aspects of the CGP described below that depart from established Clean Water Act practice and precedent.

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

The CGP contains technology-based numeric effluent limitations for pH and turbidity. These limitations were based on the "best professional judgment" (BPJ) of Board staff, relying in large part on conclusions set forth in a blue ribbon panel report issued in 2006. However, neither staff judgment, nor the panel report, nor any other explanation offered in the CGP fact sheet is adequate to justify these limitations using the required Clean Water Act factors.

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

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

[1] UWAG is an ad hoc group of 217 individual energy companies and three national trade associations of energy companies, the Edison Electric Institute, the National Rural Electric Cooperative Association, and the American Public Power Association. The individual energy companies operate power plants and other facilities that generate, transmit, and distribute electricity to residential, commercial, industrial, and institutional customers. The Edison Electric Institute is the association of U.S. shareholder-owned energy companies, international affiliates, and industry associates. The National Rural Electric Cooperative Association is the association of nonprofit energy cooperatives supplying central station service through generation, transmission, and distribution of electricity to rural areas of the United States. The American Public Power Association is the national trade association that represents publicly owned (municipal and state) energy utilities in 49 states representing 16 percent of the market. UWAG's purpose is to participate on behalf of its members in EPA's rulemakings under the CWA and in litigation arising from those rulemakings.

not only the permittee, but also the public and, ultimately, an administrative law judge.

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

First, the permit writer must determine the need for additional controls beyond existing effluent guidelines (40 CFR 125.3). Although there are no such guidelines in place now, EPA is on an aggressive schedule to develop effluent guidelines for the construction and development industry section by next year. In fact, EPA is expected to release draft guidelines shortly after the CGP comment period closes. On this basis, EPA has proposed to extend its own federal CGP for a short period of time, so that the Agency may then harmonize the CGP with the new guidelines. See 73 Fed. Reg. 28454 (May 16, 2008). Against this backdrop, it would be both hasty and premature for California to proceed with its own proposed BPJ limits.

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

- The total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application.
- 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.
- The reasonableness of the relationship between the costs of attaining a reduction in effluent and the effluent reduction benefits derived.
- The comparison of the cost and level of reduction of such pollutants from the discharge of POTWs to the cost and level of reduction of such pollutants from a class or category of industrial sources.

(40 CFR 125.3; EPA NPDES Permit Writers' Manual at p. 70).[2] EPA has underscored the importance of these factors to deriving permit limits that are both technically sound and reasonable. In this context, "technically sound" means limits that "are achievable with existing

[2] The first six factors must be evaluated for limits derived using "best practicable control technology currently available" or BPT. The second through eighth factors must be evaluated for limits derived using "best conventional pollutant control technology" or BCT. In this proceeding, the State has determined that "BCT shall be equivalent to BPT" (Fact Sheet at p. 51).

technology" and "reasonable" means limits that "are achievable at a cost that the facility can afford." (EPA NPDES Permit Writers' Manual at pp. 70-71).

For the CGP proceeding, the State has not provided its record of evaluation. Instead, it has provided only a conclusory summary at the end of the fact sheet (see pp. 50-53 in particular). This is inadequate to give interested stakeholders, like UWAG, an opportunity for meaningful review and comment. See Connecticut Light & Power Co. v. NRC, 673 F.2d 525, 530-31 (D.C. Cir. 1982) ("In order to allow for useful criticism, it is especially important for the agency to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules. To allow an agency to play hunt the peanut with technical information, hiding or disguising the information that it employs, is to condone a practice in which the agency treats what should be a genuine interchange as mere bureaucratic sport. An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary.")

In fact, based solely on the record provided, it appears as if the State reached its conclusions without using data and information specific to California (i.e., receiving water quality and effluent discharge quality from different types of construction activity, including linear construction as compared to traditional "box" development). We note, in particular, that the data reviewed by the expert blue ribbon panel were drawn from national repositories, such as the National Storm Water Quality Database, not California. Even using these data, the panel's findings were far from unqualified. The panel concluded that active treatment technologies could make numeric limits technically feasible for turbidity, but the panel qualified this conclusion by acknowledging that those technologies "have as yet only been applied to larger construction sites, generally five acres or greater," that "toxicity has been observed at some locations" and that "the cost [at smaller sites] may be prohibitive" (Blue Ribbon Panel Report at pp. 15-16). The panel also offered a series of 13 "reservations and concerns" related to the actual feasibility of numeric limitations for construction sites. The CGP fact sheet does not address these reservations and concerns in any meaningful way.

We urge the State to share its full record of evaluation before finalizing the CGP. On the basis of this record, we also urge the State to revisit its conclusions about the technical soundness and reasonableness of its proposed BPJ limits. For those conclusions to be defensible, they must be based on relevant data and information specific to California and responsive to the reservations and concerns raised by the expert blue ribbon panel. At present, they are not.

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

The CGP includes a novel land use restriction that reads:

> This General Permit requires all dischargers to maintain pre-development hydrologic characteristics in order to minimize post-development impacts to offsite water bodies.

(CGP at p. 2). The specific condition related to this restriction reads:

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

(CGP at pp. 20-21). In the accompanying fact sheet, the State explains that its goal is to control post-project (i.e., post-construction discharge) runoff volume and, in turn, any resulting hydrologic impacts (Fact Sheet at pp. 38-45). However, the State's permit authority begins and ends with conditions that relate to the quality of a regulated discharger's *effluent* -- here, as discharged during a regulated construction activity. See NRDC v. EPA, 859 F.2d 156, 170 (D.C. Cir. 1988) ("the CWA does not empower the agency to regulate point sources themselves; rather, EPA's jurisdiction under the operative statute is limited to regulating the discharge of pollutants"). By their terms, the land use restriction and associated condition focus on runoff from a site after construction is complete. This is clearly unrelated to effluent discharged during a regulated construction activity and, in turn, must be removed.

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

Under the CGP, applicants are required to electronically file all "Permit Registration Documents" with the State. These Permit Registration Documents are not defined or listed in the CGP -- a critical, unresolved gap that must be addressed before the permit is finalized. However, the Permit Registration Documents appear to include both the Notice of Intent and Stormwater Pollution Prevention Plan (see Fact Sheet at p. 3). The State explains that the filing of the plan is required as a result of recent federal court cases involving EPA's permits for municipal separate storm sewers and concentrated animal feeding operations. But this explanation is misleading, since another federal court case involving EPA's permit for construction activity (the only one that is directly analogous here) specifically upheld EPA's decision *not* to require the filing of a Stormwater Pollution Prevention Plan. See Texas Independent Producers and Royalty Owners Association v. EPA, 410 F.3d 964 (7th Cir. 2005).

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

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

Even if it does so, we urge the State to qualify the requirement for homeland security reasons. Under the CGP, a permittee's Stormwater Pollution Prevention Plan must identify a number of sensitive site details, including the location of bulk chemical storage areas, access points and access controls. To minimize homeland security risks, permittees must be given some meaningful opportunity to protect these types of details from disclosure to the public (e.g., by submitting redacted or confidential versions of their plans).

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

The CGP provides:

> Dischargers located in a drainage area where a Total Maximum Daily Load (TMDL) has been adopted by the Regional Water Board or USEPA may be required by a separate Regional Water Board Action to implement additional Best Management Practices (BMPs), conduct additional monitoring activities, and/or comply with an applicable waste load allocation and implementation schedule. Such dischargers may also be required to obtain a Regional Water Board permit specific to the area.

(CGP at p. 5). This is a sensible approach. Consistent with applicable regulations, guidance and agency practice, it recognizes that TMDLs are not self-implementing (a fundamental precept of EPA's TMDL program), that TMDL wasteload allocations may affect construction sources in different ways, if at all, and that existing or enhanced BMPs may be adequate to implement any required TMDL wasteload allocations. However, we question how the State's approach will be implemented in practice. Specifically, if a Regional Water Board determines that additional action is required (e.g., BMPs, monitoring), how will the requirements be imposed -- by separate order, separate permit or amended CGP? We recommend that the State provide these details in the final permit so that permittees have fair notice of possible additional obligations.

We also urge the State to clarify that the TMDL watershed provision only applies to permittees discharging *within* the particular TMDL segment, not upstream of it. We understand that EPA is currently working on "watershed-scale TMDL" guidance, to be released this summer, that specifies the legal limitations against reaching outside or upstream of a particular 303(d)-listed segment except for informational purposes under § 303(d)(3). The CGP should respect those limitations.

5. The Board needs to distinguish linear construction projects from other, more traditional "box" development projects.

The CGP makes no distinction for linear construction projects. This is clear error. As the California Council for Environmental and Economic Balance noted in comments dated May 5, 2008, the differences between land development projects and linear construction projects "are sufficiently great that any attempt to force both types of construction to be covered under the

same permit will result in an overstatement of the risk of linear projects, unreasonably high costs to the owner of the linear project, and significant compliance challenges which would make compliance at most linear sites nearly, if not completely, impossible." We wholly incorporate and endorse this position.

Linear projects include, for example, construction of power line corridors for the transmission of electricity and gas or water utility lines. These projects may occur in the public domain (like streets) or in areas surrounded by private property where the opportunity for responsible stormwater management is inherently site-specific.

In addition, linear projects, particularly overhead electric transmission lines, typically do not increase impervious surfaces or concentrate or re-direct stormwater. Their impacts, if any, are minimal, temporary and best controlled, where appropriate, with management practices that are peculiar to the linear setting (as compared to shopping centers or other planned commercial or residential development).

We understand from the recent public hearing that the State may now be considering options for addressing linear projects in a manner distinct from traditional "box" development projects. We strongly support this effort.

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