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FILE NO: 29142.070026

September 19, 2013

Via E-Mail

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

Re: **NPDES General Permit for Storm Water Discharges
Associated with Industrial Activities, Order NPDES No. CAS000001
Draft of July 19, 2013
Comments of the Utility Water Act Group (UWAG)**

Dear Ms. Townsend:

Attached are the comments of the Utility Water Act Group (UWAG) on the above referenced draft Industrial General Permit. UWAG appreciates the opportunity to provide these comments and the effort the Board and Staff have made to develop this permit.

If you have any questions, please feel free to contact us. Tim can be reached at 415/975-3710 or at tcarlstedt@hunton.com, and Kristy can be reached at 202/955-1547 or at kbulleit@hunton.com.

Sincerely,

A handwritten signature in blue ink, appearing to read "Kristy Bulleit".

Kristy A. N. Bulleit*
Timothy J. Carlstedt

Attachment

* Not admitted in California



**Utility Water Act Group's Comments on the
NPDES General Permit for Storm Water Discharges
Associated with Industrial Activities
California State Water Resources Control Board
Order NPDES No. CAS000001
Draft of July 19, 2013**

September 19, 2013

The Utility Water Act Group (UWAG)¹ appreciates the opportunity to comment on the State Water Resources Control Board’s July 17, 2013 draft of the NPDES General Permit for Storm Water Discharges Associated with Industrial Activities, Order NPDES No. CAS000001 (the “IGP”). Several UWAG members have California operations that will be directly affected by the new permit; all members have an interest in the permit to the extent it may set precedent.

UWAG previously commented on an earlier draft of the permit. We commend the effort and progress Board Staff has made since then. The current draft of the permit is a much improved product.

While UWAG supports many of the changes Staff has made to the draft permit, we continue to have concerns that, given its complexity, it may not be clear enough as to what constitutes “compliance.” As the Board undoubtedly is aware, while the regulated community seeks reasonable, cost-effective storm water regulation, above all it seeks certainty in the permit – concrete permit terms that, once satisfied, assure compliance. It is largely with that focus that we provide the following comments.

I. Compliance Clarity

A. Compliance with the IGP Constitutes Compliance with the Clean Water Act

Permits for discharges associated with industrial activity must meet applicable provisions of the Clean Water Act. Clean Water Act § 402(p)(3)(A), 33 U.S.C. § 1342(p)(3)(A). Those provisions include any applicable technology-based effluent limitations (achieved through the use of “best available technology economically achievable” [BAT] and “best conventional pollutant control technology” [BCT]) and, if necessary to meet relevant water quality standards (WQS), water quality-based effluent limitations. *Id.* at § 301(b), 33 U.S.C. § 1311 (b).

Where EPA has developed effluent limitations guidelines (ELGs) for an industrial category, they serve as the technology-based effluent limitation (TBEL). *Id.* at § 304(b), 33 U.S.C. § 1314(b). If numeric effluent limitations are infeasible, EPA may specify best management practices

¹ UWAG is a voluntary, *ad hoc*, non-profit, unincorporated group of 198 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 (units of state and local government) energy utilities in 49 states representing 16 percent of the market. UWAG’s purpose is to participate on behalf of its members in rulemakings under the Clean Water Act and in litigation arising from those rulemakings.

(BMPs) to achieve the BAT/BCT standard. 40 C.F.R. § 122.44(k)(3). Where EPA has not established ELGs (in the form of numeric limits or BMPs), the permit writer must use his or her best professional judgment (BPJ) to develop permit terms and conditions that will achieve the BAT/BCT standard. Clean Water Act § 402(a)(1), 33 U.S.C. § 1342(a)(1). BMPs also may be included in the permit as water quality-based effluent limitations (WQBELs) where numeric effluent limitations are infeasible. 40 C.F.R. § 122.44(k)(3) and (4).

The point of all this is that by complying with the terms and conditions of the IGP (which for the most part is BPJ-based), a discharger is complying with the applicable BAT/BCT and WQS standards for discharges associated with industrial activity. If a discharger is in compliance with the IGP, he or she is in compliance with the CWA.

We raise this point at the outset because of a concern that some could interpret the IGP to require permit compliance *and* compliance with BAT/BCT/WQS standards. By clarifying that compliance with the IGP constitutes compliance with the applicable standards, Staff would provide the regulated community with needed (and appreciated) certainty.

B. Minimum BMPs Should be Presumed to Achieve Technology-Based Effluent Limitations; Advanced BMPs Only Should be Required for Chronic Upset Conditions (e.g., NAL Exceedances).

1. Minimum BMPs

The IGP requires dischargers to implement and maintain certain minimum BMPs enumerated in the permit. As we understand it, implementation of these minimum (mandatory) BMPs generally will achieve the BAT/BCT standard, as determined by the permit writer's BPJ. We commend Staff for developing this minimum BMP approach for achieving BAT/BCT, which should make permit compliance more certain to ascertain. However, the permit needs to be clarified.

The Fact Sheet makes clear that advanced BMPs only are required when implementation of the minimum BMPs are not meeting the requirements of the permit (which we understand to mean that discharges are not achieving the BAT/BCT standard, as suggested by numeric action level (NAL) exceedances). *See* Fact Sheet, Section I.D.1 at p. 5. However, the Order itself is less clear. It provides that in addition to the minimum BMPs, dischargers must implement any advanced BMPs "necessary to reduce or prevent discharges of pollutants in its storm water discharge in a manner that reflects best industry practice considering technological availability and economic achievability." Order, Section X.H.2.a at pp. 32-33. Based in part on statements made at the State Board's August 21, 2013 hearing, we interpret this to mean that, as stated in the Fact Sheet, advanced BMPs only are required when the minimum BMPs are not achieving BAT/BCT (*i.e.*, the requirement of the permit).

We request that Staff revise the IGP to clarify that, as was explained at the Board hearing on August 21st, advanced BMPs only are required when implementation of the minimum BMPs is not adequately controlling the discharge of pollutants (*i.e.*, NAL exceedances are occurring). As discussed below, if the NALs are based on appropriate data/values, for most dischargers

implementation of the minimum BMPs should result in no NAL exceedances and compliance with the BAT/BCT standard.

2. Numeric Action Levels

We appreciate that Staff repeatedly has affirmed that numeric action levels (NALs) are not numeric effluent limitations (NELs) and that a NAL exceedance does not constitute a permit violation. However, we still have concerns with the NALs as currently crafted.

As we understand the concept of NALs, they should serve as a tool for dischargers to use to determine when the minimum BMPs may not be working as designed/intended. Thus, they should represent pollutant targets that most facilities can achieve when implementing the minimum BMPs.² NAL exceedances generally should be limited to situations where the minimum BMPs have been improperly designed/implemented/maintained or where a facility has unique characteristics. If the NALs have not been tailored to California-specific conditions and facilities, they may not adequately serve this purpose.

Because the IGP's NALs are derived from EPA's national benchmarks included in the Multi-Sector General Permit (MSGP), they are not necessarily appropriate indicators of ineffective controls for California facilities. As the Blue Ribbon Panel of Experts concluded, NALs (and NELs) should be based on California-specific data; until the State Board has such data (or has demonstrated that the use of national data is appropriate) the use of NALs may not be appropriate.

Accordingly, before adopting the IGP, we ask that the Board direct Staff to demonstrate that the MSGP-derived NALs are applicable and relevant for use at California facilities. Alternatively, we suggest Staff could revise the IGP to allow for the use of "alternative" NALs, established by dischargers themselves, as is allowed in the State of Georgia's 2012 NPDES General Permit for Storm Water Discharges Associated with Industrial Activity.³

3. Advanced BMPs

As noted above, the Fact Sheet clearly states that advanced BMPs only are required "when implementation of the minimum BMPs do not meet the requirements" of the IGP. Fact Sheet, Section I.D.1 at p. 5. Unless this means advanced BMPs only are required when NAL exceedances have occurred, the statement is confusing. Implementation of the minimum BMPs should be presumed to achieve the BAT/BCT standard, which is the requirement of the IGP. Exceedances of a NAL or NALs suggest to the discharger that implementation of the minimum BMPs may not be achieving BAT/BCT. In that case (which again should be fairly uncommon), the discharger may need to implement additional or advanced BMPs to achieve BAT/BCT (*i.e.*,

² The Blue Ribbon Panel of Experts convened by the State Board in 2005 called NALs "upset" values, indicating constituent levels in runoff that clearly are above the normal observed variability achieved through implementing BMPs.

³ Georgia's permit is available at: <http://www.gaepd.org/Documents/IndustrialStormwater.html>.

the requirement of the IGP). To avoid this confusion, we recommend that Staff revise the IGP to clarify that the requirement to implement advanced BMPs is connected to NAL exceedances.

We also recommend that Staff revise the IGP to clarify that if NAL exceedances continue to occur after the discharger has implemented any advanced BMPs necessary to meet the BAT/BCT standard, the discharger will still be deemed in compliance with the IGP and that no additional steps need be taken. The Fact Sheet currently appears to say this: if any additional BMPs required to eliminate NAL exceedances go beyond the BAT/BCT standard, the discharger is not required to implement the additional BMPs. *See* Fact Sheet, Section I.D.6 at p. 6.⁴ The Order itself, however, provides that, if the discharger implements “additional” BMPs that achieve compliance with the IGP’s effluent limitations (*i.e.*, BAT/BCT) but do not eliminate NAL exceedances, the discharger must take additional steps to evaluate what might be done to reduce or prevent NAL exceedances. *See* Order, Section XII.D.2.a.iv at p. 49. This highlights the point that the EPA-derived NALs may not be appropriate for use in California – if the discharger is meeting the BAT/BCT standard, there generally should be no NAL exceedances if the NALs have been developed correctly.⁵

4. Exceedance Response Actions

The IGP requires the discharger to initiate Exceedance Response Actions (ERAs) if NAL exceedances occur. The first year that NAL exceedances occur the discharger’s status changes from “baseline” to “Level 1.” A Level 1 discharger must identify (and provide an implementation schedule for) any additional BMPs necessary to prevent or reduce future NAL exceedances. If a NAL exceedance for the same parameter occurs in a subsequent year the discharger’s status changes to “Level 2.” A Level 2 discharger must submit, by January 1st of year following the Level 2 NAL exceedance, a Level 2 ERA Action Plan addressing the Level 2 NAL exceedances. By January 1st of the following year, the Level 2 discharger must submit a Level 2 ERA Technical Report.⁶

The discharger must demonstrate in the Level 2 ERA Technical Report that (i) the implemented BMPs (including additional BMPs) achieve compliance with the IGP’s effluent limitations (and, possibly, are expected to eliminate future NAL exceedances), (ii) the NAL exceedances are due

⁴ The Fact Sheet refers to “additional BMPs required to eliminate NAL exceedances [that] are not technologically available or economically achievable.” At the Board hearing on August 21st, Board Counsel indicated that the “technologically available or economically achievable” language is intended to describe the BAT/BCT standard.

⁵ As noted at the outset, this also suggests a possible decoupling of permit compliance from CWA compliance: a discharger could be meeting the BAT/BCT standard (*i.e.*, CWA compliance) but still be considered in violation of the permit if he or she did not do the subsequent evaluation to reduce or prevent future NAL exceedances.

⁶ We respectfully suggest that the Level 2 ERA Action Plan and Technical Report requirements need clarification. For example, it is not clear that by “addressing” a new Level 2 NAL exceedance, the discharger must implement additional BMPs, although the Technical Report requirements suggest that additional BMPs will be identified in the Level 2 ERA Action Plan.

solely to the presence of non-industrial pollutant sources, and/or (iii) the NAL exceedances are due solely to the presence of the pollutants in the natural background. These three demonstrations are the (i) “Industrial Activity BMPs Demonstration,” (ii) “Non-Industrial Pollutant Source Demonstration,” and (iii) “Natural Background Pollutant Source Demonstration.” Order, Section XII.D.2 at pp. 48-51

The Board may (but is not required to) review the Level 2 ERA Technical Reports. A discharger only can return to baseline status by implementing additional BMPs that result in no further NAL exceedances.⁷

Our principle concern with the ERA process is that all dischargers should be allowed to make “Non-Industrial Pollutant Source” and “Natural Background Pollutant Source” demonstrations, not only Level 2 dischargers. If a NAL exceedance is the result of non-industrial pollutant sources or background pollutant sources, a discharger should be allowed to use that information to avoid Level 1 or Level 2 status in the first place. It is a waste of resources to require the discharger to go through the Level 1 and Level 2 hoops if, at the end of the day, the discharger will be “absolved” of the NAL exceedance.⁸

Perhaps more significantly, it appears that making a Non-Industrial or Natural Background Pollutant Source demonstration actually gets a discharger very little, if any, relief. While the Fact Sheet says that a discharger who demonstrates that a NAL exceedance is the result of non-industrial or natural background pollutant sources may be excused from further ERA requirements (*see* Fact Sheet, Section I.D.6 at p. 6), the Order itself appears to provide the opposite. It provides that dischargers are ineligible to return to baseline status if they submit either of those two demonstrations. *See* Order, Section XII.D.4.b at p. 52.

Accordingly we request that Staff revise the IGP to clarify that (i) any discharger may demonstrate that a NAL exceedance is the result of non-industrial or natural background pollutant sources, and (ii) making such a demonstration will result in the discharger being placed in baseline status, with no further permit obligations.

⁷ The fact that NAL exceedances trigger additional permit obligations suggests that such exceedances are indicative of not meeting the BAT/BCT standard. Otherwise, if the discharger was achieving BAT/BCT, if he or she should have no further permit obligations.

⁸ We recognize that the IGP does allow a discharger to submit a Level 2 ERA Action Plan or ERA Technical Report prior to entering Level 2 status. However, the discharger is then automatically designated a Level 2 discharger and, as we read the IGP, will remain a Level 2 discharger, regardless of the cause of the NAL exceedances, until the discharger implements BMPs that eliminate future NAL exceedances.

C. *Minimum BMPs Should be Presumed to Result in Compliance with Receiving Water Limitations as Determined in the Receiving Water*

1. Corrective Action

The IGP provides in Section XX.B, that if a determination is made that a discharge is causing or contributing to an exceedance of an applicable water quality standard (WQS), the discharger must implement certain water quality based corrective actions. These actions include evaluating the discharger's existing BMPs and whether additional BMPs may be needed to meet the Receiving Water Limitations (RWLs). We agree this is an appropriate process. To ensure this process is followed, Staff should revise the IGP to clarify that (i) the discharger may presume that the minimum BMPs will result in compliance with the RWLs,⁹ and (ii) provided the discharger implements the required corrective action, he or she will be in compliance with the permit.¹⁰

2. Point of Compliance

Finding No. 37 in the Order makes clear that WQS apply to the quality of the receiving water, not the quality of the storm water discharge/effluent. Order, Section I at p. 5. In other words, compliance with the permit's RWLs is determined in the receiving water, not at the "end of the pipe." Given concerns that the permit's RWL language could be viewed by some as a form of WQBEL, we recommend that the clarifying language of Finding No. 37 be included in Section VI. of the Order.

II. Other Issues

In addition to the "compliance/clarity" issues discussed above, we also want to raise the following issues:

A. *Total Maximum Daily Loads (TMDLs)*

1. Guidance

The IGP provides that each Regional Board will develop its own TMDL-specific permit and monitoring requirements that the State Board will incorporate into the IGP. *See* Order, Section VII.A at p. 21. We believe this is a reasonable approach. However, we believe the State Board should provide guidance to the Regional Boards so that TMDL implementation through the IGP is consistent.

⁹ The Fact Sheet supports this presumption: "Implementation of the BMPs required under Section V of this General permit will typically result in compliance with WQS." Fact Sheet, II.E., p. 21.

¹⁰ Rather than impose RWL obligations on a discharger where a Regional Board determines, on a case-by-case basis, that the discharger has caused or contributed to WQS exceedances, the Board could instead rely on the TMDL process to address WQS exceedances. If a discharger discharges to an impaired water body (*i.e.*, applicable WQS are being exceeded), he or she would be subject to TMDL-specific permit requirements the State Board incorporated into the IGP.

2. Treatment Control BMPs

Notwithstanding that the Regional Boards will be developing their own TMDL-specific permit requirements, the Fact Sheet prejudices the ultimate process, stating that dischargers will be required to design or retrofit treatment control BMPs to meet the TMDL implementation requirements. *See* Fact Sheet, Section II.I.3 at p. 38. The Order itself does not include this language. We recommend that Staff remove the “treatment control BMP” language in the Fact Sheet.

3. New Dischargers

Coverage under the IGP is not available to a “new discharger” that discharges a pollutant into a water body which is impaired for that pollutant if there are not sufficient remaining waste load allocations (WLAs) in an approved TMDL. *See* Order, Section VII.B at 21-22. Rather than this absolute bar to new economic activity, we recommend that Staff look into the possibility of equitably reallocating the existing WLAs in an approved TMDL. Also, Staff should define the term “new discharger” such that, at a minimum, a new owner of an existing facility is not subject to “new discharger” requirements.

B. Legally Responsible Person

The IGP requires that all permit registration documents be certified by the discharger’s “Legally Responsible Person” (LRP). Order, Section XXI.K.1 at p. 68. For a corporation, an LRP must be an “authorized corporate officer.” *Id.* This requirement essentially is unchanged from the current permit. However, for a reason not explained in the permit documents, Staff has revised the definition of “authorized corporate officer.”

The previous definition of “authorized corporate officer” was the same as the federal definition found at 40 C.F.R. § 122.22(a)(1) and (b).¹¹ The revised definition likely only will serve to complicate the corporate certification process, without any perceived benefit to human health or the environment.

The IGP definition of “authorized corporate officer” provides, in the last clause of Section XXI.K.4.a(a): “...or **other officer** of the corporation with authority to execute documents on behalf of the corporation **pursuant to corporate bylaws or board resolution.**” (Emphasis added.) The federal regulations, by comparison, provide simply: “...or any other person who performs similar policy- or decision-making functions for the corporation.” 40 C.F.R. § 122.22(a)(1)(i). Similarly, the IGP provides in the last clause of XXI.K.4.a(b): “...in accordance with **corporate bylaws and by corporate resolution.**” (Emphasis added.) The federal regulations provide: “...in accordance with corporate procedures.” 40 C.F.R. § 122.22(a)(1)(ii).

By requiring that corporate LRP designations be limited to officers and managers whose authority to sign documents is pursuant to corporate bylaws and/or resolution, the IGP will

¹¹ The current permit and the federal regulations use the term “responsible corporate officer” instead of “authorized corporate officer.”

unnecessarily complicate implementation of the permit and will be inconsistent with federal requirements.¹² Accordingly, we request that Staff revise the definition of “authorized corporate officer” consistent with the current permit and the federal regulations.

¹² In its recently proposed “NPDES Electronic Reporting Rule” EPA does not propose any changes to who can serve as a “responsible corporate officer.” *See* 78 Federal Register 46006 (July 30, 2013). If EPA does not feel compelled to limit who may sign NPDES documents, it is not clear why Staff proposes to do so.