

AMENDED RESPONSE TO COMMENTS
(reflecting changes to permit made by the State Water Board at the 11/16/10 hearing)

December 15, 2010
 NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES)
 GENERAL PERMIT FOR
 STORM WATER DISCHARGES
 ASSOCIATED WITH CONSTRUCTION AND LAND DISTURBANCE
 ACTIVITIES (CONSTRUCTION GENERAL PERMIT)
ORDER NO. 2010-0014-DWQ
NPDES PERMIT NO. CAS000002

The State Water Resources Control Board's (State Water Board or SWB) Response to Comments is responsive to all timely comments submitted by noon on November 5, 2010 concerning modifications to Order No. 2009-0009-DWQ General Permit for Discharges of Storm Water Associated with Construction and Land Disturbance Activities. All written comments are available to view at:

http://www.waterboards.ca.gov/water_issues/programs/stormwater/comments110510cgp.shtml

Number	Company	Representative
1	California Stormwater Quality Association	Scott Taylor
2	Central Valley Regional Water Board	Pamela Creedon
3	City of Los Angeles Department of Water and Power	Katherine Rubin
4	Department of Army	A.L. Faustino
5	Department of Water Resources on behalf of the Central Valley Flood Protection Board and Itself	Ward Tabor
6	EDA Design Professionals	Guy Bates
7	Foley & Lardner LLP on behalf of Building Industry Association of San Diego	S. Wayne Rosenbaum
8	General Public	Teresa Jordan
9	Sacramento Regional County Sanitation District	Lysa Voight
10	Sempra Energy	R. Scott Pearson
11	Southwest Gas Corporation	William Schrand
12	U.S. Army Corps of Engineers	John Esparza
13	U.S. Department of Defense	Michael Huber

1. Scott Taylor – California Stormwater Quality Association (CASQA)	
Comment Summary	Comment Response
<p>Suggests adding another level of approval – e.g. Authorized Representative – to help clarify various roles of individuals and entities involved in obtaining coverage and signing permit documents, using language in 40 CFR § 122.22(a) as a guide. The Authorized Representative would act on behalf of the Legally Responsible Person (LRP), and would be the party with the authority to designate Approved Signatories.</p> <p>While there would be overlap between the individuals that can serve as Authorized Representative and Approved Signatory, especially for less complex organizations, we feel it is important that the permit language clearly identify Authorized Representatives and the distinction between this role and that of the Approved Signatory and the distinction between the LRP and the Authorized Representative.</p>	<p>The State Water Board disagrees. The SWB believes that introducing a third level of authorization will not simplify the process, but add additional confusion. The SWB also thinks that a third level of authorization is unnecessary because the Stormwater Multi-Application, Reporting, and Tracking System (SMARTS) allows individuals to create accounts in the database on behalf of the Legally Responsible Person (LRP).</p>
<p>Suggests amending the definition of Approved Signatory to clearly indicate what types of documents and other information the Approved Signatory can submit through SMARTS.</p>	<p>The SWB agrees and has made changes pursuant to this comment.</p>
<p>Recommends that the State Water Board provide guidance to permittees on how they can change the LRP for their projects or change the designation of their project from LUP to Traditional as many Permit Registration Documents may have been filed with a strained definition of LUP. In other cases the project proponent and landowner might prefer to remove landowners as the LRP to more closely reflect project management.</p>	<p>The SWB has amended the order to state that if an LRP transfers its status to another LRP, the new LRP will have to file new Permit Registration Documents.</p>

2. Pamela C. Creedon – Central Valley Regional Water Quality Control Board (Central Valley Water Board)	
Comment Summary	Comment Response
<p>The Central Valley Water Board supports a change to the signatory requirements that would allow a contractor designated by the U.S. Army Corps of Engineers to act as the Legally Responsible Person. However,</p>	<p>The SWB agrees and has modified the definition of LRP pursuant to this comment.</p>

2. Pamela C. Creedon – Central Valley Regional Water Quality Control Board (Central Valley Water Board)

Comment Summary	Comment Response
the Central Valley Water Board wants the Army Corps to retain ultimate responsibility for the actions of its contractors.	

3. Katherine Rubin – City of Los Angeles Department of Water and Power (LADWP)

Comment Summary	Comment Response
Suggests amending the definition of Approved Signatory in #3 to ensure that the Approved Signatory also oversees compliance with all environmental laws and regulations and to ensure that information submitted through the SMARTS system is accurate.	The SWB disagrees. While the SWB recognizes that LADWP is concerned about environmental compliance, the SWB does not think it's necessary to include this language. The SWB hopes and expects a public agency LRP to only delegate signatory authority to those employees who are knowledgeable about and understand this General Permit, and who will help to ensure compliance with all permit requirements and environmental laws.
Suggests limiting the definition of Legally Responsible Person to only those persons or entities that are the property owner or have a real property interest, except those with a leasehold interest, because lessees may change or vacate the property before the project is completed.	The SWB disagrees. The central purpose of reopening this General Permit to redefine LRP is a reaction to the numerous problems dischargers have faced in trying to get the landowner to obtain coverage as the LRP. The SWB does not want to limit this definition; the SWB wants to expand it to include persons or entities that possess any real property interest, as well as persons or entities that fit other special circumstances, as detailed in the revised definition. If there is a change in lessees, then the new lessee would become the LRP, unless the owner in fee would prefer to act as the LRP.

4. A.L. Faustino – Department of Army

Comment Summary	Comment Response
The Department of the Army and the Sacramento Area Flood Control Agency jointly propose revising the definition of Legally Responsible Person as follows: "However, when a federal agency is a Legally Responsible Person, or has written permission from a Legally Responsible Person to enter and/or construct a project, then a contractor to the federal agency shall be a Legally Responsible Person when it	The SWB agrees and has made changes pursuant to this comment.

4. A.L. Faustino – Department of Army

Comment Summary	Comment Response
contractually assumes all NPDES permit compliance responsibilities including signing and certifying all required NPDES permit documents.”	

5. Ward A. Tabor – Department of Water Resources (DWR)

Comment Summary	Comment Response
The California Department of Water Resources, on behalf of the Central Valley Flood Protection Board, jointly propose revising the definition of Legally Responsible Person as follows: “However, when a federal agency is a Legally Responsible Person, or has written permission from a Legally Responsible Person to enter and/or construct a project, then a contractor to the federal agency shall be a Legally Responsible Person when it contractually assumes all NPDES permit compliance responsibilities including signing and certifying all required NPDES permit documents.”	The SWB agrees and has made changes pursuant to this comment.
This commentor states that the U.S. Army Corps of Engineers believes that the Army Corps cannot act as the LRP because doing so would potentially violate the federal Anti-Deficiency Act, which prohibits Federal agencies and officers from binding the federal government to responsibilities beyond the current federal fiscal year.	The SWB disagrees. If the U.S. Army Corps (or any other federal agency) acts as the LRP, doing so does not run afoul of the Anti-Deficiency Act. Section 313(a) of the CWA states that the President has the authority to exempt federal projects from the CWA, provided that “[n]o such exemptions shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation.” The “no such exemptions shall be granted due to lack of appropriation” implies that when the appropriation is made, the appropriation is intended to include the costs associated with complying with the Clean Water Act. If it is discovered that a project does not have a sufficient appropriation to cover the compliance costs, then the President can ask for an additional appropriation in his or her next budget proposal. If that appropriation is rejected, the President may exempt the federal project from the CWA for that budget year. The President must report to Congress every January, reciting the exemptions that were granted in the last budget year, along with the reason for granting the exemptions. The fact that Congress included this provision supports the idea that Congress, by enacting the CWA, intended that the projects that it funds be designed to meet the requirements of the CWA.

5. Ward A. Tabor – Department of Water Resources (DWR)

Comment Summary	Comment Response
	<p>Federal courts have agreed that state permitting requirements of the NPDES program are applicable to the federal government. See, e.g. <i>State of Cal. V. U.S. Dept. of Navy</i> (1988) 845 F.2d 222 (“Section 313 of the CWA requires all federal facilities to comply with state NPDES permit requirements.”). Therefore, when the U.S. Army Corps acts as the LRP and signs the Notice of Intent, this is not considered to be a commitment of an indefinite amount of resources, and therefore is not a violation of the Anti-Deficiency Act.</p> <p>It is also important to note that, pursuant to <i>Department of Energy v. Ohio</i> (1992) 503 U.S. 607 (1992), a federal agency that discharges waste and fails to obtain permit coverage is subject to greater potential liability than a federal agency that obtains permit coverage. If signing a Notice of Intent and starting work on a project is a violation of the Anti-Deficiency Act, and if the NOI does not itself create additional unfunded liability, then merely beginning work on a project that has the potential to discharge waste into waters of the United States is a violation on the part of the military officer that approves the project. The SWB does not believe that this is Congress’ intended result.</p>

6. Guy W. Bates – EDA Design Professionals

Comment Summary	Comment Response
Asks whether a private developer can be the LRP for development projects that occur on property the private developer doesn’t own or control.	No, because the private developer does not have any real property interests.
Asks whether a City should be the LRP if the City conditions a project to make public improvements within its right-of way.	Yes, in this example the City is the LRP because the City has a real property interest.

7. S. Wayne Rosenbaum – Foley & Lardner LLP on behalf of Building Industry Association of San Diego (BIASD)

Comment Summary	Comment Response
BIASD wants the definition of LRP to be limited exclusively to the fee simple property owner or an equivalent interest such as a co-tenancy,	The SWB disagrees that the definition should be limited to only the fee simple property owner or equivalent interest. The central purpose of

7. S. Wayne Rosenbaum – Foley & Lardner LLP on behalf of Building Industry Association of San Diego (BIASD)	
Comment Summary	Comment Response
joint tenancy, or a ground lease greater than thirty years. BIASD is concerned that expanding the definition of LRP will result in confusion both for the regulated community and would make enforcement difficult, if not impossible.	reopening this General Permit to redefine LRP is a reaction to the numerous problems dischargers have faced in trying to get the fee simple property owner to obtain coverage as the LRP. The SWB does not want to limit this definition; the SWB wants to expand it to include persons or entities that possess any real property interest, as well as persons or entities that fit other special circumstances, as detailed in the revised definition. Many important construction projects would otherwise be halted if the SWB limited the LRP exclusively to the fee simple property owner or equivalent interest. In addition, the SWB does not think the expansion of this definition will result in confusion; rather this revised definition better accommodates the regulated community. Nor does the SWB think that this revised definition will make enforcement more difficult.
BIASD is concerned that there is no provision that stipulates how a public employee (in #3) will be appointed, and suggests adding language to the effect that “the delegation of authority has been assigned to the manager in accordance with procedures ratified by the agency’s governing board.”	The SWB disagrees. The SWB does not want to add language that describes the LRP’s process of authorizing the Approved Signatory, because the SWB believes it is up to the individual LRP. Of course, the SWB expects that the LRP will follow its agency’s procedures for authorizing an Approved Signatory, but the SWB does not want to prescribe what this process shall be. Moreover, SMARTS is a self-certification process, and thus no documentation needs to be submitted electronically to prove that the Approved Signatory was authorized correctly.
BIASD requests that the definition of Approved Signatory cover other ownership classes such as limited liability companies, limited partnerships, trusts, estates, joint and co-tenancies, and leaseholds longer than thirty years.	The SWB agrees and has made changes pursuant to this comment to include a catch-all in Approved Signatory #7.

8. Teresa Jordan – General Public	
Comment Summary	Comment Response
Opposes modifying the definition for Legally Responsible Person.	Comment Noted.
Opposes modifying the definition for Approved Signatory.	Comment Noted.
Opposes the proposed modifications to Section D. Obtaining and Terminating Permit Coverage.	Comment Noted.
Opposes the proposed modifications to all of the Electronic Signature and	Comment Noted.

8. Teresa Jordan – General Public

Comment Summary	Comment Response
Certification Requirements section. Opposes the proposed modifications to Attachment A, Section E.9 Electronic Signature and Certification Requirements (“a,” “i,” “(1),” “(2),” “ii,” “iii,” “b,” and “c”	Comment Noted.

9. Lysa Voight – Sacramento Regional County Sanitation District (SRCSD)

Comment Summary	Comment Response
Suggests amending the definition of Approved Signatory in #3 to include other examples of a public employee with managerial responsibility, and to clarify that the Approved Signatory is authorized and assigned by the LRP.	The SWB disagrees in part. It is unnecessary to insert additional examples of who a public employee with managerial responsibility can be, because the parenthetical states “including, but not limited to” It is likewise unnecessary to add that the Approved Signatory is “authorized and assigned by the Legally Responsible Person” because it would be redundant; the introduction of this definition already indicates that the Approved Signatory is authorized by the LRP. However, to make it abundantly clear that the public employee must be authorized, the SWB decided to change the phrase “or other public employee” to “or any other authorized public employee.”
Suggests that the Legally Responsible Person should be able to possess one or more real property interests, and that the LRP should also be anyone with legal authority to construct or disturb land within the public right of way.	The SWB disagrees. First, the “one or more” suggestion does nothing to clarify or improve the definition, because it doesn’t matter if the LRP has one or one hundred real property interests. As long as the LRP has one real property interest in the land, that is enough to qualify that person or entity to act as the LRP. Second, allowing anyone with legal authority to construct or disturb land to be the LRP is exactly the situation the SWB is trying to avoid. A contractor would have legal authority (pursuant to a contract) to construct or disturb land, and it has been the SWB’s longstanding policy to preclude contractors from being permittees. Unlike industrial storm water projects, contractors come and go for construction

9. Lysa Voight – Sacramento Regional County Sanitation District (SRCSD)

Comment Summary	Comment Response
	projects, whereas the landowner (or person with a real property interest in the land) typically remains the same. The SWB has required the landowner to obtain permit coverage as far back as the original 92-08-DWQ Construction General Permit. With this revision, the SWB is expanding the landowner requirement to include any real property interest, which the SWB thinks is sufficient.

10. R. Scott Pearson – Sempra Energy

Comment Summary	Comment Response
Suggests amending the definition of LRP to allow individuals and entities that are conducting pollution investigation and remediation projects to act as the LRP. These individuals and entities typically have an access or license agreement to conduct the investigation or remediation, but do not have a real property interest in the land.	The SWB agrees and has made changes pursuant to this comment.
[Note: The following is an oral comment made at the November 16, 2010 hearing] Suggests reinstating the language that was deleted for linear projects, because in rare circumstances, some linear projects operate pursuant to a conditional use permit, or some other type of agreement that does not constitute a real property interest.	The SWB agrees and has made changes pursuant to this comment.

11. William D. Shrand – Southwest Gas Corporation

Comment Summary	Comment Response
Suggests amending the definition of Approved Signatory is (1)(b) to allow corporations to delegate signatory authority to employees other than “the manager of facility,” which can include such persons as supervisors and other persons that the corporation entrusts with the authority to bind the corporation.	The SWB disagrees. The SWB wants to retain the original delegation to the manager of the facility, because the manager of the facility makes decisions that govern the operation of the regulated facility, decisions which include compliance with environmental laws and regulations, and this General Permit. This delegation to the manager of the facility is consistent with 40 C.F.R. § 122.22 (a)(1), and the SWB wants to keep this delegation consistent.

12. John R. Esparza – US Army Corps of Engineers

Comment Summary	Comment Response
Suggests revising the definition of Legally Responsible Person to be consistent with the corresponding Federal permit. Specifically, add the definition and use of “operator” and “owner or operator” as defined in the Federal Permit.	Although “owner or operator” is the correct term for industrial projects, it is not the correct term for construction projects. However, the SWB has made changes to allow a bonded contractor to act as the LRP for U.S. Army Corps of Engineers projects only.

13. Michael Huber – Department of Defense (DoD)

Comment Summary	Comment Response
Suggests amending the definition of Approved Signatory for the military to also include a DOD civilian with a similar level of project authority.	The SWB agrees and has made changes pursuant to this comment.
Suggests adding new language to the definition of LRP specific to the military, to allow any military officer or civilian acting in an equivalent capacity to act as the LRP.	The SWB does not think this change is necessary because the LRP is the permittee/discharger, and the permittee/discharger for the military would be, e.g., the Department of the Navy, not an individual military officer (or civilian acting in an equivalent capacity). It is fine for an individual military officer or DOD civilian to act as the Approved Signatory on behalf of his or her military branch, but that individual would not be the LRP. The word "person" in LRP means more than just an individual - "person" represents both individuals and entities, such as an agency, corporation, military branch, etc. In this circumstance, “person” refers to the specific military branch of the Department of Defense, such as the Department of the Navy.

14. Anthony O. Garvin – University of California

Comment Summary	Comment Response
<p>Several of our campuses are concerned that important notices from the SWRCB may be lost in the system if the SMARTS system automatically sends the notice to the Board of Regents as the LRP since the Board of Regents is not set up to receive and distribute such notices. The official address of the Board of Regents is in the Oakland Office of the President. To my knowledge, the Board of Regents does not have an office or mail or email address at each campus where the actual construction will occur.</p>	<p>Comment Noted.</p>
<p>It may be necessary to update or revise the SMARTS system to assure that notices from the SWRCB are sent to the Approved Signatories instead of the LRP where the LRP is an entity and not a real, live person, at least in the case of public universities.</p>	<p>All user IDs linked to a WDID number will receive notification emails. It is required that a LRP account be linked to all WDID numbers. Regardless if the LRP is a person or entity, an employee of the LRP must register for the LRP account.</p>