



CASTELLÓN & FUNDERBURK LLP



September 19, 2013

Via U.S. Mail and E-Mail

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

**Re: Comment Letter- Industrial General Permit
IGP Draft Issued On July 19, 2013**

Dear Ms. Townsend and Members of the Board:

Our firm represents the Paper, Glass, and Plastic Recyclers Monitoring Group (“PGPRMG”). PGPRMG respectfully submits these comments on the 2013 Draft Industrial General Permit (“2013 IGP” or “Draft Permit”) that was issued on July 19, 2013. PGPRMG is a State Water Resources Control Board (“SWRCB”) approved monitoring group in good standing and have been operating under the provisions of the Industrial General Permit since 1992.

PGPRMG consists of over twenty facilities that operate within the jurisdictions of the Los Angeles, San Francisco Bay, Santa Ana, Central Valley, and San Diego Regional Water Quality Control Boards. PGPRMG participants primarily operate under the Standard Industrial Classification (SIC) Code 5093. The industrial activities conducted by PGPRMG participants are those typically associated with the scrap paper, plastic, and glass recycling industry and the participants are primarily engaged in the processing, breaking up, sorting, and wholesale distribution of scrap paper, plastic, glass, and aluminum cans.

PGPRMG’s comments are submitted with the group members’ desire to meet their compliance obligations in a manner that will result in protection of California’s waters without placing unrealistic and arbitrary compliance burdens on industrial dischargers. PGPRMG group members have expressed concern over the following issues and/or matters contained in the 2013 IGP:

I. The State Water Board Should Maintain The Receiving Water Limitations Provision in the Findings Section of the Draft Order And Adopt Language That Ensures that Receiving Water Limitations Will Be Satisfied by The Assessment and/or Implementation of Additional Best Management Practices (“BMPs”) Set Forth in Section XX

As a preliminary matter, the group members commend the State Water Board’s interpretation of the receiving water limitations in Section I.E. of the Draft Order. More specifically, the group members maintain that the following language contained in the Draft Order should be included in the Final Order:

“WQS apply to the quality of the receiving water, not the quality of the industrial storm water discharge. Therefore, compliance with the receiving water limitations can generally not be determined solely by the effluent water quality characteristics.” Section I.E.37.

However, in order to ensure consistency with the above-language in the Draft Order, the 1997 Industrial General Permit’s C.3 provision,¹ and the *Kramer Metals* decision,² it is necessary to include language in Section VI (“[d]ischargers shall ensure that industrial storm water discharges and authorized NSWDS do not cause or contribute to an exceedance of any applicable WQS in any affected receiving water”) that specifically states that a facility will not be in violation of a Receiving Water Limitation as long as the facility complies with the procedures outlined in Section XX.B.

Making it clear that complying with Section XX.B will not result in an alleged violation of a Receiving Water Limitation is extremely important and necessary to protect

¹ Section C.3 of the 1997 IGP states that “[a] facility operator will not be in violation of Receiving Water Limitation Section VI.A. as long as the facility operator has implemented BMPs that achieve BAT/BCT and the following procedure is followed: (a) The facility operator shall submit a report to the appropriate Regional Water Board that describes the BMPs that are currently being implemented and additional BMPs that will be implemented to prevent or reduce any pollutants that are causing or contributing to the exceedance of water quality standards. The report shall include an implementation schedule. The Regional Water Board may require modifications to the report; (b) Following approval of the report described above by the Regional Water Board, the facility operator shall revise its SWPPP and monitoring program to incorporate the additional BMPs that have been and will be implemented, the implementation schedule, and any additional monitoring.”

² In *Santa Monica Baykeeper v. Kramer Metals* (C.D. Cal. 2009) 619 F.Supp.2d 914, 927, 929, the court stated that section C.3 provides a “safe harbor” for industrial dischargers who cause or contribute to an exceedance of a water quality standard. Thus, a facility operator “will not be in violation of Receiving Water Limitation C(2) as long as the facility operator has implemented BMPs that achieve BAT/BCT and follows a reporting procedure.” *Id.* (internal quotation marks omitted).

industrial dischargers from a potential influx of third party citizen suits. Third party citizen suits typically results in significant costs to the industrial dischargers – anywhere from \$100,000 to \$300,000 after attorneys’ fees and environmental project costs are paid. Thus, in order to allow the industrial dischargers to focus on the end-game – the implementation of BMPs to achieve better water quality in California – it is necessary for the final draft of the IGP include the mechanism described above.

In addition, PGPRMG members strongly support CASQA’s³ proposed revisions that address Receiving Water Limitations issues.

II. Although PGPRMG Members Agree That Numeric Action Level (“NAL”) Exceedances Are Not Violations of the General Permit, Members Request Further Clarifying Language

The members commend the State Water Board for adopting, in this latest draft that “NAL exceedances defined in this General Permit are not, in and of themselves, violations of this General Permit.” Section I.M.63

As noted in the 2012 Draft Industrial General Permit Response to Comments,⁴ the State Water Board clarified that the “existing statement that ‘NAL exceedances defined in the General Permit are not, in and of themselves, violations of this General Permit’ is already sufficiently broad in that it explains that NAL exceedances do not constitute any type of alleged violation of the general permit, *including violations of receiving water limitations.*” Pages 38 and 39 (emphasis added). In order to ensure consistency and clarity, PGPRMG members request that this language be included in the IGP’s final draft.

Further, Sections I.M.62.B and XII.A.2 should contain clarifying language that states that an NAL triggering action can only occur when two or more analytical results from any parameter and from the *same discharge point* occur.

III. PGPRMG Members Agree That The NALs Are Not Intended to Serve as Technology-Based or Water Quality-Based Numeric Effluent Limitations

The members commend the State Water Board for adopting the following language: “[t]he NALs are not intended to serve as technology-based or water quality-based

³ CASQA refers to the California Stormwater Quality Association. CASQA’s Industrial Permit Subcommittee has issued comments on the 2013 IGP as well.

⁴ The 2012 Draft Industrial General Permit Response to Comments were posted on the State Water Resources Control Board’s website on September 11, 2013. The comments can be found at: http://www.swrcb.ca.gov/water_issues/programs/stormwater/docs/industrial/2012npdesgenprmt/cmmnts102212_annotated/2012igp_rtc_992013.pdf

numeric effluent limitations. The NALs are not derived directly from either BAT/BCT requirements or receiving water objectives.” Section I.M.63. This language is consistent with 40 C.F.R. 122.44 that requires a reasonable potential analysis before imposing water quality-based numeric effluent limitations.

This language is also consistent with *California Building Industry Association v. State Water Resources Control Board* (December 2, 2011), Case No. 34-2009-80000338, 4:1-12 that a permit “must identify a TBEL for the pollutant on a case-by-case basis using its best professional judgment (“BPJ”) to consider the technological standard and various evaluative factors applicable to the pollutant under the CWA.” (citing 33 U.S.C. § 1342(a)(1); 40 C.F.R. § 125.3(d); and *Natural Resources Defense Council v. U.S. Environmental Protection Agency* (1988) 863 F.2d 1420, 1424).

IV. The Design Standard Should Include Language That Does Not Require The Allowed Storm Water Bypass To Meet The NALs

Section X.H.6 of the 2013 IGP provides design storm standards for treatment control BMPs. For example, volume-based BMPs must be calculated by using one of three methods which includes, by way of example, the volume of runoff produced from an 85th percentile 24-hour storm event. In the event a large storm exceeds the design standard, storm water could bypass the treatment control. It is necessary, in order to be consistent with the inclusion of a design storm in the proposed permit, that the allowed storm water bypass not be required to meet the NALs.

V. Compliance Groups Options Should Be Retained In The Final Permit

PGPRMG continues to support the Compliance Group option for its members and would like to continue playing a role in developing industry specific data and BMPs. As stated in the Draft Order, compliance group participants “share common types of pollutant sources and industrial activity characteristics.” Section I.N.69. Furthermore, these groups are of significant importance given their ability to pool resources, consolidate ERA reports with appropriate industry-specific BMPs in conjunction with providing the public and the Water Boards with valuable storm water information.

VI. The Cost Analysis Underestimates The Cost Of Implementing The Proposed New Permit

The updated cost analysis for the 2013 Final Draft Industrial General Permit underestimates the cost of implementing the proposed new permit. For example, the 2013 Levels 0, 1, and 2 Scenarios assume no costs for developing and updating the facility’s SWPPP and monitoring program plan. It is unreasonable to make this assumption given that there are significant differences between the 1997 IGP Permit and the 2013 Draft Permit. Substantial changes will need to be made and incorporated into revised documents. Moreover, each facility

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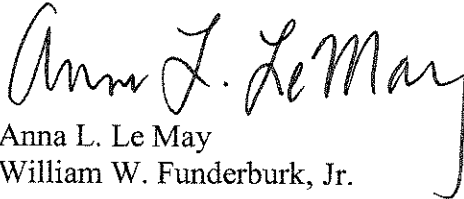
will need to train its employees on the new General Permit requirements. This will result in expense to each facility as well.

Moreover, the cost assumptions for drafting a Level 1 ERA Report (\$750) and a Level 2 Technical Report (\$1650) are underestimated as well given the importance of these documents and the level of evaluation involved.

In conclusion, we appreciate the opportunity to present these comments and your subsequent review. We also request that our comments on previous industrial general permits submitted on April 29, 2011 and October 22, 2012, be incorporated by reference to the extent that those previously made comments are still applicable.

If you have any questions or comments, please feel free to call.

Very truly yours,



Anna L. Le May
William W. Funderburk, Jr.

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