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FILE NO: 29142.070026

March 4, 2014

Via E-MailMs. 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 February 19, 2014
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 black ink, appearing to read "Kristy A. N. Bulleit".

Kristy A. N. Bulleit
Timothy J. Carlstedt

Attachment



**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 February 19, 2014**

March 4, 2014

The Utility Water Act Group (UWAG)¹ appreciates the opportunity to comment on the State Water Resources Control Board's February 19, 2014 draft of the NPDES General Permit for Storm Water Discharges Associated with Industrial Activities, Order NPDES No. CAS000001 (the "2014 draft 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.

On September 19, 2013, UWAG provided comments on the July 19, 2013 draft IGP (the "2013 draft IGP"). These comments focused on our concern that, given the draft permit's complexity, it was not clear what would constitute permit compliance (and, therefore, compliance with the Clean Water Act (CWA)).

Unfortunately, the 2014 draft IGP does not provide the clarity we sought. Rather, it arguably provides dischargers with less compliance certainty than the 2013 draft IGP.

20.1 I. Compliance Clarity Redux (IGP Section V.A and Findings 31 and 37)

A. UWAG's Previously Requested Clarifications

In our September 19th comments, we asked the State Board and Board staff to clarify that compliance with the IGP constituted compliance with the CWA, because the IGP's minimum best management practice (BMP) requirements embody all applicable technology-based or water quality-based standards. Specifically, we asked Board staff to clarify that:

- by implementing the minimum BMPs described in the IGP, dischargers would be presumed to be meeting the "best available technology economically achievable" (BAT) and "best conventional pollutant control technology" (BCT) standards;
- advanced BMPs only would be required in those instances where numerical action level (NAL) exceedances indicated that the minimum BMPs did not adequately control discharges to meet the BAT/BCT standards; and

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 CWA and in litigation arising from those rulemakings.

- NALs are applicable and relevant to California facilities.

We also asked Board staff to clarify that:

- by implementing the minimum BMPs, dischargers would be presumed to be meeting any required water quality-based effluent limitations or receiving water limitations;
- a discharger may comply with receiving water limitations through implementation of water quality-based corrective action; and
- water quality standards (WQS) apply in the receiving water, not to stormwater at the point of discharge.

The 2014 draft IGP does not adequately address all of these issues.² Regarding the BAT/BCT/NAL issues, Board staff has opened the door to an unsustainable interpretation that dischargers must implement the BMPs required by the IGP *and* meet BAT/BCT requirements. Regarding the WQS issues, Board staff made helpful clarifications in Findings 31 and 37, but generally ignored the minimum BMP issue.

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B. BAT/BCT Issues

1. NPDES Permit Requirements – Technology-Based Effluent Limitations

An NPDES permit, like the IGP, must include technology-based effluent limitations (TBELs). The permit writer (*e.g.*, Board staff) may base the TBELs on effluent limitation guidelines (ELGs) established through U.S. EPA rulemaking or, where there are no applicable ELGs, the permit writer may develop TBELs on a permit-by-permit basis using his or her best professional judgment (BPJ). U.S. EPA establishes ELGs by evaluating what pollutant reductions or controls are achievable for a category of dischargers through the use of applicable technology – generally BAT or BCT. Using BPJ, a permit writer does the same thing for an individual or general permit. In either case, it is up to the permit writer to calculate the TBELs. The TBELs, in turn, inform the discharger what he or she has to do to meet the applicable BAT/BCT standard – comply with an ELG-based TBEL or with a BPJ-based TBEL. By complying with the TBEL, the discharger complies with the CWA.

² In addition to the issues identified above, we also requested that Board staff clarify the following:

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- any requirement to implement advanced BMPs is connected to NAL exceedances;

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- if NAL exceedances persist after a discharger has implemented advanced BMPs, the discharger need not take any additional steps (which highlights that the NALs may not be relevant to California facilities); and

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- all dischargers should be able to make “non-industrial pollutant source” and “natural background source” demonstrations, and a discharger making such a demonstration will be given baseline status.

None of these issues are addressed in the 2014 draft IGP.

The point is that the CWA requires the permit writer to establish appropriate effluent limitations in an NPDES permit. The discharger, in turn, must meet the effluent limitations. It is not the discharger's burden to determine the effluent limitations in the first place.

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2. TBELs in the IGP

In the 2013 draft IGP, Section V.A provided that, to meet applicable BAT/BCT effluent limitations, dischargers were to implement BMPs to reduce or prevent discharges of pollutants in their storm water discharge. Section H.1 of the draft IGP then provided (as we understood the permit) the minimum BMPs that dischargers had to implement in order to meet BAT/BCT requirements. To comply with the IGP and, thus, the CWA, the requirement was clear: implement the minimum BMPs.³

The 2014 draft IGP appears to undermine that clarity. Section V.A now provides that dischargers are to “implement BMPs that comply with the BAT/BCT requirements of this General Permit to reduce or prevent discharges of pollutants in their storm water discharge....” The new, underlined text appears to say, in a circular fashion, that in order to meet the CWA's BAT/BCT requirements, a discharger has to implement BMPs that meet the BAT/BCT requirements. Rather than a permit where the permit writer has determined effluent limitations achievable based on BAT/BCT technology, the 2014 draft IGP could be interpreted to require dischargers to make that determination themselves. This is not what the CWA requires. Even if a discharger implements the minimum BMPs described in Section H.1, he or she would be susceptible to a claim that the BMPs do not comply with BAT/BCT requirements.

3. Recommended Clarification

Given the Board's position that it will consider only comments focused on revisions made since the 2013 draft IGP, we limit our recommended clarification to the new language added in Section V.A. To fulfill its permit writing obligation under the CWA and clarify the dischargers' compliance obligation under the IGP, we recommend revising the relevant language in Section V.A to read as follows:

Dischargers shall implement BMPs, as described in subsection X.H.1 and, when necessary to meet BAT/BCT requirements, subsection X.H.2, to reduce or prevent discharges of pollutants in their storm water discharge....

This simple change will help clarify that the permit writer has determined that implementation of the minimum BMPs described in the IGP generally will satisfy the CWA's BAT/BCT requirements. Implementation of the advanced BMPs described in the IGP only will be required for those facilities where additional controls are required to adequately reduce or prevent discharges of pollutants (e.g., when NAL exceedances persist after implementation of the minimum BMPs).

³ As noted below, in some instances, advanced BMPs might be required to meet the BAT/BCT standards.

This would be consistent with statements made at the August 21, 2013 Board hearing as well as statements made in the Response to Comments document posted to the Board’s web site on February 24, 2014. For example, in response to one of UWAG’s comments, Board staff stated:

The Permit requires Dischargers to implement a set of minimum BMPs. Implementation of the minimum BMPs, in combination with any advanced BMPs necessary to reduce or prevent pollutants in industrial storm water discharges, serves as the basis for compliance with the Permit’s technology-based effluent limitations.

See Response to UWAG Comment 4 at p. 145.⁴

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C. **WQS Issues**

Just as NPDES permits must contain TBELs, they also must contain water quality-based effluent limitations (WQBELs) when necessary for the receiving water to meet WQS. And as with TBELs, a discharger may comply with WQBELs (or receiving water limitations) through implementation of BMPs.

In Finding 31 of the 2014 draft IGP, Board staff reiterates the point previously only made in Finding 37: that WQS apply to receiving waters, not to stormwater at the point of discharge. We appreciate this change.

We also appreciate the change Board staff made in Finding 37, clarifying that, if a discharge causes or contributes to a WQS exceedance, the discharger may attain compliance with the receiving water limitations by implementing additional BMPs.

Board staff, however, did not clarify in the 2014 draft IGP that implementation of the minimum BMPs gives rise to a presumption that a discharge is not causing or contributing to a WQS

⁴ Though mindful that the Board intends only to consider comments on revisions made to the 2013 draft IGP, we feel compelled to mention staff’s response to one comment. We, along with several other commenters, asked Board staff to revise the definition of “authorized corporate officer” in the 2013 draft IGP consistent with the current IGP and with federal regulations. The language proposed in the 2013 draft IGP provides, we said, less flexibility and without any apparent benefit as compared to the federal regulations. Staff’s response is that the proposed language is intended to be consistent with the federal regulations and provides *greater flexibility*. (Responding to other commenters, staff indicated the proposed language is consistent with U.S. EPA Cross-Media Electronic Reporting Regulations.) Because we do not understand staff’s response, we respectfully request that, before adopting the IGP, the Board ask staff to better explain justification for the proposed changes to the definition of “authorized corporate officer” and, lacking a solid justification, revise the definition consistent with U.S. EPA’s regulations at 40 C.F.R. § 122.22(a)(1).

exceedance. While that presumption appears in the Fact Sheet, we renew our request that the Board revise the IGP before adoption to clarify this presumption.⁵

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II. **Level 2 Status and Exceedance Response Actions (IGP Section XII.D.)**

The above comments address the 2014 draft IGP's failure to adequately respond to our prior comments seeking compliance clarification. In the comments below we request that the Board clarify new language related to a Level 2 discharger's obligations.

The 2013 draft IGP required (as we understood it) a discharger with Level 2 status for a particular parameter to prepare and submit a Level 2 Exceedance Response Action (ERA) Action Plan and a Level 2 ERA Technical Report for each year the discharger retained Level 2 status for the parameter. A Level 2 discharger could leave Level 2 status only if it demonstrated it had implemented additional BMPs and the discharger expected no further NAL exceedances for the parameter.

By comparison, the 2014 draft IGP requires (again, as we understand it) a discharger to prepare and submit a Level 2 ERA Action Plan and Technical Report only for new exceedances – either a new parameter or new drainage area – not for the exceedances that resulted in Level 2 status in the first place. Our understanding is based on new language in Section XII.D.1 defining that a “new Level 2 NAL exceedance” is an exceedance for (i) a new parameter not already being addressed or (ii) the same parameter in a new drainage area. A Level 2 ERA Action Plan only is required for a new Level 2 NAL exceedance. Further, submittal of a Level 2 ERA Technical Report follows submittal of the Level 2 ERA Action Plan.

This understanding is supported by the 2014 draft IGP Fact Sheet.⁶ The Fact Sheet clarifies that, if a NAL exceedance is due to (i) industrial activities not related to the discharger's own activities, (ii) natural background levels, or (iii) a discharger's own activities but the discharger expects the exceedance to persist notwithstanding implementation of additional BMPs, the discharger will retain its Level 2 status but will not be subject to additional ERA obligations (unless directed otherwise by the Regional Board). *See* 2014 draft IGP Fact Sheet, Section II.K.5 at pp. 59-64.

However, new language in Section XII.D.3.c appears to contradict both the new definition of “new Level 2 NAL exceedance” in Section XII.D.1 and the Fact Sheet by suggesting that a new Level 2 ERA Technical Report is required for NAL exceedances of the same parameter/drainage area.

Accordingly, we request the Board clarify our understanding that a Level 2 discharger must submit new Level 2 ERA Action Plans and Technical Reports only for NAL exceedances of new

⁵ The Fact Sheet states: “Implementation of the BMPs required under Section V of this General Permit will typically result in compliance with WQS.” Fact Sheet, II.E., p. 22.

⁶ Given the Board's admonition that it only will consider comments on revisions to the 2013 draft IGP (shown in redline), it is disappointing that Board staff did not provide a redline of the Fact Sheet. Without a redline, it is very difficult to identify changes made to that document.

parameters/drainage areas not previously addressed in a previously submitted Action Plan/Technical Report.