CALIFORNIA COASTKEEPER ALLIANCE

268 Bush #4313, San Francisco, CA 94104
(415) 652-5479 www.cacoastkeeper.org

5

(4/1/14) Board Meeting
Final Draft IGP
Deadline: 3/4/14 by 12:00 noon

RECEIVED
3-4-14
SWRCB Clerk

Humboldt Baykeeper
Inland Empire Waterkeeper
Klamath Riverkeeper
Monterey Coastkeeper
Orange County Coastkeeper
Russian Riverkeeper
San Diego Coastkeeper
San Francisco Baykeeper
San Luis Obispo Coastkeeper
Santa Barbara Channelkeeper
Los Angeles Waterkeeper
Ventura Coastkeeper

March 4, 2014

Chair Felicia Marcus and Board Members
c/o Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814
Sent via electronic mail to: commentletters@waterboards.ca.gov

RE: Comment Letter – Final Draft Industrial General Permit

Dear Chair Marcus and Board Members:

On behalf of California Coastkeeper Alliance ("CCKA" or "Alliance"), a network of twelve Waterkeeper organizations spanning the California coast, we appreciate the opportunity to provide comments on the State Water Resources Control Board's ("State Board") 2014 final draft permit for stormwater discharges associated with industrial activities ("Final Draft Permit"). CCKA and our network of California Waterkeepers have been actively involved in ensuring the control of stormwater pollution. We appreciate the opportunity to work closely with the Board to develop, adopt and implement stormwater permits that improve our state's water quality.

While the Final Draft Permit contains some improvements over the 2013 version, CCKA remains concerned with the Permit's significant deficiencies, many of which were raised in our previous comments and remain unaddressed, as well as new deficiencies that were identified in this most recent draft. We appreciate the Board's 2014 Response to Comments noting several permit changes made based on CCKA's September 19, 2013 comments. We recognize that staff revised Section V.A., and the accompanying discussion in the Fact Sheet, to explicitly state that BAT/BCT requirements apply to this Permit. We also appreciate improved language to the Receiving Water Limitations (Section I.E.), and to the Natural Background Demonstration Section (XII.D.2.c.).

5.1

The Final Draft Permit provisions show the Board also made strides to improve the Permit's overall data collection. Unfortunately, these improvements are undermined by a significant number of compliance "off-ramps," resulting in the weakening of the new data collection requirements. One such provision is Section XI.C.5 which allows permittees to combine stormwater samples across various best management practices (BMPs) thereby essentially eliminating the possibility of conducting an adequate analysis of BMP performance and effectiveness. Other problematic provisions that will affect the quality of the data collected under the Final Draft Permit are discussed in detail below.

Ultimately, the Permit should ensure the collection of more and better data, ensure compliance with water quality objectives, and improve the use of pollution control technology, in a clear and objective way for all parties to determine compliance with the Permit. We urge the Board to consider our recommendations for the issues below, and reconsider our detailed September 19, 2013 and October 22, 2012 letters and attachments, which we incorporate by reference.

5.2

1. *The Final Draft Permit's volume-based design storm standards remain unclear and insufficient to maintain permit compliance.*

First, we recognize and appreciate the State Board incorporating our comments that volume-based design storm calculations must be informed by local rainfall history. However, the Final Draft Permit seems to provide three avenues for determining compliance with volume-based storm standards. The Permit is unclear whether a permittee can either: (1) calculate the retention of a 85th percentile 24-hour storm event based on local historic data; (2) calculate the retention of a 85th percentile storm event based on the runoff for the facility; or (3) calculate the volume of annual runoff to achieve 80 percent treatment. We continue to maintain that in order to reduce uncertainty regarding compliance for volume-based design standards, and to provide maximum protection to receiving waters as well as maximize water conservation in our drought-plagued state, the Board should set a minimum standard for volume-based controls that ensures capture of all storms up to the 95th percentile event.

5.3

It remains unclear how the State Board concluded that advanced BMPs are BAT/BCT. The Response to Comments states that "[i]mplementation of the minimum BMPs, in combination with any advanced BMPs necessary to reduce or prevent pollutants in industrial storm water discharges, serve as the basis for compliance with this General Permit's technology-based effluent limitations." However, the Board does not provide any clarification on the types of advanced BMPs being contemplated, or the types of facilities that will need to implement advanced BMPs to meet the technology based effluent limitations. Moreover, the technology-based effluent limitations must meet the BAT/BCT standards of the Clean Water Act, but there is no evidence in the record that the Board has conducted the analysis required to establish these effluent limitations. This is particularly problematic with respect to the design storm standards. With respect to these standards, the Response to Comments states that the "design storm standard was based on research demonstrating that the standard represents the maximized treatment volume cut-off at the point of diminishing returns for rainfall/runoff frequency." Yet, the State Board does not provide a proper analysis to determine whether this conclusion is consistent with the required considerations such that the proposed standard meets BAT. The Board must provide a technical analysis justifying its "diminishing return" conclusion; otherwise its development of the design storm aspects of its technology-based effluent limitations has not proceeded in the manner required by the Clean Water Act.

5.4

2. *The Final Draft Permit fails to provide required protections to ensure that discharges do not cause or contribute to exceedances of water quality standards for receiving waters.*

We recognize and appreciate the Board's attempt to strengthen the Permit's Receiving Water Limitations language. However, despite these revisions, the Permit remains confusing by retaining the following two sentences from Finding 37: "Water quality standards apply to the quality of the receiving water, not the quality of the industrial storm water discharge. Therefore, compliance with the receiving water limitations generally cannot be determined solely by the effluent water quality characteristics." For the reasons provided in our September 19, 2013 comments, we believe this language should be deleted from the Permit.

The only legally correct interpretation of these statements in Finding 37 is that: (a) by definition water quality standards are pollutant criteria necessary to protect beneficial uses of receiving waters, and (b) determining compliance with receiving water limitations requires application of the governing rules for such determinations. For example, in the case of pollutants with water quality criteria established in the California Toxics Rule (CTR), the rules require

application of the CTR criteria end-of-pipe, or establishment of a mixing zone and associated monitoring obligations. The Final Draft Permit does not establish a mixing zone for any dischargers. So while we do not disagree that the water quality standards apply in receiving waters, the only way to evaluate compliance with the Receiving Water Limitations under the Final Draft Permit is with reference to the effluent water quality characteristics.

If the Board intends to retain the above language from Finding 37, we request clarification on whether the Board considers the required monitoring in the Final Draft Permit to be sufficient to determine compliance with water quality standards. The only relevant information the Final Draft Permit requires industrial stormwater dischargers to collect is end-of-pipe effluent data, not receiving water quality data. It is well-established that every NPDES permit must include discharge monitoring sufficient to determine compliance with all permit limits—in this case, the Final Draft Permit's Receiving Water Limitations. As recently explained by the 9th Circuit Court of Appeals:

> [T]he Clean Water Act requires every NPDES permittee to monitor its discharges into the navigable waters of the United States in a manner sufficient to determine whether it is in compliance with the relevant NPDES permit. 33 U.S.C. § 1342(a)(2); 40 C.F.R. § 122.44(i)(1) ("[E]ach NPDES permit shall include conditions meeting the following . . . monitoring requirements . . . to assure compliance with permit limitations."). That is, an NPDES permit is unlawful if a permittee is not required to effectively monitor its permit compliance.[1]

The Final Draft Permit also states that "[t]his General Permit contains monitoring requirements that are necessary to determine whether pollutants are being discharged, and whether response actions are necessary. Data and information resulting from the monitoring will assist in Dischargers' evaluations of BMP effectiveness and compliance with this General Permit." While assisting dischargers and the Board with evaluating compliance is laudable, the law requires that the Permit contain monitoring that is effective in determining compliance with the Permit's provisions, including the Final Draft Permit's Receiving Water Limitations. We therefore ask the Board to confirm that the existing monitoring requirements in the Final Draft Permit are sufficient to determine compliance with Receiving Water Limitations.

5.5

3. The Recent Revisions to the Sampling Analysis Reporting Provision (Section XI.11 and Table 2) Will Create Confusion and Undermine the NAL Feedback Loop and Protection of Water Quality.

The revisions to the Final Draft Permit's provisions on Sampling Analysis Reporting include deleting the detection limits from Table 2, revising the reporting requirements related to sample results below the method detection limit and reporting limits, and revising how results reported below the reporting limit will be analyzed when averaging results for purposes of comparison with the NALs. We understand and generally agree with the State Board's decision regarding the removal of the detection limits from Table 2, though we believe that including detection limits would be more appropriate to ensure that if (and when) dischargers "propose alternative test methods with substantially similar or more stringent method detection limits" there is no confusion about the method detection limits that must be met with the proposed alternative method.

[1] *NRDC v. County of L.A.*, 2013 U.S. App. LEXIS 16416, 36 (9th Cir. 2013).

The State Board's justification for removing the "method detection limit" is that "[t]he Permit has been edited to remove the method detection limit column since it is unnecessary. By specifying the test method, the Permit is implicitly identifying the appropriate test sensitivity necessary to provide a range of low to high sampling results. The test methods have method levels that are below the NALs." *See, e.g.*, Response to Comment 45/5. This change to Table 2, and the associated changes to the reporting requirements, will only add confusion for dischargers. First, it is entirely unclear what the Board means by the term "method limit." A 'method level' is an unspecified term, and while EPA's methods state a minimum detection level (MDL), the laboratory reporting limits (RL) could be above relevant NALs or applicable water quality standards. If the State Board's reference to "method levels" refers to standardized "Minimum Levels" as that term is defined in the glossary, then these "method levels" should be specified to ensure standardized data collection under this Permit. Absent this specification, dischargers will be free to use laboratories with widely variable Minimum Levels, and as a result the consistency of data collected will not be assured. To avoid this confusion, we request that the State Board require dischargers to have their samples analyzed so to ensure accuracy to a certain Minimum Level. Further, this Minimum Level must be established to ensure that data collected allows for effective comparison to both the NALs and applicable water quality standards.

Finally, the State Board's proposed method for averaging sample results – which includes having SMARTS consider sample analysis results that are below the Minimum Levels as zero (0) for purposes of averaging and comparison the NALs is not scientifically defensible. Often, stormwater constituents are not detected above Minimum Levels, however this does not mean the constituent is not present. Further, without requiring Minimum Levels to be well below the NALs, there is no certainty any useful data will be collected. Depending on the quantity of non-detections and the method of data analysis, differences in mean concentrations from water quality data sets have ranged from 1 to 70 percent.[2] These differences in mean concentrations were found by studies to have significant impacts on estimation of constituent mass loading.[3] It is more scientifically defensible to use other methods for generating stormwater statistics - notably Regression On Order Statistics (ROS). We recommend that the State Board require ROS and to have SMARTS be able to do these calculations automatically.

As a practical matter, treating results below the Minimum Levels as zero (0) could easily lead to skewed results of the averaging process, and undermine the usefulness and intended water quality protections of the NAL-based feedback loop. The State Board should adopt a method for incorporating sample results below Minimum Levels into the calculation of averages to ensure the effectiveness of its NALs to protect water quality.

5.6

4. *The Permit cannot disregard stormwater discharges associated with regulated activities that are commingled with stormwater from "non-industrial" sources, or with "natural background" pollutants.*

Final Draft Permit Section XII.D.2.b.i., allows a Discharger to disregard a pollutant(s) in their stormwater discharge if they claim it is "attributable solely to the presence of non-industrial pollutant sources," or is "attributable to ….. natural background" pollutants. However, this regulatory exemption is contrary to the definition of stormwater associated with an industrial activity, which is what the permit is required to regulate. We re-emphasize that commingled non-industrial stormwater should not be excused in the Final Permit. This section allows for

[2] *See* Kayhanian et al., Impacts on Non-detects in water quality data on estimation of constituent mass loading, Water Sci.Technol. 45 (9): 219-25, (2002).
[3] *Id.*

commingling and run-on from non-industrial stormwater, thus diluting monitoring results effectiveness for evaluating on-site BMPs and protecting water quality. Furthermore, allowing an exemption for commingled non-industrial stormwater constitutes backsliding from the 1999 Permit, which did not excuse commingled non-industrial stormwater, required a permittee to prevent run-on when possible and address it when not, and was silent as to "background" pollutants. This Section should be revised to require continued regulation of stormwater associated with industrial activity.

5.7

5. Temporary suspension of an industrial facility's monitoring requirements should only be allowed on a strict basis.

The Final Draft Permit has been revised to allow facilities with temporary suspended industrial activities to also suspend monitoring requirements. We are concerned that this additional "off-ramp" will allow industrial facilities to suspend monitoring requirements during a qualified storm event in order to avoid enforcement. For example, in the Los Angeles Region facilities in certain industries, such as pre-production plastic pellets, routinely suspend operations for ten or more calendar days during the Christmas/New Year holiday period or during the winter season due to lowered demand for their products. This is exactly the time when a significant rain event and, during the current drought period, perhaps the only rain event may occur at a particular industrial site. Yet under the Final Draft Permit, a facility will be allowed to avoid collecting a stormwater sample during the wet season because of its decision to suspend operations. Insufficient stormwater monitoring data for such an industrial facility will essentially deprive the facility from adequately assessing the effectiveness of its BMPs and its compliance with the Permit. Moreover, this provision, which will potentially result in the collection of less stormwater samples, certainly contradicts State Board staff's stated goal of generating ample amount of high quality monitoring data. For this reason, the exemption in Section X.H.3 of the Final Draft Permit should be removed.

If the Board intends to go forward with allowing suspended industrial facilities to also suspend monitoring, we request the Permit require the delay be more than ten consecutive calendar days. We also request the permittee be required to provide further explanation as to why it is necessary for their monitoring to be suspended. Finally, we request the Board explain why it is allowing Dischargers to suspend monitoring activities, and provide clarification to Regional Water Boards that a request for temporary suspension should be denied for a facility attempting to circumvent enforcement during the wet season.

5.8

6. The Final Draft Permit continues to omit a framework and timeframe to evaluate data and develop numeric limits.

We continue to be disappointed that the Final Draft Permit fails to meaningfully evaluate extant data readily available to establish and include numeric limits for toxic chemicals associated with stormwater runoff from the thousands of industrial facilities across California. This is despite demonstration that such limits are feasible and currently being attained by the majority of industrial sites.

The Final Draft Permit states that "the State Water Board expects that this [Permit's data collection] and assessment process will provide information necessary to determine the feasibility of numeric effluent limitations for industrial dischargers in the next reissuance of this General Permit, consistent with the State Water Board Storm Water Panel of Experts' June 2006 Recommendations." During the timeframe between the adoption of the Final Draft Permit and the implementation date of July 2015, we believe that the Board should develop a framework for

assessing industrial data to ensure the Board will achieve the ability to determine the feasibility of numeric limits. Unfortunately, the Response to Comments does not provide a timeframe for assessing data, and only states that the Board "anticipates developing a plan to assess the sampling data at *some point*." We again assert that during this time, the Board should make it a priority that data collection informs future numeric limits, and put in place a framework for assessing the adequacy of data collection and monitoring parallel to permit implementation. This should include consideration of using the Permit's reopener clause to make revisions to the monitoring and reporting requirements as deemed necessary.

5.9

7. TMDL implementation must be incorporated into the Permit's effluent limitations.

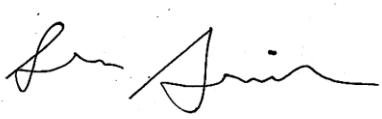
Numeric waste load allocations ("WLAs") that apply to dischargers covered by the Draft Permit must be directly incorporated into the permit as water quality-based effluent limitations ("WQBELs"). It is EPA's longstanding position that NPDES permits must contain effluent limits and conditions that are consistent with the requirements of WLAs in established TMDLs. The State Board is obligated to immediately incorporate existing, applicable WLAs as WQBELs into any adopted permit.

Rather than deferring incorporation of WLAs to an unknown later day and allowing for a BMP-based approach for compliance when numeric WLAs are in-effect, the Board must revise the Final Draft Permit to incorporate all existing, applicable numeric WLAs as WQBELs prior to adoption.

***

For the aforementioned reasons, including our previous comments incorporated by reference, the Final Draft Permit is deficient in meeting the requirements of the Clean Water Act. We look forward to working with you and your staff to ensure the Final Permit will meet these requirements and serve to protect California's water resources.

Sincerely,



Sara Aminzadeh
Executive Director
California Coastkeeper Alliance

Sean Bothwell
Staff Attorney
California Coastkeeper Alliance