

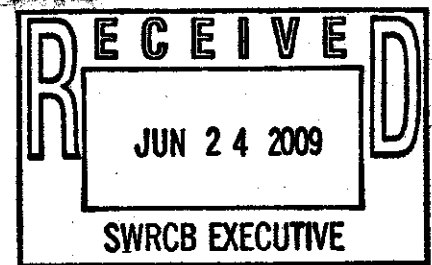


UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

Public Comment
Dft. Construction Gen. Permit
Deadline: 6/24/09 by 5:00 p.m.

JUN 24 2009

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



Re: Comment Letter – Draft Construction General Permit

Dear Ms. Townsend:

We have reviewed the revised draft general NPDES permit and fact sheet for stormwater discharges from construction sites in California which were released for public review on April 23, 2009. Our comments are enclosed.

In June 2008, we provided comments on the previous draft permit released in March 2008. In our June 2008 letter we voiced strong support for several features of the March 2008 permit which, in particular, were the risk-based approach, the NELs/NALs, the rain event action plan (REAP) requirements, the SWPPP training requirements and the post-construction requirements. Although these provisions of the 2009 proposed permit have been revised somewhat from the 2008 proposed permit, we still strongly support the permit. We also have some comments and recommendations on these particular requirements which are discussed further in the enclosure.

We are also pleased to see many of the comments and concerns raised in our June 2008 letter have been addressed in the 2009 permit. Nevertheless, we believe the permit still needs certain additional clarifications and revisions which we discuss in more detail in the enclosure.

Finally, we believe the TMDL requirements of the 2009 permit need additional clarification to ensure consistency with applicable WLAs, and we have enclosed some suggestions in our comments on this issue.

Thank you for the opportunity to review and comment on the revised general permit. Should you have any questions, please call me at (415) 972-3420, or Eugene Bromley of the NPDES Permits Office at (415) 972-3510.

Sincerely,

Douglas E. Eberhardt, Chief
NPDES Permits Office

Enclosure

Enclosure – EPA, Region 9 Comments on Proposed General NPDES Permit and Fact Sheet for Stormwater Discharges from Construction Activities in California

I. Additional Comments on the Provisions EPA Previously Supported in the 2008 Proposed Permit

In our June 2008 comments on the March 2008 permit, we expressed strong support for several features of the permit. Following below are additional comments on these features as revised in the 2009 proposed permit.

A. Risk-Based Permit

Although the details of the risk analysis and related permit requirements have been modified in the current version, we continue to support the risk-based approach proposed in the revised 2009 permit. We had recommended in our June 2008 comments that the Board try to estimate the fraction of projects that would fall into the various risk categories. Such an estimate was not provided for the 2009 proposal, and we still believe it would be worthwhile to provide additional perspective on the implications of the permit and its requirements.

B. Numeric Action Levels (NALs) and Numeric Effluent Limitations (NELs)

As we pointed out in our June 2008 comments, the enforceability of stormwater permits has been a challenge over the years since most permits have been based on best management practices (BMPs) rather than numeric effluent limitations. Although the numeric values of the NELs and NALs in the 2009 proposed permit have been modified slightly from the 2008 proposed permit, we continue to strongly support the use of numeric requirements, including the revised values in this new proposed permit.

C. Post-Construction Standards

We are pleased to see that the 2009 permit continues to include quantitative post-construction requirements for addressing the water quality impacts from areas of new developments and re-developments.

The fact sheet demonstrates the advantages of non-structural, onsite stormwater management, as close to the source of runoff as possible. It correctly points out that this approach is generally easier and more cost-effective than using conventional treatment measures. The fact sheet also points out the advantages of these non-structural methods over traditional structural BMPs in terms of protecting streams from hydromodification. We believe that a few specific changes to section XIII.A of the draft permit should be made to reflect the preference for non-structural methods expressed in the fact sheet. We also believe the draft permit should provide expectations for the information dischargers must provide the Regional Boards when they are seeking approval for the use of structural methods. Specifically, we'd suggest adding the following sentence to the end of section XIII.A.2:

“The permittee shall use non-structural controls unless the permittee demonstrates that non-structural controls are infeasible or that structural controls will produce greater reduction in water quality impacts.”

Additionally, we'd suggest adding the following sentence to the end of section XIII.A.3:

“When seeking Regional Board approval for the use of structural practices, dischargers must document the infeasibility of using nonstructural practices on the project site, or document that there will be fewer water quality impacts through the use of structural practices.”

Lastly, the fact sheet (page 36) indicates the previous 1999 permit did not specifically address post-construction controls. Although the 1999 permit did not include quantitative requirements for post-construction, the permit did include post-construction requirements in section A.10 of the SWPPP requirements. The fact sheet suggests that post-construction requirements are entirely new (which is not the case) and is somewhat misleading as a result. We would encourage the Board to retain the post-construction requirements.

D. Training/Qualifications for SWPPP Preparation and Implementation

In our June 2008 comments, we supported the requirements for training and other qualifications for individuals preparing SWPPPs, and we continue to support the revised requirements of the 2009 permit. However, we believe the description of the role of a qualified SWPPP practitioner (QSP) in section VII.B.4 of the 2009 permit needs revision. The permit indicates that the QSP would be responsible for full compliance with the permit, which might be interpreted to transfer liability for non-compliance from the permittee to the QSP. The permit may require that the permittee ensure that BMPs be implemented by persons with the qualifications of a QSP as set forth in the permit, but it should also clarify that the permittee remains fully responsible for compliance with the permit.

II. Other Comments on the Proposed Permit

A. Notice of Intent (NOI) Requirements

We believe the NOI process in the 2009 permit has been substantially improved and clarified in comparison to the 2008 permit. In particular, it is helpful to provide the list of documents which comprise the permit registration documents (PRDs). However, we still believe a number of additional revisions and clarifications are needed.

Section II.B.4.a refers to certain requirements applicable to new projects commencing construction after the adoption date of the new permit; however, in brackets, the permit indicates these requirements are intended to apply to projects commencing

after the "effective date" and this appears to be the intent of the permit, given the provisions of section II.B.6. Section II.B.4.a should also be made consistent with section II.B.5 concerning the date when a discharger is covered by the permit. Section II.B.4.a indicates that coverage begins when PRDs are "accepted" (the meaning of which is not clear) while section II.B.5 indicates that coverage begins when a discharger receives a WDID number.

Section II.B.4.a also indicates PRDs should be submitted to the Board no later than 14 days prior to commencement of construction. This implies that final action to accept the PRDs and permit coverage can be expected within the 14 days. However, Attachment B requests dischargers to allow 30 days to receive a WDID number; section II.B.5 indicates that permit coverage does not begin until receipt of the WDID number.

The fact sheet in section I.B.2 indicates that public review of permit applications would be available, including public hearings when appropriate. However, the review process is somewhat vague. We suggest a specific time frame (such as within 14 days of posting a new NOI on the State Board's website) during which time a member of the public could submit comments on an NOI or request a public hearing. If no such requests are received, permit coverage could be granted at the end of the 14 day period (or at the end of the 30 day period found in Attachment B).

The permit should also include a provision which would allow the State Board to require an individual permit or coverage under a separate general permit based on the Board's review of the PRDs.

Lastly, the NOI itself is listed as one of the PRDs. However, no additional information is provided about the NOI or the information which would be requested by the NOI. Possibly, the NOI for the new permit would be the same or similar to the NOI for the existing permit; it would be helpful to clarify this matter.

B. TMDL Requirements

Section VI.D of the proposed permit appropriately requires that the discharges comply with approved TMDLs which identify construction activity as a source of pollution. However, the discussion in the fact sheet (page 17) seems somewhat inconsistent. First, the fact sheet should note that compliance is required for all pollutants (not just sediment) which may be limited in a TMDL which addresses construction sites. In addition, the discussion in the fact sheet incorrectly suggests that compliance might be required only after a separate order were issued by a Regional Board.

Also, we recommend the permit require permittees to document consistency with applicable TMDLs. The permit should require that permittees first investigate whether or not a given construction project is subject to a TMDL; a summary of the findings of the investigation could be included in the SWPPP. If there is an applicable TMDL, the

SWPPP should document the control measures included to ensure consistency with applicable WLAs.

C. SWPPP Requirements

We recognize the Board's intent is to include all enforceable effluent limits in the permit (as opposed to the SWPPP) given the recent court decisions noted in section I.B.2 of the fact sheet. However, section XIV of the proposed permit is very brief concerning the required content of a SWPPP. Attachment H of the 2008 proposed permit (which was removed in the 2009 proposed permit) had provided the framework for the SWPPP and its basic components. This information would facilitate compliance with the permit and we would suggest the 2009 proposed permit include similar information. For example, Attachments C, D and E include various information which must be included in SWPPPs. A summary of this information would be helpful in the same way that the list of documents comprising the PRDs is helpful.

D. Requirements for Emergency Construction

Finding No. 23 for the 2009 general permit indicates that discharges from emergency construction activities required to protect public health and safety are not covered by the permit. In our June 2008 comments we expressed concern that the March 2008 proposed permit indicated NPDES permit requirements did not apply to discharges associated with emergency construction; however, the CWA and NPDES regulations do not provide for such a permit waiver. The 2009 proposed permit still suggests (incorrectly) that a permit is not required for such activities. While the general permit may not be the appropriate permitting mechanism for emergency construction (as indicated by the Finding), we suggest the Finding also clarify that discharges from emergency construction activities are not exempt from NPDES permit requirements, but that Regional Boards may use their enforcement discretion in determining appropriate requirements in emergency situations. In our 2008 comments, we attached some examples of the use of enforcement discretion for emergency situations for your consideration.

E. Oil and Gas Construction Permitting

Finding No. 21 is incomplete in describing the requirements for permitting of construction activities at oil and gas exploration, production, processing, or treatment operations, or transmission facilities. We recommend that Finding No. 21 be moved into Section C of the Findings which lists activities not covered by the general permit. The 2005 Energy Policy Act provided that construction activities at these types of oil and gas operations would be considered industrial activity covered by the State's industrial (non-construction) general permit, to the extent these oil and gas operations need stormwater permit coverage (see 40 CFR 122.26(c)(1)(iii)). The recent litigation surrounding oil and gas permitting is somewhat complicated, and since footnote #2 in the 2009 permit does

not tell the whole story, nor does it necessarily need to, we suggest that footnote #2 simply refer to EPA's website (<http://cfpub.epa.gov/npdes/stormwater/oilgas.cfm>) for more information.

F. Non-Stormwater Discharges

In our June 2008 comments, we recommended that section VIII.G.1 be revised to replace the word "control" with "minimize the discharge of pollutants." The word "control" could refer to any level of pollution control, while the word "minimize" requires a maximum effort on the part of the discharger to control pollutants, more in line with the BAT/BCT requirements of the CWA. However, in the relevant sections of Attachments C, D and E of the 2009 proposed permit, this change was not made, and we reiterate our previous comment.

Our June 2008 comments included a similar comment regarding section IV.A.2 of the 2008 permit in which we recommended the word "reduce" be replaced with "minimize"; this change was made in the 2009 proposed permit.

G. Discharges of ATS Effluent to Sanitary Sewer Systems

Attachment F (Section I.4) should require that discharges of ATS effluent to a sanitary sewer system comply with EPA pretreatment regulations if the system does not have a pretreatment program. The 2009 proposed permit does provide that compliance is required with pretreatment requirements for sewer systems which have a pretreatment program (as we requested in our June 2008 comments), but the permit does not require compliance with EPA pretreatment regulations for sewer systems without a pretreatment program, as we also requested in our June 2008 comments.

H. Section IV.R (Penalty Amounts)

We recommend the figure of \$27,500 (civil penalty) in the proposed permit be updated to the current \$37,500 (73 FR 75340, December 11, 2008) and also note the amount may be further adjusted in the future in accordance with the Federal Civil Penalties Inflation Adjustment Act.