



DEPARTMENT OF DEFENSE
REGIONAL ENVIRONMENTAL COORDINATOR, REGION 9
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September 10, 2013

Ms. Jeanine Townsend
Clerk of the Board
State Water Resources Control Board (SWRCB)
1001 I Street 24th Floor
Sacramento, CA 95814

Subject: COMMENT LETTER - INDUSTRIAL GENERAL PERMIT

On behalf of RADM Patrick Lorge, the Department of Defense (DOD) Regional Environmental Coordinator for EPA Region 9, and the Military Services in California, I respectfully submit these comments on the Water Board's Draft General Permit for Storm Water Discharges Associated with Industrial Activities (IGP).

We appreciate the Board's careful consideration of our previous comments submitted on April 28, 2011 and October 17, 2012. We also thank the Board for holding public workshops and working with us to resolve our comments and concerns. Many of our comments have been addressed, and the revised IGP greatly reduces our compliance burden while remaining protective of water quality. Enclosed are several additional comments that address the new, July 2013, permit revision, with our specific recommendations for revising the IGP.

The points of contact for this letter are Ms. Theresa Trost at theresa.trost@navy.mil or (619) 532-3709 and Mr. Michael Huber at michael.huber@navy.mil or (619) 532-2303.

Sincerely,

A handwritten signature in black ink, appearing to read "C. L. Stathos".

C. L. STATHOS

By direction

Enclosure: DoD Comments on July 2013 Industrial General Permit

DoD Comments on July 2013 Industrial General Permit

1. Annual Fees

Section: Page 15, II.B.1.c & II.B.2.b

Comment: US Constitutional law and federal jurisprudence only allow federal agencies to pay state imposed charges in certain limited circumstances. For a charge to be a payable fee, it must be within an applicable waiver of sovereign immunity in federal law. Congressional waivers for payment of state fees to not require payment of state imposed taxes. If the use of revenue for a charge is not narrowly circumscribed and more broadly benefits the general public as a whole, then the charge qualifies as a non-payable tax. See *San Juan Cellular Tel Co. v. Public Service Comm'n of Puerto Rico* 967 F.2d 683 (1st Cir. 1992). Additionally, charges must be (1) non-discriminatory and must apply to all regulated entities in a similar manner; (2) Fair approximation and program revenues must match program expenditures; and (3) Not excessive and the amount of the charge must reasonably relate to the regulator's level of program effort. See *Massachusetts v. United States*, 435 U.S. 444, 464 (1978). General Permit Coverage (NOI) and No Exposure Certification (NEC) coverage require payment of an annual fee. DoD needs sufficient information describing the type and level of services we receive from the State agency to ensure this charge is a payable fee.

Recommendation: The record should provide information and analysis to support the conclusions that the charge is a payable fee and not a non-payable tax.

2. Waiver of Sovereign Immunity

Section: Page 19, III.C

Comment: Water Code Section 13050 implicates California nuisance law for which there is no waiver of sovereign immunity.

Recommendation: Remove references to "nuisance" or provide qualifier for federal facilities.

3. Monthly Visual Observations

Section: Page 20, IV.B.4; Page 36, XI.A.1. a

Comment: The DoD acknowledges the advantages in changing the required monthly (Oct 1 to May 30) visual storm water inspections to visual observations at the time of sampling, and the elimination of pre-storm visual observations, however, it is not clear what benefit is derived from conducting monthly, vice quarterly, observations of non-storm water discharges (NSWDs), discharges which have been greatly reduced

on most DoD bases. It is also unclear what benefit is derived from requiring monthly visual observations of "outdoor industrial equipment and storage areas, outdoor industrial activities areas, BMPs, and any other potential source of industrial pollutants". In combination with the many other new requirements in this permit, these additional changes will require a substantially greater effort and increased resources, especially in the case of large military facilities. Quarterly visual observations would still be burdensome on manpower but are much more feasible without a significant reduction in the environmental benefit.

Recommendation: The Board should change this for the monthly observations currently required in XI.A.1.a.ii-iii. We hope the Board will agree that this is a reasonable compromise, since the monthly visual observations for "the presence or indications of prior, current, or potential unauthorized NSWDS and their sources" would be likely to also expose any significant issues associated with the other two items in the months between the required quarterly observations.

4. QISP Training Courses

Section: Page 23, IX

Comment: DoD would like the opportunity to participate in the development of the QISP training courses to ensure that they meet our needs.

Recommendation: Through workshops or the public comment process, ensure stakeholders including DoD are able to provide input on QISP training courses.

5. SWPPP Reporting

Section: Page 27, X.G.2.d

Comment: The reporting of significant spills and leaks for the previous five years for a large DoD facility seems excessive and would encompass a lengthy review of numerous facility records. The permit does not define a significant quantity and a reportable quantity may include numerous relatively small quantities.

Recommendation: Suggest that the number of years be reduced from five to no more than three years.

6. Employee Training Program

Section: Page 32, X.H.1.g.i.

Comment: Requiring all personnel involved in Permit compliance to be trained by a QISP if the discharger enters Level 1 status is a significant burden with a negligible benefit. Given that a facility is likely to only have one QISP, and that DoD installations often have a large number of personnel directly involved in BMP implementation, it would be a more effective use of time for both the QISP and the other facility personnel to focus this requirement on those personnel with the ability to prevent a recurrence of the exceedance(s). This requirement should be applied narrowly to those relevant staff who operate within the drainage area(s) where the exceedance triggering Level 1 status occurred, and possibly further narrowed down by the Exceedance Response Action (ERA) Evaluation and/or Report (Section XII.C) to those working in areas identified as potential sources of the pertinent pollutant. This would allow the QISP more time to focus on training the right staff and directly addressing the problem at hand. Appropriately focusing the QISP's attention thus yields greater environmental benefit.

Recommendation: Change the statement that currently reads, "If a Discharger enters Level 1 status, all personnel shall be trained by a QISP;" to instead read, "If a Discharger enters Level 1 status, all personnel working in the drainage area where the exceedance occurred shall be trained by a QISP, with the potential for this group of personnel to be narrowed down further based on the outcome of the Exceedance Response Action (ERA) Evaluation and/or Report (Section XII.C).

7. Qualifying Storm Event

Section: Page 37, XI.B.1.a,b; B.4

Comment: The permit has been revised to define a qualifying storm event (QSE) as a precipitation event that produces a discharge in at least one drainage area and reduces the antecedent dry period from 72 to 48 hours. For large military facilities, which encompass multiple drainage areas that require varying amounts of rainfall, some up to 0.5", to produce runoff, the elimination of a quantitative rainfall requirement may lead to increased false mobilizations for those areas not simultaneously producing runoff. When combined with a reduced antecedent dry period, this increase in mobilizations along with the increased sampling requirement (i.e. every outfall), would rapidly become very costly, especially for remote locations such as San Clemente Island or San Nicolas Island or large installations.

Recommendation: Either change the definition of a QSE to a "storm event that has produced a minimum of 1/4th inch of rainfall within the preceding 24 hour period", or, if this definition of a QSE is retained

in the permit, a provision should be included to address elimination of mobilizations at those locations that do not produce a discharge after completion of the two required QSE's in a reporting period. In addition, dischargers should be able to demonstrate to the Board that specific site conditions consistently do not produce a discharge and sampling should only be required for storm which exceeds a certain threshold likely to produce runoff (i.e. ¼").

8. Deadline to Input Data into Stormwater Multi-Application Reporting and Tracking System (SMARTS)

Section: Page 39, XI.B.11

Comment: The permit requires all analytical results be submitted via SMARTS within 30 days of obtaining all required results for each sampling event. This will require additional effort to format and enter data, and will be very time consuming for installations with many outfalls. In order to give dischargers enough time to review and upload data into the correct format in SMARTS, extend entry time to 45 days after obtaining all required results from laboratory.

Recommendation: Change sentence to "The Discharger's LRP shall certify and submit all analytical results via SMARTS within 45 days of obtaining all required results for each sampling event."

9. Representative Sampling Reduction (RSR) and Qualified Combined Samples (QCS)

Section: Page 43, XI.C.4.a and XI.C.5

Comment: The permit allows for sampling location reduction for multiple discharge locations within a drainage area, but doesn't clearly allow reduction of substantially similar drainage areas. Although dischargers are authorized to composite up to 4 drainage areas if they are substantially similar to one another, it could be argued that the continuous cost of a contractor conducting the sampling of each drainage area and the cost of the lab compositing a sizeable sample volume for 4 drainage areas, may not be a sizeable cost savings, especially for an installation which has a large number of drainage areas. Reduction of the drainage areas should be allowed based on the industrial activities and physical characteristics of the drainage areas, as well as previous knowledge, experience, and well-documented sampling results collected over many years at a facility.

Recommendation: Permit dischargers to use past sampling knowledge, experience, and sampling results to allow reduction of substantially similar drainage areas especially in those drainage areas evaluated to have minimal discharge and no exceedances.

10a. Numeric Action Levels (NALs)

Section: Page 46, XII.A

Comment: The annual NAL exceedance is defined as the average of all the analytical results for a parameter from samples collected within a reporting year that exceed the annual NAL value for that parameter. The potential exists for extreme sample results to skew the average, resulting in a NAL exceedance, especially for DoD bases and other dischargers with a small number of outfalls and/or QSEs.

Recommendation: Include a provision that takes into consideration the potential for one sample to skew the results thereby sending the entire facility into a Level 1 status by allowing the discharger to evaluate the origin and provide a corrective action to eliminate this exceedance. The corrective action could then be monitored during following sampling events.

10b. Numeric Action Levels (NALs)

Section: Page 46, XII.A

Comment: If the annual NAL is exceeded for any parameter, the discharger's status automatically changes to a Level 1 commencing on July 1 following the reporting year during which the exceedance occurs. This does not take into consideration or give credit to a discharger who reduces their pollutant load by some form of treatment technology or installation of structural best management practices (BMP's) to divert the 85th percentile storms. Therefore, although sampling may reflect an exceedance of an NAL, the amount or percentage of pollutant loading would be greatly reduced and may not warrant elevation to the Level 1 status.

Recommendation: If a discharger can demonstrate by diversion or treatment that they will significantly reduce the pollutant load to the receiving water based on a much reduced pollutant level existing in the remaining discharge, as opposed to one that has not been treated or diverted, the discharger should not immediately be elevated to a Level 1 status. This would create incentive for the discharger to treat or divert their discharges.

11. Exceedance Response Action (ERA) Level 1

Section: Page 47, XII.C.1

Comment: The permit states that a Discharger's baseline status for any given parameter shall change to Level 1 status if sampling results indicate a NAL exceedance for that parameter in any subsequent reporting year. Although the evaluation is required to focus on the drainage areas where the NAL exceedances occurred, all drainages are

required to be evaluated. This requirement is excessive and an undue burden on the permittee.

Recommendation: Limit the evaluation and investigation to the drainage area where the exceedance occurred rather than an investigation of the entire facility.

12. Annual Report

Section: Page 56, XVI

Comment: The Discharger is required to submit an annual report no later than July 15th of each reporting year. The reporting year is defined as July 1 to June 30. This would mean that the discharger only has 15 days from the end of the reporting year to produce the report, and may not have sampling results for the final quarter. Dischargers should have 90 days to prepare the annual report from the end of the reporting year.

Recommendation: Change the deadline for the Annual Report to October 1st.

13. Duly Authorized Representative

Section: Page 69, K.5

Comment: Duly Authorized Representative for military installations may be a senior officer or equivalent senior civilian in position of responsibility related to permitted Industrial facilities. This distinction was made in the Approved Signatory requirements in the CA Construction General Permit (Order 2010-0014-DWQ) and a similar distinction should be made for the Industrial General Permit to ensure consistency in signature authority.

Recommendation: Add the following language to Section K.5: "For the military: any military officer or Department of Defense civilian, acting in an equivalent capacity to a military officer, who has been designated."

14. Penalties

Section: Page 70, XXI.Q.1

Comment: Congress has not waived sovereign immunity for fines and penalties under the CWA.

Recommendation: Reword language as follows: "...Any COVERED person as provided for by federal law that violates any permit condition...".