

SPECIAL HEARING
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cc: BD, DI, DWQ
e-cys: BD, CC, HMS, TH, CMW

February 14, 2005

Ms. Debbie Irvin, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor [95814]
P.O. Box 100
Sacramento, California 95812-0100

Re Los Angeles County Sanitation Districts' Comments Relating to Solid Waste Management Facilities on the Reissuance of the National Pollutant Discharge Elimination System General Permit for Discharges of Storm Water Associated with Industrial Activities, Draft dated December 15, 2004 (Draft Permit)

Dear Ms. Irvin:

We submit these legal comments on the Draft Permit issued December 15, 2004, on behalf of the Los Angeles County Sanitation Districts (the "Sanitation Districts"), as a supplement to the comment letter dated February 14, 2005, from David Rothbart of the Sanitation Districts ("Sanitation District comment letter"). This letter addresses, in greater detail, the legal basis for the Districts' objections to the Draft Permit's use of the United States Environmental Protection Agency ("USEPA") benchmarks as numeric limits and to trigger tasks referred to as "corrective action." The specific provisions of the Draft Permit that require revision, to address these concerns, are Sections V.7 and VIII.4(f) and Table VIII.2, as well as, the discussion of the benchmarks on pages IV (last paragraph) and XIV (5th full paragraph) of the Fact Sheet for the Draft Permit.

1. The Draft Permit's Requirements based on the Benchmarks and Support for their Use

The Draft Permit "adopts" USEPA benchmark values taken from USEPA's Multi-sector General Permit. See Draft Permit, Section V.7. (p. 6), Table VIII.2 (p. 25), Fact Sheet, p. XIV. The Draft Permit mandates specific tasks, labeled as "corrective actions," to be accomplished within stringent timelines in the event any storm water sample exceeds these benchmark levels for any of the listed constituents. See Draft Permit, Sections V.7 (p. 6), VIII.4(f) (p. 19). The permit does not identify the benchmarks as effluent limitations. Nevertheless, the actions that must be taken upon exceeding one of these benchmarks are referred to as *corrective actions*, and the required measures are *identical to those required in the event a facility exceeds actual receiving water limitations*. Even if the discharger's facility assessment proves that no new measures are

needed to reduce or prevent pollutants in compliance with BAT [best available technology economically achievable]/BCT [best conventional pollution control technology], the discharger must file a certification that “must show why the exceedance occurred and why it will not occur again under similar circumstance.” See Draft Permit, Section V.7.c.v. [sic] (p. 6).

Under the Draft Permit, the benchmarks are clearly effluent limitations, because a discharger is prohibited from allowing constituent levels above the benchmarks to continue to be discharged. Any time a discharge exceeds one of the benchmark values, the facility is essentially required to reduce the pollutants to levels below the benchmark.

In addition, as long as a discharge continues to exceed any benchmark value, a discharger must incessantly monitor every subsequent storm, even when the discharger has confirmed permit compliance by determining that BMPs meet applicable standards, and even though the discharge is not causing exceedance of receiving water standards.

The findings of the Draft Permit do not provide legal or technical support for the manner in which it employs the benchmarks. Only one relevant finding is included. Finding 10 simply describes that BMP revisions are mandatory following a benchmark exceedance, as follows: “This permit contains benchmarks for the indicator parameters and facility specific pollutants, which, if exceeded will require dischargers to identify and implement additional controls.” See Draft Permit, Finding 10 (p. 2).

The Fact Sheet provides no support for the use of the benchmarks either to trigger mandatory action, or as numeric limits. Page IV of the Fact Sheet begins discussing the benchmarks, in the context of other aspects of numeric limits for storm water discharges. The last paragraph notes that “it is the SWRCB’s intent to determine whether numeric effluent limitations can be scientifically supported in the next general permit.” The SWRCB clearly recognizes that such determinations and such scientific support do not yet exist. However, this same paragraph also reflects that mandatory pollution control actions are required after an exceedance of the numeric benchmark, stating “if the discharges are above one or more of the benchmarks, the discharger must revise its SWPPP to improve BMPs and must sample the next two consecutive qualified storm events.” See Fact Sheet p. IV. Finally, without explanation or without justifying the difference, the SWRCB contrasts the Draft Permit’s use of the benchmarks to USEPA’s use, in its multi-sector permit:

USEPA allows dischargers to discontinue sampling if the discharges are below the benchmarks, and instructs dischargers to “consider” inclusion of improved BMPs if the discharges are “considerably above” the benchmark values. In this General Permit, there is no reduction in sampling based on benchmark levels, and, if the discharges are above one or more of the benchmarks, the discharger must revise its SWPPP to improve BMPs and must sample the next two consecutive storm events.

See Fact Sheet p. IV.

Page XIV of the Fact Sheet continues the description of the Draft Permit's benchmark use as follows:

Previous industrial permits have required dischargers who detected a pollutant in "significant quantities" to determine the pollutant's source, implement clean-up procedures when appropriate, and assess whether additional BMPs are necessary. The permits did not contain or reference a set of significant quantity concentrations for these parameters. This led to inconsistent interpretations and difficulty in enforcement. This General Permit is adopting the USEPA storm water discharge benchmarks. Concentrations above the benchmark require dischargers to review their SWPPPs and identify appropriate additional BMPs. These benchmarks are meant to generally reflect the outcome of BAT/BCT controls and are not intended to determine whether or not discharges are causing or contributing to a water quality impairment. The USEPA benchmarks are located in the USEPA multi-sector permit and appear on Table VIII.2 of this General Permit for common pollutants found in industrial storm water discharges. As used by the USEPA, these benchmarks are not numeric storm water effluent limits, are not related or necessarily protective of any specific receiving water, and exceedances of these benchmarks are not automatically considered permit violations. Similar to the USEPA multi-sector permit, when sample results exceed one or more of the benchmarks, dischargers are required to re-evaluate the effectiveness of their BMPs and develop, when appropriate, additional BMPs.

See Fact Sheet p. XIV. This paragraph clearly states that the benchmarks are not water quality based effluent limits, yet fails to identify the legal premise for their use, saying only that they are meant "*generally to reflect the outcome of BAT/BCT controls.*" As described below, technology-based limits can legally only be imposed based on actual determinations that they represent BCT or BAT, as the case may be for each type of pollutant and for the discharger's facility. This discussion is also confusing. First, the Fact Sheet notes that *USEPA* does not employ the benchmarks as effluent limits, but then leaves unstated whether *the Draft Permit* does. Second, the nature of the requirements following exceedance of a benchmark appears in one sentence to be a mandatory addition of new BMPs, but in another seems to imply such BMP revisions are required only "if appropriate."

Neither the Fact Sheet nor the findings of the Draft Permit, therefore, describe or justify the incessant monitoring required after a benchmark exceedance.

An important example of the problem presented by this approach is the benchmark value for Total Suspended Solids ("TSS") of 100 mg/L. As explained, in detail in the Sanitation Districts' comment letter, for landfill facilities, which have large areas of unpaved ground, it will typically be impossible to meet this benchmark. This benchmark level will be exceeded in storm water run-off from areas outside the landfill operation due to naturally occurring levels of the same types of undissolved solids that are part of the landfill. The Sanitation Districts' comment letter describes the extraordinary costs associated with and technical infeasibility of satisfying any

permit requirement to implement controls that will reduce TSS discharges below the benchmark value. The SWRCB cannot possibly provide a technical justification for using the TSS benchmark as a corrective action trigger, given the economic and practical infeasibility of meeting this limit.

The benchmark for TSS is not a receiving water standard and is not an appropriate measure for showing when a discharge would cause exceedance of a water quality standard. For example, the Basin Plan for the Central Valley (Region 5) contains a narrative standard for suspended solids that suspended solids should not create a nuisance condition. *See* Water Quality Control Plan (Basin Plan) for the California Regional Water Quality Control Board, Central Valley Region, Sacramento River Basin and the San Joaquin River Basin (4th ed. rev. Sept. 2004), III-7.00. In addition, the Basin Plan specifies a sliding scale standard for receiving water turbidity, and contains standards for sediment and settleable solids, none of which translates to 100 mg/l Total Suspended Solids. *Id.* at III-7.00, III-9.00.

2. Legal Prerequisites to Use of the Benchmarks to Trigger Mandatory Controls and as Effluent Limits

Pursuant to Sections 402(p)(2) and (3) of the Clean Water Act, storm water discharges associated with industrial activity must be regulated by restrictions set forth in a NPDES Permit. *See* 33 U.S.C.A. §1342(p). NPDES permits must require compliance with “technology-based effluent limits,” and any more stringent provisions necessary to achieve water quality standards in receiving water (“water quality-based effluent limits”). *See* 33 U.S.C.A §§ 1342, 1311, 1312. Technology-based limits are to be based on application of best conventional pollution control technology (BCT) for conventional pollutants such as Total Suspended Solids. They are to be based on application of best available technology economically achievable (BAT) for toxic and unconventional pollutants. *See* 33 U.S.C.A. § 1311(b)(2); 40 C.F.R. § 125.3. USEPA has established technology-based effluent limits based on BCT and BAT for a number of industries covered by the General Permit. In so doing, it is required to apply economic, as well as technical, factors in detailed evaluations of the measures corresponding to the BCT and BAT standards. *See, e.g.,* EPA’s BCT methodology described at 51 Fed. Reg. 24,974-76 (July 9, 1988).

If USEPA has established effluent guidelines for a type of facility, those guidelines serve as the basis for technology-based permit limits for each facility of that type. Where effluent guidelines do not exist for a discharge, the permit writer is to use “best professional judgment” (BPJ) to apply the technology standards. The USEPA Permit Writer’s Manual describes this process as follows:

In setting BPJ limitations, the permit writer must consider several specific factors as they appear in 40 CFR §125.3(d). These factors, which are enumerated below, are the same factors required to be considered by EPA in the development of [effluent limit guidelines] and, therefore, are often referred to as the Section 304(b) factors:

- For BPT requirements:

- The total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application

- The age of equipment and facilities involved*

- The process employed*

- The engineering aspects of the application of various types of control techniques*

- Process changes*

- Non-water quality environmental impact including energy requirements*

- For BCT requirements:

- All items in the BPT requirements indicated by an asterisk (*) above

- The reasonableness of the relationship between the costs of attaining a reduction in effluent and the effluent reduction benefits derived

- The comparison of the cost and level of reduction of such pollutants from the discharge of POTWs to the cost and level of reduction of such pollutants from a class or category of industrial sources

- For BAT requirements:

- All items in the BPT requirements indicated by an asterisk (*) above

- The cost of achieving such effluent reduction.

USEPA Permit Writer's Manual, Ch. 5, p. 22-23

As noted in the Permit Writer's Manual, effluent limits need not be numeric and may be in the form of best management practices. *Id.* Best management practices fall within the definition of "effluent limitation" in federal NPDES regulations, which provide as follows: "[e]ffluent limitation means any restriction imposed by the Director on quantities, discharge rates, and concentrations of 'pollutants' which are 'discharged' from 'point sources' into 'waters of the United States ...'" 40 C.F.R. §122.2 (emphasis supplied).

“Best management practices” are defined at 40 C.F.R. § 122.2 as

schedules of activities, prohibitions or practices, maintenance procedures, and other management practices to prevent or reduce the pollution of “waters of the United States.” BMPs also include treatment requirements, operating procedures and practices to control plant site runoff, spillage, or leaks, sludge or waste disposal, or drainage from raw material storage.

Where necessary, to achieve water quality standards in the particular receiving water body, water quality-based effluent limits more stringent than the technology-based limits are required in an NPDES permit. Such limits, including those prescribed by 40 C.F.R. § 122.44(d), can be either numeric limits or restrictions in the form of alternative effluent control strategies, such as BMP requirements. *See Tesoro Ref. and Mktg. Co. v. Communities for a Better Env't, San Francisco BayKeeper*, 109 Cal App. 4th 1089 (Cal.App. 1st Dist. 2003); *rehrng denied, Communities for a Better Env't v. Cal. State Water Resources Control Bd.*, 2003 Cal. App. LEXIS 1082 (Cal. App. 1st Dist., June 27, 2003); *rev. denied*, 2003 Cal. LEXIS 7251 (Cal., Sept. 24, 2003). Federal regulations make clear that in storm water permits, it is acceptable to include narrative discharge prohibitions and requirements for “best management practices” in lieu of numeric water quality-based effluent limitations where numeric effluent limitations are “infeasible.” *See* 40 C.F.R. § 122.44(k)(3). Generally, permits can use narrative limitations where it is not feasible to include a numeric limitation. *Id.*

USEPA, through its Interim Permitting Policy for Water-Quality Based Effluent Limitations in Storm Water Permits (August 26, 1996) (“Interim Permitting Policy”), 61 Fed. Reg. 43761 (Aug. 26, 1996),¹ and California, through the State Board’s adoption of the General Permit for Discharges of Storm Water Associated with Industrial Activities (“General Permit”), Water Quality Order 97-03-DWQ, have both recited why the calculation of numeric water quality-based effluent limitations for storm water discharges is generally considered “infeasible,” and regulation through best management practices appropriate.

EPA found that the calculation of numeric water quality-based effluent limitations for storm water discharges is typically not required, due to the special characteristics of storm water. Storm water discharges are highly variable in terms of both flow and pollutant concentrations, as

¹ The Interim Policy is EPA’s own policy for use in States where EPA performs NPDES permitting directly; however, EPA strongly encourages States to adopt similar policies, recognizing the regulatory justification of using BMPs where numeric water quality-based effluent limitations are infeasible to properly determine. Through specific questions and answers in the Interim Policy, EPA expressly indicates that the policy applies to industrial dischargers, as well as, municipal systems. California previously recognized the complications generally associated with calculating water quality-based effluent limitations for storm water discharges in adopting the General Permit for Discharges of Storm Water Associated with Industrial Activities. *See* Water Quality Order Nos. 91-03, 91-04, and 97-03-DWQ.

well as, in terms of the complex relationships between discharges and receiving water quality. *See* Interim Policy at Answer 3. As a result, EPA has discouraged the use of existing methodologies for deriving numeric water quality-based effluent limitations, stating,

These methodologies were designed primarily for process wastewater discharges which occur at predictable rates with predictable pollutant loadings under low flow conditions in receiving waters. Using these methodologies, limitations are typically derived for each specific outfall to be protective of low flows in the receiving water. Because of this, permit writers have not made wide-spread use of the existing methodologies and models for storm water discharge permits. In addition, wet weather modeling is technically more difficult and expensive than the simple dilution models generally used in the permitting process.

Id. EPA further described the ramifications of using standard methodologies to derive numeric water quality-based effluent limitations for storm water discharges by stating,

Deriving numeric water quality-based effluent limitations for any NPDES permit without adequate effluent characterization, or an adequate receiving water exposure assessment (which could include the use of dynamic modeling or continuous simulations) may result in the imposition of inappropriate numeric limitations on a discharge. Examples of this include the imposition of numeric water quality criteria as end-of-pipe limitations without properly accounting for the receiving water assimilation of the pollutant or failure to account for a mixing zone (if allowed by the applicable State. . .). This could lead to overly stringent permit requirements, and excessive and expensive controls on storm water discharges, not necessary to provide for attainment of [water quality standards].

Id. at Answer 5. In accordance with these statements, EPA has specifically refrained from providing guidance on a methodology for deriving numeric water quality-based effluent limitations for intermittent wet weather discharges during high flow conditions and instead, advocated the use of BMPs to regulate storm water discharges. *Id.* at Answer 2.

3. The Draft Permit's Proposed Use of the Benchmarks would be Unlawful

a. Failure to Use Standards and Procedures Prescribed under the Clean Water Act

As described above, the Draft Permit's current use of the benchmarks is equivalent to numeric effluent limitations, because it imposes mandatory requirements on dischargers to implement additional BMP controls, and punitively increases monitoring requirements. However, such use of the benchmarks does not conform to Clean Water Act provisions and federal regulations defining the process and standards to be used in the development of such limits.

To legally adopt the benchmarks as technology-based effluent limitations, as the Draft Permit does, in actual effect, would require findings by the State Board that the BMPs actually represent

BCT for conventional pollutants and BAT for other pollutants. Although the Fact Sheet suggests that the EPA Benchmarks “generally approximate” levels which represent BCT and BAT standards, evidence is not provided that they actually correspond to the application of BCT and BAT for any of the constituents for solid waste facilities, or for other industries covered by the permit. Clearly, the State Board has not justified, with an appropriate analysis, the finding that the benchmark of 100 mg/l total suspended solids represents the application of BCT. Under the Clean Water Act, Total Suspended Solids is a conventional pollutant subject to control using BCT, a standard that considers cost effectiveness. The Draft Permit offers no possible basis, and no explanation of any basis, to conclude that the TSS benchmark represents this level of control technology at solid waste facilities.

Even if numeric effluent limitations were feasible and the standard methodology for imposing numeric limitations applied, imposing numeric limits where there is insufficient information to determine BCT and BAT, or to determine reasonable potential to cause exceedance of receiving water quality objectives, or to calculate appropriate limits is premature and violates federal law. *See* 33 U.S.C. § 1311; 40 CFR §§ 122.44(d), 125.3. Imposing technology-based or numeric water quality-based effluent limitations without sufficient information, data, and technical reasoning in the record to support such imposition is arbitrary and capricious, violates federal and state law, and constitutes an abuse of the State Board’s discretion.

b. Absence of Findings and Support for Provisions in Draft Permit Fact Sheet

All administrative orders, including waste discharge requirements, must be supported by the findings and such findings must be based upon the evidence in the record. Orders not supported by the findings or findings not supported by the evidence constitute an abuse of discretion. *See* 40 C.F.R. § 124.8(b)(4); *Topanga Ass’n for a Scenic Cmty v. County of Los Angeles*, 11 Cal.3d 506, 515; *Cal. Edison v. SWRCB*, 116 Cal. App. 751, 761 (4th Dist. 1981); *see also In the Matter of the Petition of City and County of San Francisco, et al.*, State Board Order No. WQ-95-4 at 10 (Sept. 21, 1995). Federal regulations require specific information concerning the basis for effluent limits and other permit provisions in the permit fact sheet. 40 C.F.R. § 124.8. As described above, the Draft Permit contains no such findings in the permit document or Fact Sheet.

c. Inconsistency with California Water Code Requirements Governing Use of the Benchmarks

Imposition of the benchmarks as effluent limitations in the permit in a manner inconsistent with the Clean Water Act would violate Water Code section 13377, which requires permits to be consistent with the Clean Water Act).

The Draft Permit also fails to consider economic, environmental and social impacts of the requirements as mandated by Water Code Section 13263. As part of the process of establishing effluent limitations in a permit, the State Board must “take into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste

discharges, the need to prevent nuisance, and the provisions of Section 13241.” *See* Water Code § 13263(a). There is no evidence in the record to reflect that in developing the benchmarks as effluent limitations or triggers for mandatory corrective action, the State Board has taken into consideration the water quality objectives reasonably required for the protection of the existing and probable future beneficial uses, and, in particular, other waste discharges preventing the attainment of those beneficial uses.

Water Code section 13263 also requires the State Board to “consider the provisions of Section 13241.” *See* Water Code § 13263(a). Section 13241 requires the consideration of each of the following factors, among others:

- (a) “Past, present, and probable future uses of water.” Water Code § 13241(a)
- (b) “Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto.” Water Code § 13241(b).
- (c) “Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.” Water Code § 13241(c).
- (d) “Economic considerations.” Water Code § 13241(d).

There is no evidence in the Draft Permit to reflect that the State Board considered the required factors contained in Water Code section 13241, including the environmental impacts associated with the construction and operation of necessary treatment and the economic impact of the Draft Permit’s newly imposed requirements. Its failure to clearly allow for consideration of natural and ambient background in comparing discharges to benchmarks fails to focus on controllable water quality factors and coordination of control considering other factors affecting water quality in the area. Because it fails to consider the provisions of section 13241, and the factors in Section 13263, adoption of the Draft Permit would violate Water Code section. 13263.

Finally, the use of the benchmarks in the Draft Permit represents the imposition of unreasonable requirements inconsistent with the mandates of Water Code Section 13000. The California Legislature has found and declared that activities affecting water quality “shall be regulated to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.” *See* Water Code § 13000. This section sets State policy and imposes an overriding requirement on the State Board and Regional Boards that all effluent limits be reasonable, considering all circumstances.

The requirements contained in the Draft Permit are not reasonable, considering all of the related circumstances. The permit imposes requirements equivalent to, and falling within applicable definitions of, numeric effluent limits, but without the necessary support justifying their use either as technology-based or water quality-based limits. The stringency of these requirements is

clearly unreasonable in light of all of the factors described above and their adoption as currently drafted would violate Water Code section 13000.

As the Sanitation Districts expressed in their comment letter, they are in favor of reasonable criteria for the establishment and evaluation of BMPs and the SWPPP which are the fundamental requirements of the permit. The Sanitation Districts are not opposed to more reasonable terms that provide such guidance, but simply cannot accept the approach set forth in the Draft Permit in relation to the benchmarks.

If you have any questions relating to the legal issues discussed above, please do not hesitate to contact me. Thank you for the opportunity for comment and for the continued courtesy and diligent efforts of State Board staff in the permit revision process.

Very truly yours,

DOWNEY BRAND LLP



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cc: David Rothbart

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