



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

FEB 13 2018



Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
P.O. Box 100,
Sacramento, CA 95812-2000

Re: Proposed Permit Amendment Regarding TMDL Requirements for General Permit No. CAS000001

Dear Ms. Townsend:

Enclosed please find EPA Region 9's comments on the State Board's proposed General Permit Amendment that was public noticed on December 15, 2017 to incorporate the requirements of approved Total Maximum Daily Loads (TMDLs) into NPDES General Permit No. CAS000001 for stormwater discharges associated with industrial activity.

In an email to the State Board dated November 7, 2017, Region 9 provided initial comments on an earlier, pre-public notice version of the proposed Permit Amendment sent to EPA in October 2017. In spring 2016, we also provided comments on multiple proposals from the Regional Boards for incorporation of TMDLs into the Permit. In addition, we have met with State Board staff on several occasions (most recently on November 9, 2017) to discuss the proposed Permit Amendment.

The public notice version of the proposed Permit Amendment is very similar to the earlier version we reviewed in October. As such, many of the concerns we identified in the October version are reiterated in the attached comments, along with some additional issues we identified upon further review.

We appreciate the opportunity to comment on the proposed Permit Amendment. If you have any questions regarding this matter, please contact Eugene Bromley of the NPDES Permits Section at (415) 972-3510.

Sincerely,

A handwritten signature in black ink, appearing to read "David Smith".

David Smith, Manager
NPDES Permits Section (WTR-2-3)

Enclosures

Enclosure – EPA Region 9 Comments on Proposed Amendment to Industrial General Permit

1) On-Site Compliance Option

Under the proposed amendment (Attachment I), facilities that provide on-site retention of the runoff from the 85%, 24-hour storm would be deemed in compliance with the Permit. A similar provision is found in the 2012 Los Angeles County MS4 Permit for MS4s that develop and implement an Enhanced Watershed Management Program (EWMP). We would point out, however, that this provision in the Los Angeles County MS4 Permit was challenged and in 2015 the State Board issued an order (Order WQ 2015-0075) that which requires that in the event that retention of the 85% storm does not result in compliance with applicable TMDLs, additional steps would need to be implemented to achieve compliance through the Permit's adaptive management process; see pages 41-46 of the order for further information. We recommend that a similar provision be added to the General Permit Amendment. It's important to demonstrate how the 85% option will successfully control pollutants of concern.

2) Off-Site Compliance Option

The proposed amendment (Attachment I) also provides that industrial permittees may enter into agreements with local MS4s for off-site retention of the runoff from the 85% storm. Currently, however, the proposal does not specify the volume or pollutant load of the runoff that would need to be retained off-site. We note that industrial runoff may contain higher levels of contaminants than runoff from other land uses. The proposed amendment should ensure that the off-site pollutant load reduction would match or exceed the load from the industrial site itself. If adopted, this option should also specify the recommended elements of these agreements to ensure they are legally, financially and technically rigorous. This is to ensure off-site controls are implemented in a timely manner and maintained in the future.

3) Use of TMDL Numeric Action Levels (TNALs)

For many of the applicable TMDLs, the proposed amendment incorporates the wasteload allocations (WLAs) as numeric action levels (NALs) rather than numeric effluent limits (NELs). In our comments on the original proposals from the Regional Boards for General Permit modifications in spring 2016, Region 9 expressed concern that action levels may not be consistent with applicable NPDES regulations at 40 CFR 122.44(d)(1)(vii)(B) for TMDL implementation in NPDES permits. However, we also recognize that for some TMDLs, it may be infeasible to derive NELs due to a lack of adequate information, and that TNALs may be appropriate in such circumstances. Each TMDL needs to be considered individually in making such a determination.

After review of the justifications in the fact sheet for using TNALs rather than NELs, we recommend that the Board reconsider the use of TNALs in certain instances. For several TMDLs (such as the San Diego Creek Toxics TMDL) with WLAs for metals that are hardness dependent, the WLAs are incorporated as TNALs due to the perceived difficulty that dischargers

would have in obtaining appropriate hardness data for the receiving water. However, we would point that EPA's Multi-Sector General Permit (MSGP) does require that hardness determinations be made for relevant parameters in the implementation of the benchmark monitoring requirements of the MSGP. The MSGP also includes guidance (Appendix J) for obtaining suitable hardness data. We are not aware that this procedure has proven to be a significant obstacle for permittees. Thus, we recommend that the State Board consider whether the procedure in the MSGP would be workable for the Industrial General Permit and whether NELs could be used in place of TNALs in these situations. EPA's MSGP, including appendices, is available at: <https://www.epa.gov/npdes/final-2015-msgp-documents>.

Another justification in the fact sheet for using TNALs in place of NELs is the fact that WLAs are expressed as mass loads that depend on the flow from a given facility. Calculating a facility-specific load based on the facility size and discharge flow rate is described as burdensome and rejected as a result. However, we would note that EPA has published a stormwater sampling guide (EPA 833-B-92-001) that provides a number of methods for estimating flow. Accordingly, such, we recommend that the State Board consider whether this would be practicable for the Industrial General Permit.

We also note that NPDES regulations at 40 CFR 122.44(d)(1)(vii)(B) only require that effluent limits be consistent with the assumptions and requirements of TMDLs. In exploring alternate ways for incorporating WLAs that may be more easily implemented by permittees, we looked at the Los Cerritos Channel Metals TMDL and found a concentration (e.g., 8.796 ug/L for copper in Table 6.4) for the daily load for all flow rates. That number could be incorporated into the proposed amendment as a NEL, and permittees would not have to calculate a daily flow rate since the same concentration is used for all flow rates. Such a limit would also seem to be reasonably consistent with the assumptions and requirements of the TMDL.

This approach for the Los Cerritos Channel Metals TMDL seems practicable for other TMDLs as well, such as the San Gabriel River Reach 2 TMDL for lead. Nonetheless, we also recognize that for some TMDLs (e.g., Los Angeles River Metals TMDL, Ballona Creek Metals TMDL) the approach would not be practicable since the NELs required to meet the WLAs vary with the flow.

We have two other comments regarding the proposed requirements for the Los Cerritos Channel Metals TMDL. First, the TNAL in the proposed amendment for copper is 9.8 ug/L. The intended effluent concentration of the TMDL for industrial stormwater (after including the margin of safety and the contribution of atmospheric deposition) is 8.796 ug/L; therefore, this TNAL is not accurately implementing the intent of the TMDL. Second, we found a significant typo in Table 6-9 of the TMDL that has been carried forward into the fact sheet for the proposed amendment. Each of the figures in Table 6-9 of the TMDL, and Table E-6 of the fact sheet, needs to be divided by a factor of one million.

4) Compliance Deadlines Extending Beyond the Term of the Permit

For certain TMDLs (e.g., Los Angeles and Long Beach Harbor Waters TMDL), the fact sheet indicates that the final NELs will not be implemented at this time since the compliance deadlines are beyond the term of the current permit. However, the deadlines are included in Attachment E. The discussion in the fact sheet raises questions about whether the NELs are intended to be enforceable limits in this permit; this issue should be clarified.

The final NELs and compliance deadlines should be included in this Permit even if they are beyond the Permit term to ensure enforceability in the event the Permit is not reissued in a timely manner (see attached May 10, 2007 Hanlon memorandum).

5) Sufficiently Sensitive Test Methods

Section X.B.10 of the proposed amendment includes new requirements to perform laboratory analyses using sufficiently sensitive test methods approved under 40 CFR 136. This change is in response to EPA's new regulations on this subject dated August 19, 2014 (79 FR 49001). We recommend that the amendment include more detailed requirements to further clarify what is required for compliance with the regulations.

Other NPDES permits issued recently in California provide more detailed requirements on this matter and may provide model permit language that could be incorporated into the proposed amendment. As an example, we suggest you consider the requirements of NPDES Permit No. CA003 7648 issued in April 2017 for Contra Costa County (page D-4 of Attachment D) for language that could be used for the Industrial General Permit. The Contra Costa County permit can be found here:

https://www.waterboards.ca.gov/sanfranciscobay/board_info/agendas/2017/April/5c_final_to.pdf

6) TMDLs with Immediate Compliance Deadlines

Appendix E of the Industrial General Permit lists the applicable TMDLs, discharge limits and compliance deadlines. For many of the TMDLs, compliance is required on the effective date of the Permit Amendment. As we discussed with Board staff in December 2017 in regards to the modification of the Small MS4 General Permit to incorporate TMDL requirements, we are concerned about the fairness of requiring immediate compliance with new TMDL-related permit requirements. For the Small MS4 General Permit, the Board delayed the effective date of the modification by one year to provide additional time for dischargers to come into compliance or for a Time Schedule Order to be issued. We recommend that the Board address the deadline issue for the Industrial General Permit by similarly delaying the effective date of the proposed amendment or by some other appropriate means.

7) Omission of Certain Standard Conditions

NPDES regulations at 40 CFR Part 122.41 require that certain standard conditions be included in all NPDES permits. A review of Section XXI (Standard Conditions) of the 2015 Industrial General Permit shows that the requirements of Part 122.41(m) (Bypass) and Part 122.41(n) (Upset) are missing. We recommend that these standard conditions be added to the Industrial General Permit as part of this permitting action to address this omission.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
WATER

May 10, 2007

MEMORANDUM

SUBJECT: Compliance Schedules for Water Quality-Based Effluent Limitations in NPDES Permits

FROM: James A. Hanlon, Director
Office of Wastewater Management
/s/

TO: Alexis Strauss, Director
Water Division
EPA Region 9

Recently, in discussions with Region 9, questions have been raised concerning the use of compliance schedules in National Pollutant Discharge Elimination System (NPDES) permits consistent with the Clean Water Act (CWA) and its implementing regulations at 40 C.F.R. § 122.47. The use of compliance schedules in NPDES permits is also the subject of ongoing litigation in California. The purpose of this memo is to provide a framework for the review of permits consistent with the CWA and its implementing regulations.

When may a permitting authority include a compliance schedule in a permit for the purpose of achieving a water quality-based effluent limitation?

In *In The Matter of Star-Kist Caribe, Inc.*, 3 E.A.D. 172, 175, 177 (1990), the EPA Administrator interpreted section 301(b)(1)(C) of the CWA to mean that 1) after July 1, 1977, permits must require immediate compliance with (*i.e.*, may not contain compliance schedules for) effluent limitations based on water quality standards adopted before July 1, 1977, and 2) compliance schedules are allowed for effluent limitations based on standards adopted after that date only if the State has clearly indicated in its water quality standards or implementing regulations that it intends to allow them.

What principles are applicable to assessing whether a compliance schedule for achieving a water quality-based effluent limitation is consistent with the CWA and its implementing regulations?

1. "When appropriate," NPDES permits may include "a schedule of compliance leading to compliance with CWA and regulations . . . as soon as possible, but not later than the applicable statutory deadline under the CWA." 40 C.F.R. § 122.47(a)(1). Compliance schedules that are longer than one year in duration must set forth interim requirements and dates for their achievement. 40 C.F.R. § 122.47(a)(3).

2. Any compliance schedule contained in an NPDES permit must be an "enforceable sequence of actions or operations leading to compliance with a [water quality-based] effluent limitation ["WQBEL"]" as required by the definition of "schedule of compliance" in section 502(17) of the CWA. *See also* 40 C.F.R. § 122.2 (definition of schedule of compliance).

3. Any compliance schedule contained in an NPDES permit must include an enforceable final effluent limitation and a date for its achievement that is within the timeframe allowed by the applicable State or federal law provision authorizing compliance schedules as required by CWA sections 301(b)(1)(C); 502(17); the Administrator's decision in *Star-Kist Caribe, Inc.* 3 E.A.D. 172, 175, 177-178 (1990); and EPA regulations at 40 C.F.R. §§ 122.2, 122.44(d) and 122.44(d)(1)(vii)(A).

4. Any compliance schedule that extends past the expiration date of a permit must include the final effluent limitations in the permit in order to ensure enforceability of the compliance schedule as required by CWA section 502(17) and 40 C.F.R. § 122.2 (definition of schedule of compliance).

5. In order to grant a compliance schedule in an NPDES permit, the permitting authority has to make a reasonable finding, adequately supported by the administrative record, that the compliance schedule "will lead[] to compliance with an effluent limitation . . ." "to meet water quality standards" by the end of the compliance schedule as required by sections 301(b)(1)(C) and 502(17) of the CWA. *See also* 40 C.F.R. §§ 122.2, 122.44(d)(1)(vii)(A).

6. In order to grant a compliance schedule in an NPDES permit, the permitting authority has to make a reasonable finding, adequately supported by the administrative record and described in the fact sheet (40 C.F.R. § 124.8), that a compliance schedule is "appropriate" and that compliance with the final WQBEL is required "as soon as possible." *See* 40 C.F.R. §§ 122.47(a), 122.47(a)(1).

7. In order to grant a compliance schedule in an NPDES permit, the permitting authority has to make a reasonable finding, adequately supported by the administrative record, that the discharger cannot immediately comply with the WQBEL upon the effective date of the permit. 40 C.F.R. §§ 122.47, 122.47(a)(1).

8. Factors relevant to whether a compliance schedule in a specific permit is "appropriate" under 40 C.F.R. § 122.47(a) include: how much time the discharger has already had to meet the WQBEL(s) under prior permits; the extent to which the

discharger has made good faith efforts to comply with the WQBELs and other requirements in its prior permit(s); whether there is any need for modifications to treatment facilities, operations or measures to meet the WQBELs and if so, how long would it take to implement the modifications to treatment, operations or other measures; or whether the discharger would be expected to use the same treatment facilities, operations or other measures to meet the WQBEL as it would have used to meet the WQBEL in its prior permit.

9. Factors relevant to a conclusion that a particular compliance schedule requires compliance with the WQBEL "as soon as possible," as required by 40 C.F.R. § 122.47(a)(1) include: consideration of the steps needed to modify or install treatment facilities, operations or other measures and the time those steps would take. The permitting authority should not simply presume that a compliance schedule be based on the maximum time period allowed by a State's authorizing provision.

10. A compliance schedule based solely on time needed to develop a Total Maximum Daily Load is not appropriate, consistent with EPA's letter of October 23, 2006, to Celeste Cantu, Executive Director of the California State Water Resources Control Board, in which EPA disapproved a provision of the Policy for Implementation of Toxic Standards for Inland Surface Waters, Enclosed Bays, and Estuaries for California.

11. A compliance schedule based solely on time needed to develop a Use Attainability Analysis is also not appropriate, consistent with EPA's letter of February 20, 2007, to Doyle Childers, Director Missouri Department of Natural Resources, nor is a compliance schedule based solely on time needed to develop a site specific criterion, for the same reasons as set forth in the October 23, 2006, (referenced in Paragraph 10) and February 20, 2007 letters.

If you have any questions, please contact me at (202) 564-0748 or have your staff contact Linda Boornazian at (202) 564-0221.