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VIA EMAIL - COMMENTLETTERS@WATERBOARDS.CA.GOV.

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

Re: **Comment Letter – Industrial General Permit Amendment**

Dear State Water Board Members and Ms. Townsend:

On behalf of several of our firm's clients that are subject to or could be affected by the proposed changes to the Industrial General Storm Water Permit ("Permit"), Order No. 2014-0057-DWQ, as amended by Order No. 2015-0122-DWQ, we provide the following comments on those proposed changes to the Permit. We have also proposed other changes that would beneficially clarify the terms and conditions of this Permit.

One of the key goals for permittees during the 2014/15 reissuance of the Permit was to reduce unnecessary third party citizen enforcement under the Clean Water Act ("CWA") by modifying the Permit to provide permittees with a clear pathway to compliance through the Exceedance Response Action ("ERA") process. However, instead of the desired reduction, the number of threatened citizen enforcement actions is seemingly at an all-time high, with dozens of notice letters[1] being sent out monthly to virtually every type of facility covered by the Permit across the state, from an ever-expanding set of citizen groups and law firms not previously involved in Permit enforcement.

Notwithstanding the clear wording of the Permit, these actions continue to center around allegations that because the Permit's Numeric Action Levels ("NALs") are being exceeded while a facility adjusts to the new requirements and implements new or revised Best Management Practices ("BMPs"), the facility is automatically in non-compliance with the CWA (whether that be with technology or water-quality based requirements). Such actions represent an unnecessary cost to businesses and municipalities trying to comply and thrive in California.

[1] Pursuant to the Clean Water Act citizen suit provision, 33 U.S.C. § 1365(b), requiring citizen enforcers to provide dischargers with notice of alleged violations at least 60 days prior to bringing suit.

Just as California's Proposition 65 has a well-deserved reputation for "shakedown" lawsuits,[2] businesses and municipalities are now suffering through this same problem under the Permit.[3] We certainly recognize the need for citizen enforcement to correct actual violations, and such enforcement can be valuable as an adjunct to oversight and enforcement by state and federal agencies, when those agencies are not closely monitoring Permit compliance.[4] However, in many cases, the actions being instituted under the Permit do not reflect that reality.

As such, we believe that siphoning off the same limited monies that businesses or municipalities could otherwise use to implement new or improved BMPs and protect water quality does not represent an effective use of resources. The following comments are made with the goal of clarifying what is and is not a violation under the Permit, and to focus citizen enforcement to those instances where genuine violations exist that are not being addressed by the Water Boards.

A. New Compliance Options Are Helpful, But Revisions and Clarifications Are Needed.

The addition of new Compliance Option language to the Permit may be helpful. However, the implication of such language is that permittees not taking one of the compliance options will be deemed out of compliance.[5]

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[2] See, for example, Governor Brown's statement concerning his effort to eliminate "frivolous 'shake-down' lawsuits" under that statute: "While Proposition 65 has motivated businesses to eliminate or reduce toxic chemicals in consumer products, it is also abused by some lawyers, who bring nuisance lawsuits to extract settlements from businesses with little or no benefit to the public or the environment." *See* Office of the Governor's May 7, 2013 Press Release, available at: https://www.gov.ca.gov/2013/05/07/news18026/.

[3] The issue has become so critical that the U.S. Department of Justice ("DOJ") has begun investigating law firms for improper settlements. *See attached* September 26, 2017 DOJ Letter regarding Clean Water Act Citizen Suits.

[4] The United States Supreme Court has opined that "the citizen suit is meant to *supplement* rather than to *supplant* governmental action." (*Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation,* 484 U.S. 49, 60 (1987) (emphasis added).) "The Senate Report noted that '[t]he Committee intends the great volume of enforcement actions be brought by the State,' and that citizen suits are proper *only 'if the Federal, State, and local agencies* ***fail*** *to exercise their enforcement responsibility.*'" (*Id.* at 59.) It is undeniable that the State Board and Regional Board have "primary responsibility" for issuing and enforcing the CWA and related NPDES permits, in accordance with a comprehensive and self-contained system of administrative procedure. (*See* Permit at p. 2, Finding 7 ("Effective July 1, 2015, the State Water Board and the Regional Water Quality Control Boards (Regional Water Boards) (Water Boards, collectively) will enforce the provisions herein."); at p. 13, Finding 74 ("Regional Water Boards are primarily responsible for enforcement of this General Permit."); and at p. 66 ("The Regional Water Boards have the authority to enforce the provisions and requirements of this General Permit."); *see also* Cal. Water Code §§13225, 13268, 13300-13305, 13350, 13385.)

[5] Paragraph I.D. of Attachment I of the proposed amendments state:

> "If a Discharger chooses, but fails to comply with the requirements for the On-Site or Off-Site Compliance Option provided below, the Discharger shall demonstrate compliance with the above sections of this General Permit."

This proposed language fails to specify how a permittee can "demonstrate compliance," particularly for BAT/BCT when there are no Effluent Limitation Guidelines ("ELGs") for the industry in question. This problem is discussed elsewhere in this letter.

1. The Permit Does Not Provide Any Specific Provision in the Order Authorizing the Use of Compliance Options.

Currently, the proposed amendments contain a new Attachment I, and the following new Finding 56:

> 56. The State Water Board allows Dischargers statewide to comply with the alternative compliance options in Attachment I instead of complying with applicable numeric action levels (NALs),[6] Discharge Prohibitions Section III.C, TMDL waste load allocations (WLAs), and Receiving Water Limitations. Dischargers are still required to comply with applicable Subchapter N effluent limitations.

We recommend rather than merely a Finding, there needs to be an enforceable provision in the Order portion of the Permit that specifically and clearly authorizes this option to comply with Discharge Prohibitions, Receiving Water Limitations, and Waste Load Allocations ("WLAs"). The Compliance Options need to be included in each of the relevant areas for which such options may be available in order to provide adequate clarity and avoid narrowly focused interpretations where the State Board is trying to provide flexibility.

Request: Add Provision in the Order portion of the Permit authorizing the use of Compliance Options in Attachment I.

2. The Permit Needs to Recognize Potential Issues For Diversions to Sanitary Sewers.

Attachment I, Paragraph II.B states: "Discharger may include the BMPs that capture and divert the required storm water runoff volumes to a publicly-owned treatment works [POTWs] …"

The Permit must recognize that separately enforceable requirements may need to be met prior to permittees being able to implement such diversions, and that diversions to the sanitary sewer may not be possible in many locations. POTWs may not have capacity to accept storm water during and after wet weather events, or may be unable to accept the additional pollutants present in industrial storm water and still meet the POTW's effluent limitations. In addition, sewer use or pretreatment permits will likely be required before any such diversions would be authorized by the POTW. The Permit amendments appear to assume that an industrial facility can unilaterally plumb their storm drains to the sanitary sewer and discharge unlimited quantities of untreated storm water to that sewer. POTWs may need to be given incentives and regulatory relief if this is a solution that the State Board wishes to pursue.

Request: Clarify that there are other requirements that must be met before diversions to a POTW can be used as a Compliance Option.

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[6] Only non-compliance with the Exceedance Response Action ("ERA") requirements that follow from an NAL exceedance present a compliance/violation issue; not the NAL exceedance itself. The proper reference should be to the ERA requirements instead.

3. The Compliance Options Should Not Regulate Discharges to Groundwater, Which Are Not Appropriately Addressed in an NPDES Permit.

Storm water discharges solely to land or groundwater do not require coverage under the Permit. *See* Permit at Provision II.B.1. (requiring coverage for discharges to waters of the United States). While the State Water Board has the authority under California law to permit discharges to land that could affect groundwater, that regulation should not be included in a federally enforceable NPDES permit. A straightforward reading of the CWA demonstrates that when Congress wanted certain provisions of the CWA to apply to groundwater, it stated so explicitly. For example, CWA section 102(a) identifies groundwater as distinct and separate from navigable surface waters, by stating:

> The Administrator shall, after careful investigation, and in cooperation with other Federal agencies, State water pollution control agencies, ... prepare or develop comprehensive programs for preventing, reducing, or eliminating the pollution of the *navigable waters* and *groundwaters* and improving the sanitary condition of *surface and underground waters*. 33 U.S.C. §1251(a) (emphasis added).

Similarly, CWA section 104(a) states that the EPA Administrator shall:

> in cooperation with the States ... establish, equip, and maintain a water quality surveillance system for the purpose of monitoring the quality of the *navigable waters* and *groundwaters* and the *contiguous zone*, and the *oceans* ....

33 U.S.C. §1254(a) (emphasis added). Thus, Congress specifically identified four different and distinct types of water bodies in the CWA: (1) navigable waters, (2) groundwater, (3) the contiguous zone, and (4) oceans.[7]

The term "discharge of a pollutant" is defined in the CWA to cover the discharge of any pollutant to: (1) *navigable waters*, (2) the *contiguous zone*, or (3) the *ocean*. 33 U.S.C. §1362(12). The omission of "groundwater" from the definition of "discharge of a pollutant" clearly indicates that Congress did not consider discharges to groundwater to be discharges that would trigger the need for an NPDES permit. (*See Russello v. United States*, 464 U.S. 16, 23, 78 L.Ed. 2d 17, 104 S. Ct. 296 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion").) Therefore, regulation of infiltration discharges to groundwater should be addressed in a separate state-only general (or individual) Waste Discharge Requirements ("WDR") promulgated pursuant to the California

[7] Other sections of the CWA also refer to navigable waters and groundwater as distinct and separate. *See e.g.,* 33 U.S.C. §1256(e)("...the Administrator shall not make any grant ... which has not provided or is not carrying out as part of its program – (1) the establishment ... of appropriate devices ... necessary to monitor and to compile data on ... the quality of *navigable waters* and, to the extent practicable, *groundwaters*") (emphasis added); *see also* 33 U.S.C. §§1288(b), 1314(a), and 1314(e).

Water Code, to avoid federal enforcement of state-only requirements that are not required by and more stringent than the CWA.[8]

Request: Remove requirements related to discharges to land/groundwater from the Permit and only regulate discharges to waters of the United States.

4. Besides not Being Appropriate for Inclusion in an NPDES Permit, the Infiltration Requirements are too Detailed to Encourage Such Activity.

a. Create a Single, Easier Volumetric Compliance Storm Standard

A standard amount of rain water (*e.g.*, 1 inch) should be used instead of the 85th percentile, 24 hour storm, so as to avoid confusion and to provide a unified framework. Because the table in the Fact Sheet on p. 31 shows that the 85th percentile, 24 hour storm ranges generally from .61 to 1.16 inches, the selection of a standard amount in that range would be justified based on this data. In addition, any rain event that exceeds that selected value is likely to be large enough to provide ample dilution water for any remaining flows that the constituents discharged to be of less regulatory and water quality concern.

Request: Select a standard rain volume for use statewide.

b. Discharge into On-Site Ponds Should Not Require Compliance with MCLs

Attachment I proposes to require that all water entering infiltration BMPs meet Maximum Contaminant Levels ("MCLs"). (Attachment I, p. 3, Section II.E.6.a.) MCLs were designed to apply to finished drinking water supplied by public water suppliers at the point of consumption. While many Basin Plans have incorporated MCLs as water quality objectives, these objectives do not apply in storm water ponds; rather, assessment is appropriately in the groundwater or upon extraction for beneficial use. Further, requiring compliance with MCLs prior to storm water entering an infiltration pond, dry well, or underground gallery is overly stringent, since the value of the infiltration process itself in protecting groundwater is not taken into account. Such stringent requirements will not encourage adoption of infiltration BMPs. In fact, just the opposite: if dischargers must pretreat the water, permittees may choose to discharge the water instead.

Request: Remove requirements from Attachment I regarding compliance with MCLs for water entering infiltration BMPs.

[8] Alternatively, any groundwater provisions should be included in a separate State Law Only portion of the Permit. Many Regional Boards have separated requirements in this manner.

c. Monitoring of Bypassed Water Should not be Required.

If storms above the design storm standard and treatment levels occur, Attachment I proposes that the bypass/overflow be sampled. If such monitoring data is required and made public, this will become a new area of alleged violation, as the Permit does not clearly state what requirements exist related to this discharge.

The Fact Sheet contains Footnote 8, which says "This information is not to be used for enforcement of WQS or permit compliance but to provide feedback on the effectiveness of this Compliance Option" and other related text. However, this information contained only in the Fact Sheet is not adequate to put people on notice of how or why this information is being collected and what will be done with the data. The Permit should contain a Compliance Determination section to describe specifically what constitutes compliance. Further, this language raises concerns that permittees may be hesitant to invest substantial capital in a particular Compliance Option that may cease to be an available option in the future.

Request: Remove requirements to monitor bypass/overflow water above the capacity of the On-Site Compliance BMPs.

d. Exemptions Must Be in Permit

Attachment I states that Dischargers compliant with the On-Site Compliance Option are exempt from several provisions of the Permit. However, to ensure that is the case, Attachment I should be expressly incorporated into the enforceable provisions of the Permit. In addition, it is unclear why the TMDL and Water Quality Corrective Action provisions are not also included in the exempted provisions.

Request: Place or clearly cross reference the Compliance Option provisions and exemptions in the Provisions part of the Permit. Include all other provisions that should be exempted.

e. Other Requested Changes to Attachment I.

In addition to the changes requested above, other modifications to Attachment I should be made for clarity.

- There are internal inconsistencies in Attachment I. For example, Section II.J.1.b. prohibits the discharge of authorized Non-Storm Water Discharges ("NSWDs"), yet this is contrary to Finding 33, Provision III.B., and Section IV of the Permit, which explain why and what authorized NSWDs are permitted for discharge.

- It is unclear how an infiltration BMP can be built and maintained to recover capacity within a day (not 24 hours, but 12:00 am to 11:59 pm). Beyond the fact that this is micromanaging compliance in a manner contrary to Water Code

section 13360(a), this may not be technically feasible. An alternative would be to require two times the water volume standard, so that if there are two back-to-back days of heavy rain, that volume would be contained. If rains extend for longer periods, the dilution would be significant and help minimize the pollutant concentrations.

- Remove the word "influent" from Attachment I (and elsewhere from the proposed amendments and Permit). This is a wastewater term. In this context, influent means storm water, so the term "storm water" should replace "influent."

- Clarify Section II.K.1 of Attachment I applies only to infiltration Compliance Options, not diversions, as follows:
"The applicable Regional Water Board Executive Officer has the authority to review site-specific information, and disapprove ~~any~~ On-Site infiltration BMPs ~~Compliance Option~~ as a permissible Compliance Option for the Discharger where findings are made that such an option would raise ~~to address~~ regional groundwater concerns."

- If groundwater requirements are maintained in the permit over the objections provided herein, then the following modification in Section II.K.4 of Attachment I should be made regarding monitoring:
"The State Water Board Executive Officer or the applicable Regional Water Board Executive Officer may exempt a site from or authorize~~d~~ [sic] the discontinuation of groundwater monitoring if no threat to groundwater is determined."

- Section III.A.3. of Attachment I, which prohibits use of waters of the United States ("WOTUS") or waters of the State ("WOTS"), will unduly constrain Off-Site Compliance Options. Since this is an NPDES permit, such discharges may be authorized. Further, the use of ditches, which might be characterized as WOTUS or WOTS, may be necessary to achieve an off-site solution. As worded, large infiltration basins in the Los Angeles River and other southern California areas might be construed as falling under this prohibition. For these reasons, this provision should be removed or substantially modified.

Request: Make the above recommended Permit modifications.

B. No Numeric Effluent Limits Should Be Included Where No Reasonable Potential Exists.

The Permit should not prescribe effluent limitations for any constituents without demonstrated reasonable potential (RP). Under 40 C.F.R. section 122.44(d)(1)(i), limits must control conventional, nonconventional, and toxic pollutants only where those pollutants will be

discharged "at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality." (*See also* Water Code section 13377 (requiring effluent limitations to be "necessary"). The proposed Permit newly imposes NELs based upon proximity to 303(d) listed waters with TMDLs, instead of relying upon the actual data that demonstrates a reasonable potential to exceed the applicable water quality objectives.

The State Water Board is bound by court and previous precedential decisions, which hold that in the absence of a showing of reasonable potential for a pollutant to be contained in the effluent, the Permit should not contain any limitations on that substance. Where substances were not detected, or were detected at low levels not rising to RP, limits are not required and may be removed from NPDES permits. Under the ruling in the *City of Woodland* case, Alameda Superior Court Case No. RG04-188200, Order Granting Writ of Administrative Mandamus (2005), where no reasonable potential exists, no effluent limit is required.

Federal rules require a reasonable potential analysis *first* (40 C.F.R. §122.44(d)(1)(ii)), and then if an effluent limitation is required, the permitting authority shall ensure that the effluent limits are consistent with the assumptions and requirements of any available waste load allocation (WLA) in a TMDL (40 C.F.R. §122.44(d)(1)(vii)(B)). To address the need to demonstrate compliance with the TMDL, the WLAs could be applied as Receiving Water Limitations with associated monitoring, where compliance is determined in the receiving water, rather than effluent limits. Group monitoring or the use of on-going receiving water monitoring might streamline and make this option more cost-effective.

If NELs remain in the permit without a finding of reasonable potential, then these limits are more stringent State law based requirements and the factors in Section 13241 must be considered.

C. The Permit Amendments Should Include Recognition of Self-Contained Prospective Injunctive Relief as the Appropriate Remedy for NAL/RWL Exceedances.

Under the Permit, as revised in 2014/15, permittees were required to develop and implement a new and improved Storm Water Pollution Prevention Plan ("SWPPP") with both minimum and advanced BMPs. (Permit at Section X.) If, despite implementation of the new SWPPP, a permittee exceeded any NAL, then the permittee moved to "Level 1" status in July of the next year, and was required to undertake additional tasks and reporting obligations called "Exceedance Response Actions" or "ERAs." (*Id.* at pp. 49-50, Section XII.C, and Fact Sheet at pp. 6-7.) If NAL exceedances continued during the second year for those same pollutants, notwithstanding the additional efforts in Level 1, then the permittee moved to "Level 2" status in July of 2017 and incurred additional compliance obligations. (*Id.* at pp. 50-55, Section XII.D.) The Permit recognizes "[i]t is not a violation of the General [2015] Permit to exceed the NAL values; it is a violation of the permit, however, to fail to comply with the Level 1 status and Level 2 status ERA requirements in the event of NAL exceedances." (Permit Fact Sheet at p. 60 (emphasis added); *see also id.* at p. 45, Figure 3 (Compliance Determination Flowchart).)

Other reasons may exist for NAL exceedances, wholly unrelated to pollutants entrained in industrial storm water. Thus, the Permit allows permittees to demonstrate that the exceedances are "attributable solely to pollutants originating from non-industrial pollutant sources (such as run-on from adjacent facilities, non-industrial portions of the Discharger's property, or aerial deposition)." (Permit at p. 12, Finding 66, and pp. 52-54, Sections XII.D.2.b. and c. (Non-Industrial and Natural Background Pollutant Source Demonstrations).) These exceedances "are not a violation of this General Permit because the NALs were designed to provide feedback on industrial sources of pollutants." (*Id.* at p. 12, Finding 66.)

The Permit also states that sampling results above the newly incorporated NALs are "not, in and of themselves, violations of the general permit." (Permit at p. 11, Finding 63.) Only when a permittee's industrial storm water discharge exceeds the NALs *and* the permittee does not comply with the Level 1 or Level 2 status ERAs should the permittee be considered "in violation" of the Permit. Thus, the Permit includes self-contained prospective injunctive relief to correct the issue of exceeding an NAL (which is not a permit violation). The Permit should clearly state that this prospective injunctive relief is the sole remedy for a NAL exceedance.

Similarly, under the Permit, if a permittee's discharge is determined to have caused or contributed to an exceedance of an applicable water quality standard in the local receiving waters, then the permittee must undertake "Water Quality Based Corrective Actions." (Permit at pp. 67-68, Section XX.B, and Fact Sheet at p. 22, Section E.) Moreover, the permittee or the Regional Water Board must make this Receiving Water Limitation ("RWL") exceedance determination based on data. (*Id.* at p. 22, Fact Sheet, Section E.) Where neither the Regional Board nor the permittee has determined that there have been RWL exceedances, no violation of the permit should be found. And, even if there had been RWL exceedances, these Corrective Actions, including identifying pollutant sources, assessing BMPs' effectiveness, and determining whether additional BMPs are needed to reduce or prevent pollutants, are the same type of prospective injunctive relief that could be issued by a court and should be recognized by the Permit to be the remedy for such exceedances.

The Permit provides appropriate redress and concrete steps for permittees to take if NAL or RWL exceedances occur (e.g., Level 1 and 2 ERAs, SWPPP modifications, and, where applicable, Water Quality Based Corrective Actions). Because the Permit itself contains prospective injunctive relief, court intervention to order such relief is unnecessary and duplicative. The requested changes would be consistent with the State Board's conclusion that significant revisions to the 1997 version of the Permit were "necessary for implementation, consistency and objective enforcement." (Permit, Fact Sheet at p. 2 (emphasis added).)

Request: The Permit should include modifications to clarify that the ERA and Water Quality Based Corrective Action pathways are the exclusive manner to address NAL and RWL exceedances, respectively.

D. Clarification of BAT/BCT Standards Needs to Be Included, to Decouple Those Standards from NALs

The Permit's technology-based effluent limitations and the Clean Water Act's "BAT/BCT standards" are not clear, which has led to allegations of non-compliance that are unwarranted.

The CWA requires the achievement of "effluent limitations for categories and classes of point sources, other than publicly owned treatment works,[9] which shall require application of the best available technology economically achievable [i.e., "BAT"] for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title…." (33 U.S.C. §1311(b)(2)(A)(emphasis added). When setting BAT for industries, the Environmental Protection Agency ("EPA") must consider many factors and set industry-specific Effluent Limitation Guidelines ("ELGs"). (*See* 33 U.S.C. §1314(b)(2)(A) and (B); 40 C.F.R. §125.3(a)(2) (iii)(A), (iv)(A), and (v)(A)(emphasis added).) Similar requirements exist for the EPA promulgation and achievement of "effluent limitations for categories and classes of point sources, other than publicly owned treatment works" to achieve best conventional control technology ("BCT"). (33 U.S.C. §1311(b)(2)(E); §1314(b)(4)(A) and (B)(factors considered when EPA sets ELGs based on BCT); 40 C.F.R. §125.3(a)(2)(ii)(A).)

Although BAT/BCT requirements have been included in the CWA since 1972, industrial storm water discharges were unregulated prior to the 1987 CWA amendments. (33 U.S.C. §1342(p).) Under the new subsection (p), industrial storm water dischargers were newly required to obtain NPDES permits (33 U.S.C. §1342(p)(2)(B)), and such "[p]ermits for discharges associated with industrial activity shall meet *all applicable provisions* of this section and section 1311 of this title." (33 U.S.C. §1342(p)(3)(A)(italics added).)

The Permit must more clearly recognize that EPA has not set any ELGs or BAT/BCT standards for many categories and classes of industry. (*See* Permit at p. 10, Finding 58; p. 12, Finding 64, 174-175 (listing all industries for which EPA has promulgated ELGs with defined BAT/BCT standards).) Without promulgated ELGs, there are no applicable "BAT/BCT standards" to be compared to sampling data, or to be otherwise achieved.

The Permit currently states that:

> "The primary TBEL in this General Permit requires Dischargers to 'implement BMPs that comply with the BAT/BCT requirements of this General Permit to reduce or prevent discharges of pollutants in their storm water discharge in a manner that reflects best industry practice considering technological availability and economic practicability and achievability.' (Section V.A of this General Permit). This TBEL is a restatement of the BAT/BCT standard, as articulated by U.S. EPA in the 2008 MSGP and accompanying

[9] A publicly owned treatment works ("POTW") is a municipal wastewater treatment plant.

> Fact Sheet. In order to comply with this TBEL, Dischargers must implement BMPs that meet or exceed the BAT/BCT technology-based standard."

Because no "BAT/BCT standard" has been set for most industries, it is impossible to demonstrate compliance with this requirement or, on the flip side, to avoid allegations of non-compliance. To avoid this conundrum, the Permit must be modified to state that, for industries without promulgated ELGs, implementation of the minimum and additional BMPs specified for the facility in its SWPPP constitutes compliance with BAT/BCT. However, if NALs are not met, notwithstanding implementation of the SWPPP's BMPs, then the permittee must attend to the ERA Level 1 and Level 2 reporting and action plan tasks to continue to be considered compliant with BAT/BCT. Currently, these requirements are confused and contradictory, particularly since the Permit states that "NALs are not intended to serve as technology-based or water quality-based effluent limitations." (Permit at p. 11, Finding 63.) Similar concerns exist about the TNALs, since these values seem to be somehow tied to the TMDL, but yet are not specified as being indicators of technology or water quality-based requirements. However, because NALs are being used as indicators of non-compliance with both technology-based and water quality based requirements, and TNALs are likely to be used in the same way, the Permit must be clarified.

Request: To eliminate the current regulatory uncertainty, Effluent Limitation V.A. should be modified in one of the following ways:

> "Dischargers shall implement BMPs that comply with the ~~BAT/BCT~~ requirements of this General Permit to reduce or prevent discharges of pollutants in their storm water discharge in a manner that reflects best industry practice considering technological availability and economic practicability and achievability. Implementation of such BMPs, in accordance with the terms of the facility's SWPPP, and updated as needed under Section XII. Exceedance Response Actions (ERAs), shall constitute BAT/BCT for industries not subject to storm water ELGs in Subchapter N."
>
> OR
>
> "Dischargers shall implement BMPs that comply with ~~the~~ any applicable BAT/BCT requirements ~~of~~ for the industry regulated by this General Permit to reduce or prevent discharges of pollutants in their storm water discharge in a manner that reflects best industry practice considering technological availability and economic practicability and achievability. If no BAT/BCT standards exist for a particular industry, the Discharger shall implement the BMPs required in Section X.H, as supplemented by modifications required as a result of Section XII. Exceedance Response Actions (ERAs)."

E. New Proposed Language Contradicts Previous Findings and Permit Language

1. Adding Numeric Effluent Limitations ("NELs") is Contrary to Previous Permit Findings that Numeric Limits are Infeasible, and Lacks Supporting Evidence of Feasibility.

The Permit currently contains no numeric effluent limitations. The 2014/2015 Permit stated that "[i]t is not feasible for the State Water Board to establish numeric technology based effluent limitations for discharges authorized by this General Permit at this time…. Therefore, this General Permit requires Dischargers to implement minimum BMPs and applicable advanced BMPs as defined in Section X.H. (collectively, BMPs) to comply with the requirements of this General Permit." (Permit at p. 5, Finding 33, and at Section X.H.) The Permit's reliance upon BMPs in lieu of numeric effluent limitations to control or abate the discharge of pollutants is authorized by EPA regulations. (*Id.* at Finding 36; 40 C.F.R. §122.44(k)(2), (3), and (4).

The Permit's Fact Sheet at page 17 recognizes (with emphasis added) that: "U.S. EPA has also interpreted the CWA to allow BMPs to take the place of numeric effluent limitations under certain circumstances. 40 C.F.R. §122.44(k), titled 'Establishing limitations, standards, and other permit conditions (applicable to State NPDES programs ...),' provides that permits may include BMPs to control or abate the discharge of pollutants when: (1) '[a]uthorized under section 402(p) of the CWA for the control of stormwater discharges'; or (2) '[n]umeric effluent limitations are infeasible.' 40 C.F.R. § 122.44(k)." Nevertheless, the Permit now proposes the addition of TNELs (NELs based on Total Maximum Daily Loads ("TMDLs")), even though these TNELs are no more feasible to comply with than any other NEL.

The Permit contains numerous findings that NELs are infeasible, and contains no new findings or evidence demonstrating that the proposed TNELs will be feasible to comply with. Under the authority of federal regulations at 40 C.F.R. sections 122.44(k)(2) -(4), BMPs are authorized in lieu of NELs, even those based on TMDLs. As such, the proposed TNELs should not be imposed as numeric limits, but should instead require BMPs designed to meet the numeric targets set by the TMDL for industrial sources.

The language of 40 C.F.R. section 122.44(k)(3), which allows BMPs in lieu of effluent limitations when "numeric effluent limitations are infeasible" turns on whether discharger *compliance* with such limitations is feasible, not on the ability and propriety of *calculating* numeric effluent limitations.

The fact that such limits can be calculated from the TMDL is irrelevant. "It will nearly always be possible to [calculate or] establish numeric effluent limitations, but there will be many instances in which it will not be feasible for dischargers to comply with such limitations. In those instances, states have the authority to adopt non-numeric effluent limitations." (Emphasis added.) *See* Statement of Decision Granting Writ of Mandate, *City of Tracy v. SWRCB*, Sacramento Superior Court Case No. 34-2009-80000392 (2010) at p. 42 (case is binding on the Water Boards since not appealed).

In addition, the *Communities for a Better Environment* case made clear that one factor a board may consider in determining whether a numerical effluent limitation is "feasible" is the "ability of the discharger to comply." *See Communities for a Better Environment ("CBE") v State Water Resources Control Bd.* (2003) 109 Cal. App 4th 1089, 1100. The court expressly approved the regional board's consideration of this factor in upholding the determination that numeric effluent limits were not "appropriate" for the refinery at issue in that case. *Id.* at 1105 (approving determination that numeric WQBEL was not feasible "for the reasons discussed above," which included inability of discharger to comply).

In *Natural Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369 (D.C.Cir.1977), the D.C. Circuit stressed that when it is infeasible to comply with numerical effluent limitations, permits may be issued with conditions designed to reduce the level of discharges to acceptable levels. This may well mean opting for a gross reduction in pollutant discharge rather than the fine-tuning suggested by numerical limitations. *Id.* at 1380, and at n. 21 (noting that the proposition that Congress did not regard numeric effluent limitations as the only permissible limitation was supported by section 302(a) of the CWA (33 U.S.C. §1312(a)).

Accordingly, in determining the "feasibility" or "propriety" of numeric effluent limitations, the Water Boards may consider the ability (or inability) of the discharger to comply with such limitations. The ability to comply is a critical factor in determining the "feasibility" or "propriety" of numerical limitations. *City of Tracy v. SWRCB,* Statement of Decision at pg. 42. The feasibility of calculating a limit is not.

Request: Remove TNELs and utilize a BMP-based approach for TMDL compliance related to industrial storm water sources.

2. New Findings on RWL Compliance Point Conflict with Permit Provisions.

The 1997 version of the Permit contained different language than the 2014/2015 Permit, without express reference to receiving waters, as follows:

> "Storm water discharges and authorized non-storm water discharges shall not cause or contribute to an exceedance of any applicable water quality standards contained in a Statewide Water Quality Control Plan or the applicable Regional Water Board's Basin Plan.

Based on judicial opinions incorrectly applying water quality standards to the "end of the discharge pipe." (*See, e.g., Santa Monica Baykeeper v. Kramer Metals*, 619 F.Supp.2d 914, 926-927 (C.D. Cal 2009).), the 2014/2015 Permit now expressly prohibits exceedances, *not* at the end of pipe, but "in any affected receiving water." (Permit at p. 21, Section VI.A. (emphasis added); *see also Johnson v. Consumerinfo.com, Inc.*, 745 F.3d 1019, 1022 (9th Cir. 2014), *quoting Stone v. INS*, 514 U.S. 386, 397 (1995) (Amendments are presumed "to have real and substantial effect.").)

The 2014/2015 Permit expressly recognized that "compliance with the receiving water limitations generally cannot be determined solely by the effluent water quality characteristics." (Permit at p. 6, ¶37.) Thus, both end of pipe discharge *and* receiving water samples, preferably contemporaneously collected, would be needed to demonstrate an RWL exceedance is caused or materially contributed to by industrial storm water discharges. (*See Arkansas v. Oklahoma*, 503 U.S. 91, 111 (1992) (holding an exceedance may only occur where the discharge "effected an 'actually detectable or measurable' change in water quality.").)

Newly proposed language turns this finding on its head by stating: "the point of compliance established in this General Permit is at the discharge point of the facility and not at the receiving waters." Proposed Fact Sheet at p. 41, Section F.5.a.2. This is contrary to the language in Provision VI.A that ensures industrial storm water discharges are not causing or contributing to "an exceedance of any applicable water quality standards in any affected receiving water." If there are no exceedances in the receiving water, then there can be no violations of this section, even if the concentrations of the storm water leaving the facility exceed standards. The amendments should not make this type of modification without more extensive public involvement on this topic.

Request: Remove findings attempting to modify the point of compliance for Receiving Water Limitations.[10]

F. Reinsert Standard Provisions to Cover Treatment Systems

The CWA provides just two affirmative defenses, bypass and upset. However, in the most recent amendments to the Permit, the State Water Board removed the standard upset and bypass provisions set forth in the regulations for all NPDES permits. *See* 40 C.F.R. §122.41(m)&(n) ("The following conditions apply to all NPDES permits . . . (m) (Bypass) . . . (n)(Upset).") These provisions should be reinserted into Provision XXI. (Standard Conditions) of the Permit because technology-based BMPs and treatment can fail for reasons beyond the reasonable control of the permittee. *See FMC Corp. v. Train*, 539 F.2d 973 (4th Cir.1976) and *Marathon Oil v. EPA*, 564 F.2d 1253 (9th Cir. 1977). In the *Marathon Oil* case, the Ninth Circuit Court of Appeal concluded that a facility using proper technology operated in an exemplary fashion would not necessarily be able to comply one hundred percent of the time, and thus an upset defense in the permit was necessary. Further, in the *Marathon Oil* case, the Ninth Circuit Court of Appeal concluded an upset defense in the permit was necessary to cover instances of equipment failure and human error. (*Id.* at 1273.)

Request: Reinsert the Standard Provisions for Upset and Bypass into the Permit.

[10] As to meeting Waste Load Allocations (WLAs) and TNALs at the point of discharge, if these are modified to be BMP-based programs as requested previously, then no numeric target is needed. In addition, the change requested is consistent with the finding at the bottom of page 40 of the Fact Sheet, which states: "Concentration-based WLAs or concentration-based numeric targets applicable to industrial storm water discharges with a compliance location established in the receiving water body (not at the point of discharge from the industrial facility) are translated into a TNAL(s)" (emphasis added).

G. Additional Clarifying Changes Should be Made to Proposed Amendments

The following provides language changes that should be considered to make the Permit provisions more clear.

- Pg. 9 – Finding 50 – This finding should also be incorporated into the NEC and NONA sections of the Permit because findings are not enforceable provisions.

- Pg. 9 – Finding 51 – "This General Permit's NALs found in Table 2, as applicable to the particular discharge and SIC code, shall continue to apply…."

- Pg. 13 – Finding 77 – "…NAL/TNAL exceedances defined in this General Permit are not~~, in and of themselves,~~ violations of the General Permit and do not indicate that BAT/BCT is not being met."

- Pg. 14 – Finding 80 - "Exceedances of the NALs that are attributable ~~solely~~ predominantly to pollutants originating from non-industrial pollutant sources (such as run-on from adjacent facilities, non-industrial portions of the Discharger's property, or aerial deposition) are not a violation of this General Permit because the NALs are designed to provide feedback on industrial sources of pollutants. Dischargers may submit a Non-Industrial Source Pollutant Demonstration as part of their Level 2 ERA Technical Report to demonstrate that the presence of a pollutant causing an NAL/TNAL exceedance is attributable ~~solely~~ predominantly to pollutants originating from non-industrial pollutant sources."

  This change is needed because it is virtually impossible to show that no molecule of the constituents monitored is added by the industrial storm water. If the amount not attributed by industrial storm water exceeds the NAL/TNAL, that is not an industrial storm water issue.

- Pg. 22 – Discharge Prohibition III.A. – "All discharges of storm water associated with industrial activities to waters of the United States are prohibited except as specifically authorized by this General Permit or another NPDES permit."

  This change is needed because not all storm water is regulated by this permit.

- If a State Law Only section is included in the Permit, Sections III.C-E. Discharge Prohibitions, VI. Receiving Water Limitations, VIII.B. ASBS Exceptions, XVIII. Conditional Exclusion – NEC, should be placed in that section as these are based on State Law.

- Pg. 25 – Provision VII.C. – Clarify whether Compliance Groups can undertake TMDL reporting. Currently, the proposed language includes only the "Responsible Discharger."

- Pg. 25 – Provision VII.C.2. – Add language specifying that exceeding a TNAL does not constitute a violation of the permit, but requires compliance with Provision VII.D.1.

- Pg. 26 – Provision VII.E. – If NELs are maintained over the objections provided herein, then the Permit should recognize or clarify that these exceedances would be subject to Mandatory Minimum Penalties ("MMPs").

- Pg. 78 – Provision XXI.Q.1. – The civil penalty amount in this section is inaccurate. Currently, the civil penalty amount for Clean Water Act violations is $53,484, not $37,500 as stated. *See* 83 Fed.Reg. 1190 (January 10, 2018).

- Fact Sheet, pg. 24, Section b. – "The Clean Water Act requires NPDES permits to include technology-based effluent limitations and any more stringent limitations necessary to meet water quality standards. Industrial storm water NPDES permits must: (1) require compliance with technology-based standards, (2) prohibit unauthorized ~~nonstorm water discharges~~NSWDs, (3) require reduction of pollutants in the storm water discharge to ~~the~~ any applicable standard of BPT/BAT/BCT for the industry type ~~in all cases~~, and (4) include additional limitations necessary to meet water quality standards.

- Fact Sheet, pg. 28 – Section 7 – The sentence stating that: "Discharges from BMP(s) implemented for the purposes of compliance with the On-Site Compliance Option smaller or equal to the 85th percentile 24-hour storm event (daily volume) are prohibited and a violation of this General Permit, unless the discharge sample data are below any applicable NELs and compliant with the ERA requirements."

  It is not clear why such discharges would be a violation if otherwise compliant with the Permit.

- Fact Sheet, pgs. 44-45 – Subsection c on Water Effect Ratios ("WERs") allows for amendment of the Permit to incorporate WERs. However, where WERs already exist, those should be incorporated into the Permit now to avoid having to reopen the permit later.

As practitioners dealing with interpretation of this Permit on almost a daily basis, for clients that are all trying hard to comply while also conducting their industrial activities, we respectfully request that the State Water Board consider these comments and make the requested modifications prior to adopting the final Permit amendments.

Respectfully submitted,

DOWNEY BRAND LLP

Melissa A. Thorme Partner	Nicole E. Granquist Partner	Don Sobelman Partner

Attachment

ATTACHMENT

U.S. Department of Justice

Environment and Natural Resources Division

90-1-24-177

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September 26, 2017

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Re: Clean Water Act Citizen Suits

Dear Counsel:

Earlier this summer our office identified several Clean Water Act (CWA) citizen suits filed by your firm that had not been properly submitted to the Department of Justice for review. In a July 5, 2017, letter the Department expressed concerns with your firm's failure to observe CWA statutory and regulatory notice requirements, and requested that your firm submit past and future CWA complaints and settlement instruments for our review and comment. In response you submitted the 13 complaints and 3 private settlement agreements addressed in this letter. You explained that 9 of these CWA citizen suits actions filed by your firm were in active litigation; 3 of the cases were settled pursuant to the private settlement agreements you sent on July 18; and the remaining case, *Garcia v. California Expanded Metal Products*, was resolved pursuant to a court-entered consent decree which the United States properly received and to which we did not object. Subsequently, DOJ has received two additional CWA citizen suit complaints from your firm.

The United States has a number of concerns with the private settlement agreements purporting to resolve the CWA citizen suit actions, and requests these settlement agreements be modified. In addition, we have further questions about how your firm investigates and asserts claims under the CWA citizen suit provision.

A. The Department of Justice's concerns with the private settlement agreements and request that the agreements be modified

You submitted settlement agreements that resolved three federal cases: *Salnick v. Tapo Rock & Sand*, 2:16-cv-8165; *Guzman v. Potential Industries*, 2:16-cv-278; and *Espinoza v. West Coast Rendering*, 2:16-cv-7922. DOJ has four primary concerns with these settlements: (1) these settlements all provide for direct penalty payments to the plaintiff, directly contravening the Clean Water Act; (2) each settlement provides for only generalized relief with no specified method for implementation or enforcement of the agreement's terms; (3) none of the agreements

provides for any penalty payment, restoration or other mitigation; and (4) each case was dismissed with prejudice before the Department of Justice received, or had the opportunity to review, the settlement instrument.

1. The settlement agreements in *Salnick* and *Espinosa* each provide for a $1,000 payment to be made directly to each plaintiff. In *Guzman* a $37,500 payment is made directly to the plaintiff. The CWA does not allow for monetary relief payable to a plaintiff. The statute provides for only three types of relief in a citizen suit: injunctive relief, "appropriate civil penalties under section 1319 of this title," 33 U.S.C. 1365(a), and payments of attorney's fees and costs, 33 U.S.C. 1365(d). Civil penalties are payable by law to the United States Treasury except where Congress has otherwise provided, see, *e.g.*, 42 U.S.C. 7604(g)(2). A claim for civil penalties, injunctive relief, or attorney's fees may not properly be settled with a monetary payment to the plaintiff.

2. In settlement of the *Salnick* and *Guzman* cases, the defendants agreed to implement a Stormwater Pollution Prevention Plan (a copy of which was not provided in either case). In the *Espinosa* case defendant agreed to bring its facility into compliance with the Industrial Stormwater Permit, and agreed to comply fully for three years. This generalized relief, included without express enforcement mechanisms or stipulated penalties for non-compliance, is the only relief that directly seeks to remedy the harm caused by the alleged CWA violations that form the basis of the underlying complaints. The United States encourages specific injunctive relief that seeks to address runoff of contaminants that form the basis of a plaintiffs claims, and encourages plaintiffs to develop procedures that allow access and consent to monitor a defendant's property so that future compliance can be ensured. Put another way, injunctive relief in an appropriate CWA settlement agreement typically seeks more than a simple assurance that a defendant will comply with already extant requirements.

3. Additionally, though two of the settlement agreements provided for substantial attorney's fees ($19,000 in *Salnick* and $39,000 in *Espinosa*), none of the settlement agreements provide for a penalty payment, restoration, mitigation, or supplemental environmental plan. Although the United States appreciates that the contingencies of particular cases may at times affect the relief that the parties agree to include in a case resolution, a pattern of resolutions that includes none of these elements raises significant concerns. This situation is more unusual because each settlement provides for significant fees payments to your firm and/or payments directly to each plaintiff, a pattern of resolutions that seems especially difficult to justify.

4. Finally, your firm failed to submit any of these settlement agreements or the underlying complaints for DOJ review. The Clean Water Act provides for service of a copy of a citizen suit complaint on the Administrator of the Environmental Protection Agency (EPA) and on the Attorney General. 33 U.S.C. § 1365(c)(3); 40 C.F.R. § 135.4. In response to a notice of a CWA complaint DOJ issues a "Notification of Receipt" letter that addresses, among other topics, the scope of instruments subject to DOJ review. (A copy of that document is attached.) That portion of our standard notification letter reads as follows:

> For purposes of the United States' right of review, the term "consent judgment" has a broad meaning, and encompasses all instruments entered with the consent of the parties that have the effect of resolving any portion of the case. For example, a document related to dismissal of a case or any part thereof, including voluntarily,

would fall within the scope of this language. Such documents and any associated instruments (even if not submitted to the Court) must be submitted to the United States for review, notwithstanding any provisions purporting to maintain the confidentiality of such materials. Amendments to previously-entered consent judgments must also be submitted to the United States for review before entry by the Court. The Department monitors citizen suit litigation to review compliance with this requirement. Settlements that do not undergo the statutorily-required review process are at risk of being void.

You firm's failure to satisfy the basic initial notice requirements in each of these cases was compounded by your firm's own, unduly narrow, interpretation of your subsequent obligation to provide settlement instruments to the Department for review. It is possible that you and your clients could have addressed the foregoing concerns prior to dismissal of your CWA claims. Because you failed to provide us with notice of your settlement agreements, contrary to the requirements of 33 U.S.C. § 1365(c)(3), the remaining options (which include seeking to intervene and reopen each of the contested cases), are more limited and likely to be disruptive.

In summary, the three settlement agreements you have forwarded to us all involve substantial payments either to your firm in the form of attorney's fees, to the respective plaintiffs, or both. The aspects of these settlements that would improve the waters of the United States, in contrast, are weak. There is weak injunctive relief, no penalty, no restoration, no other mitigation, and no tangible mechanism to enforce the agreement's terms. This structure is insufficient – potentially indicating either that your underlying claims were not viable or that your prosecution of those claims is not focused on enhancing the quality of waters of the United States.

Please explain to us how you plan to remedy those problems and strengthen the injunctive relief provided, provide for acceptable mitigation efforts, and address the provisions requiring direct payments from the defendants to the plaintiffs.

B. The Department of Justice's further questions regarding your firm's use of 33 U.S.C. § 1365

In your July 17, 2017 letter you invited us to follow up with any additional questions regarding your prosecution of CWA citizen suit claims. The United States has the following additional questions:

Question #1
As you note in your July 17th letter, prior to that date your firm had filed thirteen suits alleging claims under the citizen suit provision of the Clean Water Act. Why did your firm fail to provide timely notice of those claims to the United States?

Question #2
As you are aware, investigation, litigation and proper implementation of remedies related to a Clean Water Act violation can be both time and resource intensive. Since March of 2016 the United States is aware of more than 160 Notice of Intent letters being sent by your firm. We are concerned that your firm may lack sufficient supporting infrastructure to properly investigate and prosecute such a large number of claims. How does your firm investigate such matters? How

does your firm plan to support related litigation and site inspections? When responding, please include the following information:

- The names, contact information and general role of any attorney your firm engaged to work on these matters.
- The amount of time attorneys from your firm have devoted to each case.
- The names, contact information and general role of any non-attorney your firm has engaged to work on these matters.
- The amount of time non-attorneys have devoted to each case
- The type of investigation your firm undertakes prior to initiating a Notice of Intent letter.
- How your firm typically comes into contact with potential plaintiffs in these matters.
- Whether your firm takes affirmative steps to initiate contact with potential plaintiffs.

Question #3
Not including the lawsuits you have filed, have you settled or reached an agreement not to pursue claims with respect to any of the alleged violations outlined in any of the Clean Water Act Notice of Intent letters you have sent in 2015, 2016 or 2017? If you have, please list which notices and explain which of the alleged violations you have settled or otherwise resolved.

Question #4
With respect to the *Guzman* matter, what was the basis, purpose and disposition of the $37,500 payment made to plaintiff? Was all or any part of the payment subsequently remitted to your firm or any other entity?

Question #5
Have you determined that you would not pursue any of the alleged violations outlined in any of the Clean Water Act Notice of Intent letters you have sent in 2015, 2016 or 2017? If you have determined that you would not pursue particular alleged violations please list which notices and explain which of the alleged violations you have determined that you would not pursue, and why.

In addition, please provide the United States with copies of any written settlement agreements or other agreements not to pursue claims with respect to any of the alleged violations outlined in any of the Clean Water Act Notice of Intent letters you have sent in 2015, 2016 or 2017.

Please respond by November 30, 2017. We appreciate your attention to these matters, and would be pleased to discuss these issues by telephone at a mutually convenient time.

Sincerely,

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