**SPECIAL HEARING**
**2/3/05**
**cc: BD, DI, DWQ**
**E-Cys: BD, CC, HMS, TH, CMW**

BEST BEST & KRIEGER LLP
A CALIFORNIA LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL CO
LAWYERS
402 WEST BROADWAY, 13TH FLOOR
SAN DIEGO, CALIFORNIA 92101-3542
(619) 525-1300
(619) 233-6118 FAX
BBKLAW.COM

RIVERSIDE
(951) 686-1450

INDIAN WELLS
(760) 568-2611

ORANGE COUNTY
(949) 263-2600

SACRAMENTO
(916) 325-4000

MARGUERITE S. STRAND
(619) 525-1346
MARGUERITE.STRAND@BBKLAW.COM
FILE NO. 93939.00055

February 1, 2005

**VIA FACSIMILE AND MAIL (916) 341-5620**

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

Re: **Comments regarding the Reissuance of the Industrial General Permits**

Dear Ms. Irvin::

Best Best & Krieger LLP hereby submits comments on behalf of over seventy (70) public entities (the "Permittees") regarding the reissuance of the Industrial General Permit, notice of which was publicly posted December 15, 2004. The Permittees we represent include school districts, sewage treatment plants, community college districts, community services districts, and other special districts.

The Permittees understand the impact of storm water pollution and seek to proactively work with the State Water Resources Control Board ("SWRCB") to reduce storm water pollution by raising issues and addressing concerns related to the reissuance of the Industrial General Permit. Therefore, in our comments below we have focused on the issues that are likely to arise from the most recent revisions to the Permit, particularly the four new requirements which were outlined in the public notice posted on December 15, 2004 and which will be discussed at the public hearings scheduled by the SWRCB on this matter. None of the comments or examples included below are intended to limit the scope of the analysis of the SWRCB in its responses.

## COMMENTS

1. Minimum Best Management Practices and Storm Water Pollution Prevention Plan Issues:

The Draft Permit SWRCB finding number 4 provides that the "General Permit does not apply to storm water discharges and non-storm water discharges that are regulated by other individual or general NPDES permits." In the situation where a Permittee's discharge is not yet governed by any NPDES permit and the discharge could be covered by either the Industrial

General Permit or by another NPDES permit, for example, the Small MS4 Permit, it is unclear which permit the Permittee should obtain. Is the Industrial General Permit inapplicable where a discharge *could* be covered under another permit or only where a discharge currently *is* covered by another permit?

The Draft Industrial General Permit ("Draft Permit") Section VII, paragraph 2(a)(iii) provides that "Dischargers shall identify and implement timely revisions and/or updates to the SWPPP." Permittees seek a clarification of what "timely revisions" means. Permittees are unsure whether they should adopt a schedule for reviewing and potentially revising the SWPPP or whether review and revisions are only required when a change in circumstances occurs. If the latter, what are the types of changed circumstances that might merit a SWPPP revision?

The Draft Permit Section VII, paragraph 3(b)(i) requires that Dischargers must include in their SWPPP "The procedures that shall be implemented to identify alternate individuals or positions to perform the required pollution prevention team responsibilities when team members are temporarily unavailable...." Permittees ask the SWRCB to consider the situation where a Permittee could resolve a sudden and unexpected absence only at great expense. In such a situation, is Permittee *actually* required to replace a pollution prevention team member, regardless of the cost, or is having replacement procedures and making a good faith effort to implement them sufficient?

The Draft Permit Section VII, paragraph 7(a) provides that "Dischargers shall include in the SWPPP a narrative assessment of all areas of industrial activity and potential industrial pollutant sources...." Permittees seek a clarification of whether the narrative assessment of <u>all</u> "potential industrial pollutants" requires an exhaustive catalogue of each and every pollutant on the property, since any pollutant, even if kept under safe conditions, could "potentially" cause industrial pollution. Permittees seek a clarification of whether this provision requires a narrative description of all pollutants *reasonably likely* to cause industrial pollution.

The Draft Permit Section VII, paragraph 7(a) provides that "At a minimum, discharges shall consider...." Permittee seeks clarification of the type of evidence the SWRCB and the RWQCB will require to show that Permittee "considered" all that they were required to. Is it sufficient if Permittee conducts a verbal assessment, visual study, and oral discussion with employees and staff regarding each required consideration, or is full documentation and written analysis required in order to demonstrate that Permittee has complied?

The Draft Permit Section VII, paragraph 7(a)(iii) requires that a Permittee consider "an assessment of past spills or leaks, non-storm water discharges, and discharges from adjoining areas." Permittees desire clarification on how long an assessment of a past spill, leak, or discharge must be considered. Permittees are concerned that scarce and much-needed funding would be spent maintaining records of minor spills years after they occur in order to comply with this provision.

The Draft Permit Section VII, paragraph 8(a) requires Permittees to implement several minimum BMPs "unless clearly inapplicable to the facility." It remains unclear how a Permittee is to determine whether a BMP is "clearly inapplicable" to its facility. Does this provision mean that impossibility of BMP implementation is required or only that impracticability of BMP implementation is required for a Permittee to be excused? This is a significant concern, because the same paragraph gives Permittees "the burden to prove inapplicability." Some initial guidance by the SWRCB may avert future challenges to the interpretation of this provision.

The Draft Permit Section VII, paragraph 8(a)(i)(1) provides that "Weekly inspections may be suspended during periods when there is no outdoor exposure of industrial activities or materials." Permittees seek clarification of what "no outdoor exposure" means. Is any exposure, no matter how slight (for example, one bus drives one time across one lot), enough to trigger the full complement of inspection schedules required by this provision?

The Draft Permit Section VII, paragraph 8(a)(i)(7) provides that "Flows from non-industrial areas that contact industrial areas of the facility are subject to this General Permit's requirements." It remains unclear whether upstream flows from a neighboring property, which Permittee does not own, that enter Permittee's property and contact industrial areas are now Permittee's responsibility. Permittees are particularly concerned where the flows from the neighboring property contain pollutants for which Permittees do not want responsibility, and for which Permittees did not account in their SWPPP or their BMPs. Permittees are also concerned that they may be held responsible for pollutants which enter their site through rain or wind deposition, such that Permittee might be held responsible for pollution which Permittee did not cause.

The Draft Permit Section VII, paragraph 8(a)(iii)(2) provides that Permittees must "Identify and describe all necessary and appropriate spill response equipment" as part of Permittee's spill response procedures. Permittees seek a clarification of what "necessary and appropriate" equipment entails. Is this determination within the good faith discretion of the Permittee, or will Permittee be held to a standard determined by the SWRCB or the RWQCB? Permittee seeks this explanation to ensure full compliance with the terms of the reissued Permit.

The Draft Permit Section VII, paragraph 8(a)(v)(4) provides that Permittee must "Maintain documentation of all completed training classes and the personnel who received training." Permittees wish to know how long Permittee must retain these records. Is the length of the Permit sufficient, or is Permittee required to maintain the records indefinitely?

The Draft Permit Section VII, paragraph 8(a)(vi)(1)provides that Permittees must "keep and maintain records of inspections, spills, BMP related maintenance activities, corrective actions, visual observations, etc." Permittees wish to know how long Permittee must retain these records.

The Draft Permit Section VII, paragraph 8(a)(vii)(2) provides that Permittees must "Maintain erosion/sediment control to achieve optimal performance during storm events." In order to ensure their full compliance, Permittees seek clarification of what "optimal performance" means. Does "optimal performance" refer to the Best Practicable Control Technology Currently Achievable ("BCT") standard, the Best Available Technology Economically Achievable ("BAT") standard, or to an entirely different standard?

The Draft Permit Section VII, paragraph 8(a)(viii)(3) provides that Permittees must "Prepare a summary and status of the corrective actions and SWPPP revisions resulting from the quarterly inspections." Permittees seek clarification of what the SWRCB contemplates should be included in the "summary." Is a narrative explanation sufficient, or must Permittee also include a list of numeric values which reflect its storm water discharge volume, pollutant levels, etc.?

The Draft Permit Section VII, paragraph 8 sets forth lengthy and detailed Minimum BMPs which Permittees must implement. Permittees are concerned that their limited budgets may not account for the cost of implementing these BMPs. Permittees want to know if any supplementary funding will be made available to them to assist with full compliance of these provisions.

2. Sampling Requirements and Indicator Parameters Issues:

The Draft Permit Section III, paragraph 1 provides that "Storm water discharges and authorized non-storm discharges to any surface or ground water shall not contain pollutants that cause a nuisance." In order to assure their compliance, Permittees seek a clarification of what the SWRCB means by "nuisance." It remains unclear whether "nuisance" is intended as a legal term of art. It is likewise unclear at what distance from the discharge source the presence of a "nuisance" will be assessed.

The Draft Permit Section VIII, paragraph 7(a) requires that storm water samples used for purposes of testing "shall be representative of the storm water discharge in each drainage area." It remains unclear what is meant by this phrase. Specifically, Permittees desire clarification of whether storm water samples are to be taken immediately from the source of each discharge or whether samples may be taken from each drainage area where the discharge leaves the site.

The Draft Permit Section VIII, paragraph 3(f) provides that "Dischargers are not required to conduct pre-storm visual observation within fourteen (14) days of a previous pre-storm visual observation." Permittees seek clarification of how this provision interacts with Section VII, paragraph 8(a)(i)(1) which provides that Dischargers must "Inspect weekly all outdoor areas associated with industrial activity, storm water discharge locations, drainage areas," and several other items. If Permittees have a weekly duty to inspect the premises and address any storm water pollution problems, then it remains unclear when the provision contained in Section VIII, paragraph 3(f) would apply.

The Draft Permit Section VIII, paragraph 4(b) provides that "Sample collection is only required of storm water discharges that begin to occur during operating hours and that are preceded by at least (3) three working days without storm water discharge." In order to ensure Permittees' full compliance with the Permit's terms, Permittees seek clarification of whether *de minimus* storm water discharge would qualify within this provision's requirement of three working days "without storm water discharge."

The Draft Permit Section VIII, paragraph 7(d) provides that, as a part of sampling and testing, a discharger may choose to analyze one combined sample consisting of "equal volumes of samples collected from as many as four (4) drainage areas. A minimum of one combined sample shall be analyzed for every four (4) drainage areas." Permittees appreciate that they may be able to reduce costs by analyzing combined samples, but it remains unclear whether a combined sample approach would reduce overall costs. A combined sample approach necessarily includes a requirement that four separate locations be monitored, that four separate sampling tasks be completed by staff, and that additional sampling equipment will be required. Thus, the funds saved through the proposed analysis may be offset by the additional costs of increased sampling. The Permittees encourage the SWRCB to look into ways which will reduce the overall costs associated with sampling requirements.

The Draft Permit Section VIII, paragraph 10(b) provides that "Dischargers may conduct their own field analysis of pH and specific conductance if the dischargers have sufficient capability (qualified and trained employees, properly calibrated and maintained field instruments, etc.) to adequately perform the field analysis." Permittees seek clarification of what is intended by the phrase "qualified and trained employees." Is a specific training or certification program required in order to demonstrate that employees are properly trained?

The Draft Permit Section VIII, paragraph 13(a) provides that the Discharger must deliver to the RWQCB "an originally signed Annual Report." Permittees seek clarification of who must sign the Annual Report. Is Permittee required to sign, or may the site's owner or a member of the Permittee's Board sign the Annual Report?

3. <u>Corrective Actions Pursuant to USEPA Storm Water Benchmark Value Issues</u>:

The Draft Permit Section V, paragraph 7(h) provides that "Nothing in this section shall prevent the appropriate RWQCB from enforcing any provisions of this General Permit while dischargers prepare and implement the above report." Permittees wish to know the type of enforcement mechanism that the SWRCB anticipates will be utilized by the RWQCBs pursuant to this section and whether any safe harbors exist which will protect the Permittees from fines or other expenses when the Permittee is faithfully implementing all required BMPs but is in violation of the USEPA benchmark values.

The Draft Permit Section VIII, paragraph 4(d) provides that "Dischargers shall select analytical test methods from the list provided in Table VIII.2." Permittees seek clarification of

whether the test methods contained in Table VIII.2 satisfy the BCT and BAT technology-based standards, such that Permittees can freely choose those methods which most appropriately fit their financial needs. If not, then Permittees desire a clarification of what criteria or types of criteria should guide their selection of the test methods contained in Table VIII.2.

The Draft Permit Table VIII.2 provides that the USEPA Benchmark value for pH is 6.0 – 9.0. Because the pH of a neutral substance, such as clean water, is 7.0, Permittees seek clarification of why the Benchmark value does not tolerate equal deviations from neutral, such as a benchmark value of 6.0 – 8.0 or 5.0 – 9.0.

4. Comprehensive Pollutant Scan Issues:

The Draft Permit Section VIII, paragraph 6(a) provides that Permittees must "analyze at least one sample collected from the first storm event during the 2008-2009 compliance year...." Permittees seek two clarifications as to this provision. Is one sample sufficient to comply with the terms of the Permit, or should Permittees take multiple samples based on area, number of discharge locations, etc.? Also, Permittees are unclear where such samples should be collected. Are Permittees to take samples directly from the pipe or channel which collects the storm water, or should samples be collected from the area where the storm water leaves the Permit site?

Finally, Permittees have great concern over the Draft Permit's effects on group monitoring plans. One of the major benefits of the prior Industrial General Permit was the ability of similarly situated Permittees to utilize a group monitoring plan which appropriately allocated costs of storm water compliance while allowing meaningful and effective pollution monitoring and reduction. For Permittees with restrictive budgets, school districts in particular, group monitoring provides a highly valued benefit. Permittees are concerned that the USEPA Benchmarks, which appear to be effluent limits unsupported by sound science, and the additional monitoring and sampling requirements imposed under the Draft Permit will do away with the cost effectiveness of group monitoring. This would force individual Permittees, such as school districts, to bear the full costs of storm water compliance and result in an untenable choice between complying with the storm water program or offering students a meaningful education.

## CONCLUSION

On behalf of our public agency clients, we believe that the General Permit should address more effective means to mitigate storm water pollution rather than mandate additional time consuming and costly sampling and analysis. The Permittees further request that the SWRCB acknowledge the success of the group monitoring approach and support its continuation.

We trust that the SWRCB will take a moment to consider these comments and address the questions and concerns raised herein before reissuing the Industrial General Permit. We look forward to working collaboratively and cooperatively with the SWRCB to address storm water pollution through the consideration and clarification of these comments. Best Best

LAW OFFICES OF
BEST BEST & KRIEGER LLP



& Krieger LLP is pleased to provide you with these comments of the Permittees. Thank you in advance for the careful consideration that you have given to their concerns.

Very truly yours,

Marguerite S. Strand
of BEST BEST & KRIEGER LLP

MSS:djg

BEST BEST & KRIEGER LLP
A CALIFORNIA LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
LAWYERS
402 WEST BROADWAY, 13TH FLOOR
SAN DIEGO, CALIFORNIA 92101-3542
(619) 525-1300
(619) 233-6118 FAX
BBKLAW.COM

RIVERSIDE
(951) 686-1450

INDIAN WELLS
(760) 568-2611

ONTARIO
(909) 989-8584

ORANGE COUNTY
(949) 263-2600

SACRAMENTO
(916) 325-4000

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| Debbie Irvin, Clerk to the Board<br>State Water Resources Control Board | (916) 341-5620 | |

**FROM:** Marguerite S. Strand

**RE:** Comments regarding the Reissuance of the Industrial General Permits

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