

FEATURE ARTICLE

CITIZEN-SUIT LITIGATION AND THE RECENT STORM WATER REGULATIONS—EIGHT WAYS CALIFORNIA FACILITIES CAN AVOID CITIZEN-SUIT LITIGATION UNDER THE CLEAN WATER ACT

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Each month, facilities across California receive letters from environmental organizations threatening to sue facility owners or operators for alleged violations of California’s General Industrial Storm Water Permit (IGP), a National Pollutant Discharge Elimination System (NPDES) permit adopted by the State Water Resources Control Board (SWRCB) that covers storm water discharges associated with industrial activities. In July 2015, the SWRCB issued the New IGP (Order No. 2014-0057-DWQ) to replace the nearly 20-year old Prior IGP (Order No. 97-03-DWQ). Under the New IGP, each permittee is required to submit an Annual Report to the SWRCB through its online “SMARTS” portal. The first Annual Reports were due by July 15, 2016. The New IGP contains a series of Numeric Action Levels (NALs), which if exceeded during the reporting year can trigger additional requirements under the New IGP’s Exceedance Response Action (ERA) process. In light of this, permittees should understand and undertake all necessary steps to maintain compliance with this new permitting paradigm. By doing so, permittees will minimize the likelihood that they will face citizen suits under the federal Clean Water Act (CWA), which have increasingly focused on alleged violations of the IGP.

Permit Compliance Is the Best Defense

Facility owners and operators can take action to enhance compliance and thereby avoid citizen-suit litigation under the federal Clean Water Act for alleged violations of the New IGP. Consider the following eight compliance methods:

Determine Whether Your Facility Is Subject to the New IGP

Is your facility required to enroll for coverage under the New IGP? You should know the answer.

The SWRCB employs the U.S. Environmental Protection Agency’s (EPA) approach for distinguishing between facilities that discharge storm water associated with industrial activities (industrial facilities), with those that do not (non-industrial facilities). For this purpose, the EPA uses the SIC Code system to establish the universe of industrial facilities, and the SWRCB adopts the same approach. The following are the SIC Codes falling under the ambit of “industrial facilities” (See Table 1).

Owners and operators should know the primary SIC Code for each of their California facilities. The SIC Code is easily searchable on the U.S. Department of Labor website [https://www.osha.gov/pls/imis/sic_manual.html], which lays out the “SIC Division Structure” and enables users to identify the correct code categorizing their particular facility.

This exercise can become more complicated when a business has multiple facilities engaging in different activities. For example, a company that primarily engages in business services at its headquarters might have one SIC Code for that office location and another SIC Code or Codes for different operations (such as warehouses). The warehousing facilities might be defined as industrial, in which case they would need to obtain coverage under California’s New IGP even if the corporate headquarters would not require permit coverage.

The New IGP eliminates an effective presumption in the Prior IGP that light-industry facilities do not

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SIC Code Nos.	General Description	Code Section
24 (except 2434), 26 (except 265 and 267), 28 (except 283 and 285), 29, 311, 32 (except 323), 33, 3441, 373	Heavy manufacturing facilities (e.g., paper mills, chemical plants, petroleum refineries, steel mills/foundries)	40 C.F.R. § 122.26(b)(14)(ii)
10-14	Mining/oil and gas facilities	40 C.F.R. § 122.26(b)(14)(iii)
5015 and 5093	Recycling facilities (e.g., metal scrapyards, battery reclaimers, salvage yards, automobile junkyards)	40 C.F.R. § 122.26(b)(14)(vi)
40, 41, 42 (except 4221–25), 43, 44, 45, and 5171	Transportation facilities	40 C.F.R. § 122.26(b)(14)(viii)
20, 21, 22, 23, 2434, 25, 265, 267, 27, 283, 285, 30, 31 (except 311), 323, 34 (except 3441), 35, 36, 37 (except 373), 38, 39 and 4221–25	Light industry manufacturing facilities where industrial materials are exposed to storm water	40 C.F.R. § 122.26(b)(14)(xi)

Table 1.

discharge industrial storm water and thus are not required to seek IGP coverage. The list of light-industry facilities is long, and includes manufacturers of apparel (SIC 23), food (SIC 20), and certain computer equipment (SIC 35), among many others. Facility owners/operators who are unsure whether they need to enroll a given facility under the New IGP should be proactive in investigating the question. This is particularly true for owners and operators of facilities that were considered to be “light industrial” under the Prior IGP. By determining today whether to obtain coverage under the New IGP, companies may save significant resources later, since the costs to defend against agency enforcement actions and/or citizen-suit litigation can be much more expensive than compliance from the outset.

Closely Evaluate Your Facility’s Permit Documents

IGP and other storm water permittees now encounter heightened scrutiny because the SWRCB relies on SMARTS, which allows public searches of permittees’ compliance documents. For this reason, permittees should take steps to confirm their permit-related documents are compliant.

Permittees should begin by developing Storm

Water Pollution Prevention Plans (SWPPPs) that are tailored to their facilities’ operations and designs, rather than by relying on off-the-shelf SWPPP samples that industry consultants tend to promote. In addition to ensuring that their SWPPPs address every single element that the New IGP requires — of which there are dozens (see the New IGP’s list of Minimum Best Management Practices (BMPs) at 30-33, § X(H)(1))—facility owners and operators should spend time with relevant facility personnel to develop methods for particularizing the SWPPP to each permitted facility, while addressing key issues concerning the facility’s primary pollutant-generating operations.

Ensure that Your Facility’s On-the-Ground Storm Water Compliance Measures Are Being Implemented Effectively

Preparing a good SWPPP will help minimize the likelihood of enforcement or litigation, but compliance will ultimately turn on how effectively the SWPPP is implemented. While developing the SWPPP, facility owners and operators should consider the potentially numerous approaches for improving facility storm water management practices to minimize the potential entrainment of pollutants in the storm water discharges. As part of this exercise,

permittees should consider methods for improving facility organization and housekeeping. This may involve moving under cover, or disposing of, old facility equipment that has not been used in years. Old equipment left outdoors can rust and lead to metals exceedances (e.g., copper, lead, zinc) during rain events. Given the widespread occurrence of certain metals in urbanized environments and their ability to migrate onsite by way of aerial deposition or other means, a facility's storm water discharges may contain metals even where those metals are not part of the facility's industrial processes. To the extent a facility can show—through an evaluation of the industrial materials handled, produced, stored, recycled, or disposed—that certain metals (e.g., copper, lead, zinc) would not likely be present in the Facility's storm water discharges, the facility need not sample for such additional parameters. Moving old facility equipment indoors or under cover is but one of a number of methods that facilities can employ to achieve this important outcome.

The New IGP requires all permittees to implement a set of “minimum Best Management Practices” (BMPs). See New IGP at 30-33, § X(H)(1). After ensuring that the minimum BMPs have been addressed, the permittee might also consider implementing additional BMPs, which—although not necessarily required by the New IGP—may help reduce pollutant concentrations in storm water discharges and demonstrate the seriousness with which facility owners/operators approach their storm water management responsibilities. Even if additional BMPs are not necessary, permittees may elect to increase sweeping, move certain industrial operations indoors, and/or implement cost-effective structural or “advanced” BMPs (see, New IGP at 33, § X(H)(2)) such as downspout filters (to filter pollutants drained from rooftops); drop-inlet filters (to filter storm water at the catch basin before it enters the municipal separate storm sewer system (ms4) or receiving water body); and/or clarifiers to gravity separate pollutants before runoff discharges from facility outfalls.

Employ Best Industry Practices When Collecting Storm Water Samples

The New IGP requires permittees to collect and analyze storm water samples from two qualifying storm events (QSE) within the first half of the reporting year—i.e., July 1 to December 31—and from

two QSEs within the second half of the reporting year—i.e., January 1 to June 30. (New IGP at 39, § XI)(B)(2)). The term QSE is defined as a precipitation event that produces a discharge for at least one drainage area and is preceded by 48 hours with no discharge from any drainage area. (Id. at 39, § XI)(B)(1)).

In recent years, California has experienced prolonged drought, with recent El Niño conditions providing moderate relief. During such drought periods, estimating how many rain events might occur within each half of the reporting year is difficult. To ensure they collect enough storm water samples, facility operators may be tempted to sample at the first opportunity, often after long dry periods. The problem with this approach is that pollutants tend to develop during dry periods, both from industrial operations and—particularly in heavily industrialized areas where pollutants are ubiquitous—from off-site sources, such as vehicles on neighboring roads and freeways. The first rain event following a long dry period produces a “first flush” as storm water runoff captures and entrains the pollutants that have accumulated over time. As a result, grab samples of first-flush discharges typically are not representative of a facility's storm water discharges; those samples will tend to contain relatively high concentrations of pollutants. So rather than collecting samples during a QSE that follows an extended dry period, facility operators should monitor the weather forecasts and strive to collect the requisite four samples after these first flushes have occurred.

In addition to considering how best to time storm water sampling to meet the permit requirements and obtain the most representative samples, facility operators should understand that the methods for collecting storm water samples may significantly influence the sampling results. For example, facility personnel charged with storm water collection responsibilities should avoid collecting samples from standing water, which tends to contain high concentrations of sediment and other pollutants, and which are not likely representative of facility storm water discharges. Facilities can greatly improve their storm water results by employing drop-inlet filters in drainage features, which enable facility personnel to collect storm water that has passed through the filtration system and emerges relatively clean.

To minimize the chances of collecting samples

resulting in Numeric Action Levels (NAL) exceedances, and to avoid citizen-suit claims that try to rely upon those results, IGP permittees should develop and be consistent in implementing sampling protocols based on best industry practices.

Scrutinize Your Facility's Storm Water Sampling Results

Environmental organizations and their attorneys are closely monitoring the storm water sampling results that facilities upload to SMARTS under the New IGP. Permittees should do the same regarding their own facility sampling. Although exceedances of the NALs set forth in Table 2 of the IGP do not alone constitute violations of the permit, they do tend to attract unwanted attention from environmental groups who seek to use those results to support their citizen-suit allegations.

In addition to avoiding agency enforcement and citizen-suit litigation, permittees should closely monitor facility-sampling results to address any storm water issues that those results reflect. Such issues, if not resolved, may result in exceedances that could eventually subject the facility to the ratcheting—and increasingly burdensome and expensive—regulatory requirements that apply under the New IGP's Exceedance Response Action (ERA) framework. If a facility's storm water sampling results indicate NAL exceedances, notwithstanding the facility's existing storm water compliance measures, the permittee should investigate the results by performing in-depth analyses and considering what additional BMPs, if any, the permittee might implement to avoid such exceedances.

If the permittee decides to proceed with additional BMPs (e.g., filters, sweeping, disposing of or moving old equipment indoors), the permittee should update its SWPPP to reflect those response actions. By doing so, the permittee will enhance its own storm water management records while also demonstrating to would-be litigants that the permittee takes its compliance obligations seriously and maintains a proactive approach when addressing environmental issues.

Complete All Necessary Reporting and Be Aware of the Escalating Exceedance Response Action Process

In addition to preparing a SWPPP and submitting periodic sampling results, the New IGP requires per-

mittees to conduct an Annual Comprehensive Compliance Evaluation (Annual Evaluation) (id. at 59, § XV) and submit a certified Annual Report. (Id. at § XVI.) Through the Annual Evaluation, permittees must conduct a comprehensive review of a number of specific items. Among other things, this evaluation requires review of all sampling, visual observation, and inspection records conducted during the previous reporting year; inspection potential pollutant sources; inspection of drainage areas previously identified as having no exposure to industrial activities and materials; inspection of equipment needed to implement BMPs and inspection of the BMPs themselves. To the extent the facility identifies areas for improvement, it "shall revise the SWPPP, as appropriate, and implement the revisions within 90 days of the Annual evaluation." (Id. at § XV.)

Under the New IGP, facilities must certify and submit an Annual Report no later than July 15 following each reporting year. The first of these Annual Reports was due on July 15, 2016. In addition to responding to specific questions in SMARTS, permittees will discover whether their storm water monitoring data results in exceedances of the Numeric Action Levels set forth in the new permit. To the extent such exceedances occur, facilities may become subject to heightened scrutiny and additional requirements under the New IGP's Exceedance Response Action (ERA) process. Although NAL exceedances do not themselves constitute violations of the New IGP, failure to comply with the ERA process could lead to permit violations. (New IGP Fact Sheet at 60 ("It is not a violation of this General 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.") In the weeks and months ahead, environmental groups will likely monitor permittees' compliance with the ERA requirements to identify targets for citizen suit litigation.

Create a Culture of Compliance By Providing Effective Training and Stressing the Importance of Company Compliance Measures

Once a permittee obtains IGP coverage, and throughout the duration of the permit coverage, IGP permittees should stress the importance of storm water compliance and ensure that all affected personnel understand how they can contribute to the facility's

successful performance. Excellent periodic training for affected personnel is important; facility personnel should understand their storm water management responsibilities and know what activities are prohibited (e.g., washing vehicles outdoors).

But in many instances, good training is just the beginning. Facility managers should recognize and stress the importance of the facility's storm water management practices, establishing storm water compliance as a company mandate. Facilities' environmental health and safety (EH&S) managers should be equipped with the resources and authority necessary to implement BMPs and otherwise manage the facility's storm water program.

If You Receive a 60-Day Notice Letter, Take Immediate Steps to Determine Applicability and Ensure Your Facility Is in Compliance With the New IGP

An environmental organization cannot file a complaint under the CWA's citizen-suit provision before sending the discharger a notice of intent (NOI) to sue, with copies to the U.S. Environmental Protection Agency, the SWRCB, and other entities. The NOI must conform with a number of regulatory prescriptions. Among these, the NOI must describe the alleged violations that would be included in a com-

plaint. Once the 60-day notice period expires—but no sooner—the environmental organization may file suit in federal district court under the CWA.

Some NOIs do not proceed to litigation. To avoid litigation, dischargers that received NOIs should take the letters seriously. Upon receiving an NOI, dischargers should consider whether it makes sense to address the NOI allegations within the 60-day notice period, usually with the advice of experienced counsel and storm water consultants. To the extent a discharger cures the alleged violations within the 60-day period, it may prevent any “ongoing violations,” thereby rendering the allegations moot under Supreme Court precedent. A discharger that does nothing during the 60-day period might be fortunate to receive no further communications from the noticing party. It is more likely, however, that the discharger will receive service of a federal complaint once the 60 days have run.

Conclusion and Implications

It remains to be seen whether citizen suits will continue to proliferate under the new IGP. In the next several months we will see if the first round of annual reports leads to an uptick of citizen-suit filings. For more information see Latham & Watkins IGP Client Alert Detailed Analysis (White Paper).

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