

## California's New Industrial Storm Water General Permit and Public Agencies

**Sean Porter and Wayne Rosenbaum**

On April 1, 2014, after 17 years of work, the California Water Resources Control Board adopted a new General Industrial Storm Water Permit (IGP). The IGP is a statewide general National Pollutant Discharge Elimination System (NPDES) permit that regulates storm water discharges from industrial activity. The new IGP will take effect July 1, 2015.

Federal regulations require that NPDES permits be renewed every five years. Because of the time involved in developing the new IGP, in some ways, California is playing catch up with the requirements imposed by other states and the federal IGP. However, because California often leads the way with regards to environmental regulations, many of the requirements in this new IGP exceed anything introduced in other states. For example, California's new IGP imposes strict liability for exceedances of Water Quality Objectives, while many other states continue to take a "trial and error" approach to Best Management Practice (BMP) implementation.

The new IGP is intended to minimize applicants' permit costs, as well as streamline the compliance process. The new IGP imposes many of the existing requirements for landfills, transportation facilities, and wastewater treatment plants, while adding more stringent drainage area delineations and BMPs evaluations. It adds Numerical Action Levels (NALs), Exceedance Response Action Reporting (ERA), and ocean discharge and Total Maximum Daily Loads (TMDL) requirements, as well as strict liability for discharges that cause or contribute to an exceedance of a Water Quality Objective (WQO). WQOs are defined by the nine regional basin plans and the statewide Ocean Plan.

The scope of facilities regulated by the permit is broad. As an example, in San Diego County alone, the number of regulated facilities is projected to increase from approximately 750 to more than 14,000.

### **Worth Noting**

Under the new IGP Phase II storm water regulations, facilities owned and operated by a municipality with a population of less than 100,000 will need a permit for storm water discharges.



This is due to the previous exemption from the Phase I permitting requirements under section 1068 of the Intermodal Surface Transportation Efficiency Act of 1991 being eliminated. Section 1068 exempted municipal agencies serving populations of less than 100,000 from Phase I permit requirements other than sanitary landfills, power plants, and airports facilities. U.S. EPA's Phase II regulations eliminated the above exemption as of March 10, 2003. All facilities in Attachment A of the IGP that are operated by a small municipal agency are subject to NPDES storm water permitting requirements.

The biggest shock will come to the small MS4s such as school districts, prisons, state parks, water districts, lighting and landscaping districts, etc. By their very nature, most of these organizations will be ineligible for a No Exposure Certification (NEC). On the other hand they would be well served by forming regional Compliance Groups.

It's clear that if a public facility falls into any of the categories described in Attachment A, they are regulated under this permit.

For public agencies, the universe of regulated facilities from Attachment A of the GIP will include:

- o Landfills, land application sites, and open dumps
- o Recycling Facilities
- o Steam Electric Power Generating Facilities
- o Transportation Facilities
- o Sewage or Wastewater Treatment Works

### **Changes from the Current Permit**

- **Training Requirements:** A Qualified Industrial Storm Water Practitioner (QISP), with specific credentials, training, and state certification, is now required to complete IGP documents and implement a compliance program. While the IGP outlines training requirements, final training and testing details have not yet been established. QISP training will not be required until the exceedance response actions are triggered. QISP standing is not required to implement the program at Baseline Level (see below) or to prepare an NEC. However, most solid waste and recycling facilities are very likely to exceed a WQO. Moreover, demand for state-certified QISPs is likely to increase significantly in 2015 and 2016 due to the large number of facilities that will have to comply with the new IGP and the limited time available to develop and implement credentialing procedures. Thus, public agency-owned facilities should identify and engage certified QISPs as early as possible.

- **Monitoring Requirements:** Prior pre-storm visual observations and the quarterly authorized and unauthorized non-storm water discharge visual observations can now be combined into a single monthly visual observation. Monthly observations will then be included with actual sampling events required twice during each half of the year. Litmus paper will be allowed for screening of pH exceedances. Eligibility for a Sample Frequency Reduction will require data from four storm events.

- **Exceedance Response Actions (ERAs):** When it comes to water quality, there are two different response action levels, depending on the magnitude and frequency of the WQO exceedance. The result of the first exceedance of an instantaneous or annual average concentration is a Risk Level 1 ERA. Re-occurring exceedances trigger Level 2 ERAs. Risk Level 2 ERA requirements include two-steps– the discharger must develop an Action Plan and a Risk Level 2 ERA Technical Report. The Technical Report must demonstrate the Action Plan's viability , as well as the process for implementing the plan. Level 2

also requires structural controls, such as bio-swales, separators, or treatment systems. You should carefully consider how your reports are prepared and by whom, as they become public information and could be used as evidence in a Clean Water Act Citizen Suit.

- **Compliance Groups:** The IGP allows dischargers from similar industries to form Compliance Groups. Participants in Compliance Groups receive a 50 percent reduction in required sampling. A QISP must oversee a group's monitoring program. It will likely be in the best interest of solid waste and recycling facilities to consider forming Compliance Groups through their trade organizations as a means of ensuring affordable and consistent compliance.
- **Annual Reports:** Electronic reporting to the Storm Water Multiple Application and Report Tracking System (SMARTS) is mandatory. Remember, your compliance data will be available to the public, which drastically increases the compliance exposure of public agency industrial facilities. A facility's Storm Water Pollution Prevention Plan (SWPPP), monitoring results, completed forms, and lab data all have to be uploaded.
- **No Discharge/No Exposure:** The new IGP includes new "No-Discharge" eligibility requirements for dischargers eligible to file a Notice of Non-Applicability (NONA). Very few facilities qualify for this. If your facility does not discharge industrial storm water or is in a basin that does not discharge to a water of the U.S., or the facility does not discharge at all, you still qualify. You can file an NEC if you can demonstrate that your industrial processes are not exposed to rain, snow, snowmelt, or runoff. Only a very limited number of public facilities are likely to file an NEC and even if you do, you'll still have to provide SMARTS reporting and annual re-certifications.

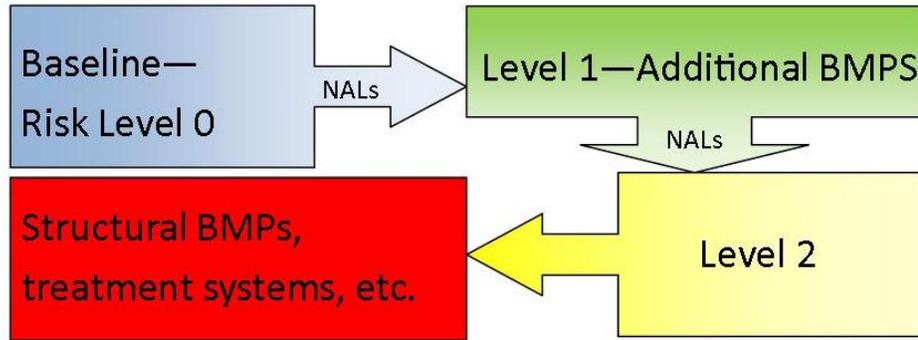
## Implications

Landfills, recycling, transportation and wastewater treatment facilities are essential public services with their own unique storm water signature. These facilities are distinct from virtually all other forms of industrial activity.

The IGP drastically changes the storm water management approach for these facilities. There is strict liability for exceedance of Water Quality Objectives (WQOs), as well as Numerical Action Levels (NALs) for discharges. In the new IGP, NAL compliance is tied to a three-tiered Risk Level system. As the risk level increases due to re-occurring exceedances, additional elements are required in SWPPPs:

- Enhanced observations and inspections
- Formal Monitoring Implementation Plans
- Additional wet weather sampling
- Obtaining daily average or qualified combined samples
- NAL exceedances and corrective actions
- Implementing treatment control Best Management Practices (BMPs)

Risk Levels will be assigned based on EPA benchmarks. For example, a site at Baseline Risk Level 0, with Total Suspended Solids (TSS) in runoff data from two consecutive storm



events that exceed the benchmark values (100 mg/L) on the annual average, or exceed the instantaneous maximum (400 mg/L), or the exceedance of two benchmarks in the same storm event, will be elevated to Risk Level 1. Also be aware that even if the facility does not exceed a benchmark, it still may be in violation if the discharged storm water causes or contributes to the exceedance of a WQO.

When a site reaches Risk Level 2, the discharger must address the problem with structural treatment BMPs. Although there are no mandatory minimum penalties for the exceedance of NALs, there is a mandatory minimum penalty for failure to prepare and implement a corrective action report.

The one-way system of escalating Risk Levels, combined with strict liability for exceeding WQOs, dramatically change how storm water is managed at public agency facilities.

### **An Invitation for Lawsuits**

The IGP assigns strict liability for discharges of storm water that cause or contribute to the exceedances of a WQO. The IGP also requires permit holders to post all documentation and data concerning contaminants in their discharges to the SMARTS website.

That means that there's a very short step from reporting elevated levels of contaminants in your discharged storm water to an allegation by a Citizen Suit plaintiff that your discharge is causing or contributing to the exceedance of a WQO, particularly when the receiving water has been identified as being impaired under Section 303(d) of the Clean Water Act. This makes Citizen Suit enforcement much easier because the data is readily available to the general public, and due to being posted by the discharger, it is very difficult to refute. Moreover, failure to report the data is a violation of the Clean Water Act, enforceable by Citizen Suit. If, for example, you fail to submit ERA reports or upload your SWPPP in a timely manner, you could be sued for violations of the Clean Water Act. Other examples include the failure to report unauthorized storm water discharges, failure to monitor and report pollutants, and failure to submit timely Annual Reports.

For more information, contact:

Sean Porter, CPSWQ, QSD/P, National Partner for Storm Water, [sporter@scsengineers.com](mailto:sporter@scsengineers.com)

S. Wayne Rosenbaum, Esq., Partner Opper & Varco, LLP, [swr@envirolawer.com](mailto:swr@envirolawer.com)

Or contact your local SCS Engineers office.

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