



## Environmental ADVISORY ■

**AUGUST 4, 2014**

### Is Your Facility Ready to Comply with the New 2014 California Industrial NPDES General Permit?

California's new Industrial Storm Water Permit (2014 Permit) applies to many new facilities and requires new obligations for all existing facilities covered under the prior 1997 permit.<sup>1</sup> Compliance is due by July 1, 2015, but facilities need to start preparing now to determine if they comply or whether modifications are necessary to meet the new permit's requirements.

In particular, new facilities need to quickly assess whether they can comply with the new rules. If they cannot, they should consider obtaining coverage under the 1997 permit and then transition into the new permit as an existing facility.

#### **Who Is Covered by the New 2014 Permit?**

The types of facilities with new permit obligations are listed by SIC code in Appendix A of the 2014 Permit. (See 2014 Permit and Appendices [here](#).)

The term "industrial" is broader than the colloquial understanding and includes many landowners and general businesses. Generally, the 2014 Permit regulates any facility that engages in "industrial" activity, even if that facility does not expose storm water to industrial activity. Covered facilities include, but are not limited to, any facilities regulated under the Clean Water Act, manufacturing facilities, oil and gas facilities, mining facilities, landfills, recycling facilities, electric generator facilities, transportation or vehicle maintenance facilities and sewage or wastewater treatment facilities.

#### **What New Facilities Are Covered Under the 2014 Permit?**

The new 2014 Permit brings under its purview "light industry" uses that were previously exempt under the 1997 permit. The increase in number of facilities covered is enormous and has not been calculated due to the breadth of the new SIC code classifications. Examples include warehouse and storage facilities, breweries, wineries, courier services and certain farms.

<sup>1</sup> The National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges Associated with Industrial Activities, Order NPDES No. CAS000001 (April 1, 2014) ("2014 Permit").

Existing dischargers listed as exempt from the 1997 permit as Category 10 (light industry) and who continue to conduct no industrial activities and use no covered hazardous materials have until October 1, 2015, to file a No Exposure Certificate (NEC) with the Water Boards and must resubmit NECs on an annual basis. Otherwise, a Notice of Intent (NOI) and ongoing regulation under the 2014 Permit will now be required and submitted by June 1, 2015.

### **What Are the Applicable Deadlines and Key Steps to Take Now?**

Industrial facilities covered by the 2014 Permit should begin planning and preparation now. Existing facilities will need to review and revise their Storm Water Pollution Prevention Plans (SWPPP). Based on that review, they also may learn that they need to implement new Best Management Practices (BMPs). Given the voluminous amount of new facilities covered under the new 2014 Permit, it is expected that demand for qualified consultants will be fierce. Only Qualified Industrial Storm Water Practitioners (QISP) may prepare and submit certain data and information to qualify for an NOI.

Facilities must submit either an NOI by July 1, 2015, or an NEC by October 1, 2015. An NOI is required for facilities that are subject to the 2014 Permit due to discharges of storm water to one or more "Waters of the U.S." An NEC may be submitted if the facility can establish that storm water is not exposed to industrial activities or materials, which exempts a facility from regulation under the 2014 Permit but does require annual recertification of NEC status.

### **What Are the New Obligations for Covered Facilities?**

#### ***Submission of Documents and Reports to the Water Boards***

All documents and reports submitted to the Water Boards under the 2014 Permit are now to be submitted electronically through the State Board's Storm Water Multiple Application and Report Tracking System (SMARTS) website.

#### ***New BMP Requirements***

The new 2014 Permit has more prescriptive BMP requirements than the 1997 permit. Facilities will no longer be able to merely select from a list of BMPs but will be responsible for demonstrating that they meet the technology standards or Best Available Technology Economically Achievable/Best Conventional Pollutant Control Technology (BAT/BCT) specifying the pollutants present at the facility and showing how a BMP controls each pollutant.

The 2014 Permit mandates the implementation "to the extent feasible" of both Minimum BMPs and Advanced BMPs. Minimum BMPs are generally non-structural and include: good housekeeping requirements, preventative maintenance of equipment and systems that may release pollutants, the development of spill and leak prevention and response procedures, materials handling and waste management procedures, erosion and sediment controls, employee training and quality assurance and recordkeeping. Advanced BMPs are structural BMPs and include exposure minimization, storm water containment, discharge reduction and treatment control BMPs.

### ***New Numeric Action Level and Response Action Requirements***

The 2014 Permit also implements new Numeric Action Level (NAL) standards, which in turn can trigger Exceedance Response Actions (ERA). There are two types of NAL exceedances: annual and instantaneous. An annual exceedance occurs when the average of all sampling results within a reporting year for a single listed parameter (except pH) exceeds the applicable annual NAL. Instantaneous maximum NALs target hot spots or episodic discharges of pollutants. An instantaneous maximum NAL exceedance occurs when two or more analytical results from samples taken for any contaminant within a reporting year exceed the applicable instantaneous maximum NAL value. The 2014 Permit requires dischargers to develop and implement ERAs when an annual NAL or instantaneous maximum NAL exceedance occurs during a reporting year. Such ERAs require a discharger to revise existing BMPs or add additional BMPs and to submit various reports to the Water Boards regarding the response actions taken and their effectiveness to curb the exceedances.

### ***New Monitoring Requirements***

Regarding monitoring, the new permit expands the definition of a Qualifying Storm Event (QSE) for which sampling is required. QSE is now defined as “a precipitation event that: a) produces a discharge for at least one drainage area and b) is preceded by 48 hours with no discharge from any drainage area.” Under the 1997 permit, the subsection b requirement was 72 hours. The 2014 Permit also increases the frequency of required monitoring, in addition to a number of other changes to sampling procedures and protocols.

### ***New Storm Water Pollution Prevention Plan (SWPPP) Requirements***

A SWPPP is a site-specific report that demonstrates a facility’s compliance with the 2014 Permit. A revised SWPPP must be submitted to the Water Boards electronically via the SMARTS website by July 1, 2015 or, for new dischargers, upon commencement of industrial activity. A SWPPP is required to be resubmitted every time a “significant” change is made to a facility and otherwise at least every three months in a reporting year.

### ***Impaired Water Bodies and Total Maximum Daily Loads (TMDLs)***

Under the new permit, facilities that discharge into waters listed as impaired on the state 303(d) list and/or for which TMDLs have been adopted which have any potential to discharge the same pollutant must conduct additional sampling and testing. California has adopted a number of new TMDLs in the past 10 years, and regulated facilities should be aware of them before submitting compliance documents to the Water Boards. New dischargers must establish that their facility will not cause or contribute to an exceedance of the relevant pollutant in the receiving water body.

### ***Are There Any other Ways to Avoid Regulation?***

Yes, facilities subject to the 2014 Permit may nonetheless avoid regulation through the submittal of a valid certified Notice of Non-Applicability (NONA). A NONA must be prepared and signed by a California-licensed professional engineer and establish one of two circumstances: (1) the facility is engineered and constructed to contain the maximum historic precipitation event so that there is no discharge of industrial storm water to waters of the United States and no discharge to groundwater that has a direct hydrologic connection to waters of the United States; or (2) the facility is in a location not hydrologically connected to waters of the United States.

## What Are the Risks of Non-Compliance?

The Water Boards have a number of enforcement options they can exercise against a facility that does not comply with the 2014 Permit. These include civil liability imposed through a court action that can add up to a maximum of \$25,000 per day of violation or administrative civil liability of a maximum of \$10,000 per day of violation. However, the far greater risk is the possibility of “citizen suits” under the Clean Water Act, which allows a third-party individual or an environmental advocacy group to file a civil lawsuit seeking enforcement, penalties and legal expenses. This is a very active area of litigation.

Due to the numerous complex legal issues involved in many of the technical determinations needed to achieve compliance, it is recommended that the QISP be retained by a facility’s attorney and be evaluated under attorney-client privilege.

If you have any questions about the 2014 Permit, the NPDES program or the Clean Water Act in general, please feel free to contact [Maureen Gorsen](#) or [Andrew Brady](#) or any of the attorneys in the [Environmental and Land Use Practice Group](#) listed below.

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