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EPA-HQ-OW-2016-0145
NPDES Application and Updates Rule

The Southern California Alliance of Publicly Owned Treatment Works (SCAP) appreciates the opportunity to submit comments to the United States Environmental Protection Agency (EPA) in accordance with the May 18, 2016, Federal Register Notice (Notice) requesting stakeholder input regarding proposed changes to the National Pollution Discharge Elimination System (NPDES) regulations. SCAP represents 80 public agencies that provide essential water supply and wastewater treatment to nearly 19 million people in Los Angeles, Orange, San Diego, Santa Barbara, Riverside, San Bernardino and Ventura counties. SCAP's wastewater members provide environmentally sound, cost-effective management of more than two billion gallons of wastewater each day and, in the process, convert wastes into resources such as recycled water and biogas. SCAP provides public wastewater agencies with oversight on regulatory, legislative and legal matters. Changes to the NPDES regulations directly impact our member agencies.

SCAP supports EPA's goal to align the NPDES regulations with the Clean Water Act (CWA) statute; eliminate regulatory and application form inconsistencies; improve permit documentation, transparency, and oversight; clarify existing regulations; and remove outdated provisions. Specifically, SCAP supports proposed revisions allowing for public notice of NPDES permits to be posted on the permitting authority's public website, as well as changes to improve the level of detail and information included in fact sheets to facilitate more transparent and effective documentation of permitting decisions and determinations concerning NPDES permits.

Although EPA has indicated that the proposed changes are primarily clarifications, and therefore should be non-controversial, SCAP working in conjunction with the California Association of Sanitation Agencies (CASA) has identified some substantive changes that represent significant deviations from existing policy and are of great concern to our members. Two changes that we strongly recommend against are: (1) the proposed revisions to §122.45, regarding the calculation of NPDES effluent limitations based on other-than-design flow for publicly-owned treatment



works (POTWs); and (2) the proposed revisions to §123.44, regarding EPA review of and objections to State permits whereby an administratively continued State permit could be designated as “proposed” after either a two-year or five-year period following the expiration of the initial five-year permit term, at which time the permit would be evaluated and decided upon by EPA. SCAP believes that these two proposed changes would be detrimental to the NPDES program and would have adverse impacts on California municipalities and POTWs, and therefore should not be implemented by EPA.

The following discussion and recommendations on these topics as well as general comments on the proposed revisions to the NPDES regulations were previously submitted by CASA but are included here to document SCAP’s similar concerns and support for modified language. Specific typographical error changes are also included as Attachment 1.

§122.45 - Calculating NPDES permit conditions

Design Flow for POTWs

The proposed NPDES Application and Updates Rule includes revisions to §122.45(b) that will require permitting authorities to calculate effluent limits for POTWs using design flow only where the limits are based on technology standards. Existing regulation states that POTW permit effluent limitations, standards, and prohibitions shall be calculated based on design flow. This is clearly a significant change to existing regulations that will allow permitting authorities to use flow other than design flow (e.g. current flow, estimated flow, etc.) as the basis for calculating effluent limitations for POTWs.

Existing regulations stipulate the use of design flow in calculation of effluent limitations for POTWs for a number of reasons. POTWs provide an essential service to public health, are designed and constructed through careful planning processes to meet future growth, and represent a major long-term investment of public funds. Unlike privately owned industrial dischargers who can more carefully control production levels in their facilities, discharge flow rates from most POTWs are affected by population growth, water usage and conservation rates, service area growth, and climatic conditions and, as such, are subject to changes beyond their control. The duration and severity of climatic variations (such as the recent drought in California) have been and will continue to be difficult to predict, and wastewater treatment is always subject to significant variability.

The negative impact of the change to non-design flows as the basis for calculating mass-based effluent limitations would be particularly significant in light of the proposed changes to the anti-backsliding provisions, which would prevent future changes in effluent limitations even as flows increase, unless the change would result in attainment of the water quality standard when a total maximum daily load has been established. POTWs would accrue violations due to flow



increases beyond their control, would be unable to fully utilize the design capacity of their facilities, thereby stranding assets financed by public funding, and would need to build additional treatment facilities to compensate for loss of operational capacity.

SCAP strongly recommends against this change and requests that the proposed revisions to §122.45(b) be removed from the proposed rule in their entirety.

§ 123.44 - EPA review of and objections to State permits

The proposed revisions to §123.44 would allow EPA to deem any State-issued permit that is not reissued within a certain period after expiration (either 2 years or 5 years) to be a “proposed” or a “draft” permit, which EPA could then formally object to for not containing appropriate permit limits and conditions. If a State does not address those concerns (such as the need for new limits based on new water quality standards that have been adopted since the permit was first issued) by issuing a new permit containing the new conditions, EPA could take over the permit and issue the permit on its own, as an EPA permit.

EPA and the States have made significant progress in recent years to reduce permit backlogs, and EPA has not provided data to indicate that outcomes differ when the EPA or the State agency is the permitting agency. Therefore, it is not clear why EPA needs a new regulatory mechanism to alter the issuance of permits. In addition, the proposed revision does not address the status and processing of pending applications for existing NPDES dischargers that have already submitted data and documentation for permit renewal under the terms of their previous permit. The compliance status of these pending-applicant dischargers in the interim would also be unclear under the proposed revised scheme.

Therefore, SCAP strongly recommends against this change and requests that the proposed revisions to §123.44 be removed from the proposed rule.

Definition of WET

EPA is proposing to change the definition of Whole Effluent Toxicity or “WET” to refer to both acute (lethal) and chronic (lethal and sublethal) WET test endpoints. EPA’s explanation is that this is consistent with EPA’s *interpretation* of its existing WET regulations. 81 F.R. 31347. However, this is a substantial modification to this definition that may have regulatory implications for permittees. In addition, the preamble states that this proposed clarification would be consistent with WET program *guidance* documents. These guidance documents have not been through a formal notice and comment period and would not require regulatory changes to ensure consistency. As also stated in the preamble, some states do not regulate both acute and chronic toxicity, and this new definition might provide ammunition to require such states to expand their water quality standards to include both and that NPDES permits must also include



both. Because the current state of WET regulation is in a state of flux and controversy, SCAP would prefer that this modification be postponed until a more global regulatory discussion of the appropriateness of WET permit limits can be undertaken. In addition, approved tests should be limited to those set forth in Part 136.

§122.2 Definitions

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Whole effluent toxicity (WET) means the aggregate toxic effect of an effluent measured directly by a toxicity test prescribed by approved Part 136 methods ~~where the test results are based on acute (lethal) or chronic (lethal and sublethal) endpoints.~~

§ 122.44 - Establishing limitations, standards, and other permit conditions

Antidegradation Policies

According to 40 CFR §130.3, “A water quality standard (WQS) defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses.” Furthermore, water quality standards are defined in CWA § 303(c)(2)(A) as “the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses.” Based on these WQS definitions, antidegradation policies represent implementation procedures to attain or maintain WQS and are not components of WQS. SCAP therefore recommends that the preamble on page 31353 not characterize antidegradation policies as components of state water quality standards:

“Water quality standards consist principally of ~~three~~**two** elements: Designated uses, and water quality criteria ~~and antidegradation policies.~~”

Antidegradation Applicability Clarification

As currently written, the proposed revisions in §122.44(d)(1) concerning antidegradation policy can be misconstrued as being applicable to all waterbodies, without regard to applicability, possibility for exceptions, or other considerations as established in §131.12. SCAP strongly recommends that the proposed revisions be revised as indicated below:

“§122.44 Establishing limitations, standards, and other permit conditions (applicable to State NPDES programs, see §123.25).

* * * * *

(d) * * *



(1) Achieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality, and where applicable, ensure consistency with the State antidegradation policy established under §131.12.”

Dilution Allowance Determinations

The NPDES Application and Updates Rule under §122.44 (d)(1)(ii) and §122.44 (d)(1)(vii)(C) proposes requirements for information to be considered and procedures to be followed by permitting staff in making determinations concerning dilution and mixing zone requirements for NPDES discharges. The proposal also includes requirements for data and analyses quantifying and accounting for the presence of pollutants and references requirements for fact sheet documentation of such supporting information at §124.56(a). However, the proposed text requires that only allowances comply with applicable dilution and mixing zone requirements. To facilitate transparency and oversight, SCAP strongly recommends that all determinations of dilution and mixing zones, including allowances as well as denials, comply with the same requirements and that such determinations be clearly documented in fact sheets. To implement this more even-handed and transparent approach, SCAP recommends that §122.44(d)(1)(ii) be revised as indicated below:

“§122.44 Establishing limitations, standards, and other permit conditions (applicable to State NPDES programs, see §123.25).

* * * * *

(ii) When determining whether a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative or numeric criteria within a State water quality standard, the permitting authority shall use procedures which that account for existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, the sensitivity of the species to toxicity testing (when evaluating whole effluent toxicity), the use of relevant qualitative or quantitative data, analyses, or other information on pollutants or pollutant parameters to assess the need for a water quality-based effluent limitation, and where appropriate, the dilution of the effluent in the receiving water. A dilution allowance determination under this paragraph must comply with consider applicable dilution and mixing zone requirements and low flows established in State water quality standards and must be supported by data or analyses that account for the presence of each assessed pollutant or pollutant parameter in the receiving water (see fact sheet requirements at §124.56(a)).

* * * * *

(vii) * * *

(C) Any dilution determination, whether resulting in an allowance or denial of dilution credit, complies with applicable dilution and mixing zone requirements and low



flows established in State water quality standards and must be supported by data or analyses quantifying or accounting for the presence of each limited pollutant or pollutant parameter in the receiving water (see fact sheet requirements at §124.56(a)).”

BMP Guidance

The Note to Paragraph (k)(4) provides references to technical information on BMPs and the elements of BMPs. To ensure that the most current BMP guidance is provided, SCAP recommends that the listed BMP guidance documents be replaced by a general reference to the website where updated BMP information is contained. SCAP recommends that §122.44(k)(4) be revised as indicated below:

“§122.44 Establishing limitations, standards, and other permit conditions (applicable to State NPDES programs, see § 123.25).

* * * * *

(k) * * *

(4) * * *

Note to Paragraph (k)(4): Additional technical information on BMPs and the elements of BMPs ~~is contained in the following documents: Guidance Manual for Developing Best Management Practices (BMPs), October 1993, EPA No. 833/B-93-004, NTIS No. PB 94-78324, ERIC No. W498); Storm Water Management for Construction Activities: Developing Pollution Prevention Plans and Best Management Practices, September 1992, EPA No. 832/R-92-005, NTIS No. PB 92-235951, ERIC No. N482); Storm Water Management for Construction Activities, Developing Pollution Prevention Plans and Best Management Practices: Summary Guidance, EPA No. 833/R-92-001, NTIS No. PB 93-223550; ERIC No. W139; Storm Water Management for Industrial Activities, Developing Pollution Prevention Plans and Best Management Practices, September 1992;~~

~~EPA 832/R-92-006, NTIS No. PB 92-235969, ERIC No. N477; Storm Water Management for Industrial Activities, Developing Pollution Prevention Plans and Best Management Practices: Summary Guidance, EPA 833/R-92-002, NTIS No. PB 94-133782; ERIC No. W492. EPA guidance documents~~ can be obtained through the National Service Center for Environmental Publications (NSCEP) at <http://www.epa.gov/nscep>. In addition, States may have BMP guidance documents.”

Reissued Permits

First, the revisions to §122.44(l) of the proposed NPDES Application and Updates Rule are sequenced to begin with a paragraph numbered (l)(2)(i), thus indicating that EPA may intend to



maintain the existing paragraph (1)(1). However, paragraph (1)(1) was not explicitly included in the documentation published in the Federal Register, nor was it included in the most recently amended version of §402(o) of the CWA, indicating that there was no congressional approval for the language of paragraph (1)(1). To ensure consistency with the CWA, paragraph (1)(1) should be removed and the remaining paragraphs should be renumbered accordingly.

Second, the exceptions currently listed under (1)(2)(iii) can be applied to waters whether or not the applicable water quality standard has been attained. However, as currently written, the applicability of these exceptions is unclear, and the proposed revisions may prevent changes to effluent limits based on TMDLs unless the changes would result in attainment of the water quality standard. This would be a significant deviation from existing regulations because there would be no allowance for exceptions, such as technical mistakes or alterations to facilities, that would justify a less stringent limit. SCAP requests that additional clarity be provided to indicate that the exceptions currently listed under (1)(2)(iii) are potentially applicable to waters meeting the classification of either (3)(i) or (3)(ii), as currently numbered in the proposed revisions.

To provide clarity and to better track the language and structure of the corresponding section of the CWA, SCAP recommends that this section in the proposed rule be reorganized as follows:

“§ 122.44 (l) *Reissued Permits* * * *

(2) 1) General Prohibition.

(i) In the case of effluent limitations established on the basis of section 402(a)(1)(B) of the CWA, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 304(b) of the CWA subsequent to the original issuance of such permit, to contain effluent limitations ~~which~~ that are less stringent than the comparable effluent limitations in the previous permit.

(ii) In the case of effluent limitations established on the basis of section 301(b)(1)(C) or section 303(d) or (e) of the CWA, a permit may not be renewed, reissued, or modified to contain effluent limitations that are less stringent than the comparable effluent limitations in the previous permit except in compliance with paragraph (l)(2) of this section.

(iii) 2) Exceptions. Limitations on Revisions of Certain Effluent Limitations.

~~(3)~~ (i) *Standard Not Attained.* For waters identified under section 303(d)(1)(A) of the ~~Act~~ CWA where the applicable water quality standard has not yet been attained, any effluent limitation based on a total maximum daily load or other waste load allocation established under ~~this~~ section 303(d) may be revised only if: (A) The cumulative effect of all such revised effluent limitations based on such total maximum daily load or waste load allocation will assure the attainment of such water quality standard, or (B) the designated



use **which that** is not being attained is removed in accordance with regulations established under **this** section 303 of the CWA.

(ii) *Standard Attained.* For waters identified under section 303(d)(1)(A) of the CWA where the quality of such waters equals or exceeds levels necessary to protect the designated use for such waters or otherwise required by applicable water quality standards, aAny effluent limitation based on a total maximum daily load or other waste load allocation established under **this** section 303(d), or any water quality standard established under **this** section 303, or any other permitting standard may be revised only if such revision is subject to and consistent with the antidegradation **requirements policy** established under this section.

(3) Exceptions.

(i) A permit with respect to which paragraph (l)(21) of this section applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant, if:

(A) Material and substantial alterations or additions to the permitted facility occurred after permit issuance **which that** justify the application of a less stringent effluent limitation;

(B)(1) Information is available **which that** was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and **which that** would have justified the application of a less stringent effluent limitation at the time of permit issuance; or

(2) The Administrator determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under section 402(a)(1)(~~b~~**B**) of the CWA;

(C) A less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;

(D) The permittee has received a permit modification under CWA section 301(c), 301(g), 301(h), 301(i), 301(k), 301(n), or 316(a); or

(E) The permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit may reflect the level of



pollutant control actually achieved (but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification).

(ii) Note to paragraph (1)(2). Paragraph ~~(2)(3)~~ ~~(ii)~~ (i)(B)(1) of this section shall not apply to any revised waste load allocations or any alternative grounds for translating water quality standards into effluent limitations, except where the cumulative effect of such revised allocations results in a decrease in the amount of pollutants discharged into the concerned waters, and such revised allocations are not the result of a discharger eliminating or substantially reducing its discharge of pollutants due to complying with the requirements of ~~this chapter~~ the CWA or for reasons otherwise unrelated to water quality.

~~(iv)~~ 4 Limitations.

(i) In no event may a permit with respect to which paragraph ~~(1)(2)~~ (1) of this section applies be renewed, reissued, or modified to contain an effluent limitation ~~which that~~ is less stringent than required by effluent guidelines in effect at the time the permit is renewed, reissued, or modified.

(ii) In no event may ~~such~~ a permit ~~to discharge into waters with respect to which paragraph (1)(1) of this section applies~~ be renewed, issued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under CWA section 303 applicable to such waters.”

§124.10 - Public notice of permit actions and public comment period

Public Notice Requirements

SCAP supports the proposed changes to the public notice posting requirements as described under §124.10 to allow for public notices of major NPDES permits to be posted on the permitting authority’s public website, in lieu of posting in a daily or weekly newspaper. SCAP recommends that all notices related to NPDES permits (major and minor permits) and hearings be allowed to meet public notification requirements by online postings.

§124.56 - Fact Sheets

Fact Sheet Requirements

SCAP supports the proposed changes to the fact sheet requirements as described under §124.56, and we particularly support changes to include discussions of a permit’s monitoring and reporting requirements and assurances that the prescribed analytical methods meet the requirements of §122.44(i). SCAP also supports the proposed goals to improve the level of detail



and information included in fact sheets to facilitate more efficient, transparent, and effective documentation of permitting decisions and determinations concerning NPDES permits. However, as discussed under the comment on dilution allowance determinations, SCAP recommends that §124.56(a)(1)(iv)(C) be revised as follows:

“§124.56 Fact sheets.

* * * * *

(C) For any proposed water quality based effluent limitation or condition required by § 122.44(d), any dilution or mixing allowance determination, including a discussion of how ambient pollutant concentrations were considered in the water quality analysis;”

Technology Based Limits

Instead of removing and reserving section 125.3(a)(1)(ii) indefinitely, the section should merely reflect the current technology-based requirement for POTWs. As such, SCAP recommends that this section should be revised as follows:

§125.3 Technology-based treatment requirements in permits.

(a) *General.* Technology-based treatment requirements under section 301(b) of the Act represent the minimum level of control that must be imposed in a permit issued under section 402 of the Act. (See §§122.41, 122.42 and 122.44 for a discussion of additional or more stringent effluent limitations and conditions.) Permits shall contain the following technology-based treatment requirements in accordance with the following statutory deadlines;

- (1) For POTWs, effluent limitations based upon: ~~(i)~~ secondary treatment from date of permit issuance; and
- ~~(ii) The best practicable waste treatment technology not later than July 1, 1983; and~~

Thank you for the opportunity to provide input on the on the proposed NPDES Application and Updates Rule. If you have any additional questions or would like additional information on the issues identified above, please do not hesitate to contact me at jpastore@scap1.org or (760) 479-4121.

Sincerely,

John Pastore, Executive Director



ATTACHMENT 1: Errata with Corresponding Page Numbers

1. Page 31371, section (1)(2)(ii): "...except in compliance with paragraph (1)(3) of this section." should be changed to "...except in compliance with paragraph (1)(2)(iii) of this section."
2. Page 31371, section (1)(3)(i): "*Standard Not Attained*. For waters identified under section 303(1)(A) of the Act..." should be changed to "*Standard Not Attained*. For waters identified under section 303(d)(1)(A) of the Act..."