

LITIGATION LOGIC

Interview with Attorney Melissa Thorne

You may have heard of the nightmare of Clean Water Act lawsuits of facilities under the Industrial General Permit. In fact, these third-party litigations are something that leave many business owners awake at night worrying if their facility will be targeted next. This month, **The Rain Events**, interviewed Melissa Thorne of Downey Brand about what these third-party litigations look like, what to do when 60-day notice is given, and any preventative actions that can be established before trouble strikes.

RE: *What is a little bit of the backstory of these third-party litigation incidents?*

MT: Citizen suits in California started in the late 1990s with a plaintiff's lawyer named Alan Beaven, who represented Deltakeeper, and mostly sued over wastewater treatment plant issues. After Alan was killed on one of the planes on 9/11/2001, the suits took a hiatus only to start again in the mid-2000s with Sanitary Sewer Overflow (SSO) cases. Later that decade, industrial stormwater cases began against auto dismantlers, which were an easy target.

RE: *Is this a new problem/trend within the storm water industry?*

MT: Not a new thing, we have seen these suits for last 10+ years, we just have more plaintiff's lawyers now trying to make money through settlements.

RE: *When you receive a 60-day notice, what steps should be taken?*

MT: Check the WDID number and allegations contained in the letter to see that it actually applies to your facility. Seek help from a QISP or lawyer to determine options for responding.

RE: *Why is time of the essence?*

MT: As the name 60-day notice implies, a recipient of a notice letter has just 60 days to come into compliance. If compliance is not possible, then trying to settle the matter quickly is the best option, although painful and irritating.

RE: *How do the environmental groups obtain data about facilities?*

MT: All data submitted to the State Water Board through

the SMARTS database as well as ERA levels are visible to the public, making it easier for a potential plaintiff to find targets for the next case.

RE: *Are there things that can be done to fight off litigation after receiving the 60-day notice?*

MT: Compliance is the best and only real defense unless you can get out of needing a permit (by getting a Notice of Termination (NOT), Notice of Non-Applicability (NONA), or No Exposure Certification (NEC)); however, this is not as easy as it sounds. The new permit amendments that come

into effect in July 2020 provide pathways to being deemed in full compliance so permittees would be well served to review those requirements and determine the feasibility of meeting those new requirements.

RE: *What are things you can do to avoid or prevent unwanted litigation?*

MT: Staying below the NALs certainly helps to lower the chance of becoming a target, but we have had letters sent to people that have never left Baseline status.

RE: *What gives these environmental groups the ability to sue a facility?*

MT: [Section 505 of the federal Clean Water Act \(33 U.S.C section 1365\)](#) authorizes citizens to sue in instances where the federal and state government has not taken enforcement action and extracted a penalty for the violations.

RE: *How do events typically play out after receiving a 60-day notice?*

"The cost of litigating a case can be between \$500,000 and \$1 million, so settlement is almost always the best option."

MT: Most cases settle, but the terms depend on the issues alleged and the citizen suit threatening suit. Many settlements are pretty easy and less painful, but others can be very costly, particularly if a case gets filed in federal court as the prevailing party's attorney and expert fees climb quickly once a lawsuit begins. Ignoring a Notice Letter is never a good idea as this normally results in a complaint being filed, a default judgment being entered, and a potential for millions of dollars in penalties being assessed by a federal court.

RE: *What percentage of the time does it settle out of court as opposed to going to court?*

MT: I would say 80% of the time cases settle without a lawsuit being filed. Another 15% settles after a complaint is filed, but before too much litigation ensues. The final 5% litigate, but rarely do cases result in a final judgment and even less get appealed. The cost of litigating a case can be between \$500,000 and \$1 million, so settlement is almost always the best option.

RE: *What are the typical settlement terms?*

MT: Normally, there are requirements for new BMPs and an updated SWPPP. Payment of attorneys' fees, oversight costs, and mitigation costs (environmental project in lieu of penalties) are routine and can range from a few thousand dollars to over a hundred thousand depending on the allegations, length of alleged non-compliance, location and size of company.

RE: *What relief, if any, is provided by the Industrial General Permit?*

MT: There are some arguments that can be made based on the language of the permit, but these arguments have not been tested in court. As previously stated, there are new provisions that will be effective next year that may provide affirmative defenses to a suit after compliance with those new provisions is demonstrated.

RE: *Of the different Level 2 ERA demonstrations, are any of them proving to be more susceptible to third-party litigation?*

MT: We have seen cases threatened against companies in each level (Baseline, ERA Level 1, or ERA Level 2), so that does not necessarily mean a notice letter is more likely. However, companies in Level 2 have data exceeding NALs, so citizens tend to argue that this discharge is more problematic and must be managed more efficiently.

RE: *Do NONAs or NECs experience third-party litigation?*

MT: Less often, but we have still seen threats made against companies where third parties question the underlying premises of NECs or NONAs, so companies with these status levels should make sure they have good backup information supporting their status.

RE: *What percentage of the time do you get a favorable settlement or decision for the discharger?*

MT: That depends on how you define "favorable." Most companies feel that a settlement requiring feasible BMPs and costs that do not break their budget to be better than the cost and business interference caused by litigation, including paper discovery, depositions, and the accompanying staff time needed to respond. Although no one wants to be enforced against, in many cases we see that companies end up with a better program after the wakeup call of threatened litigation or penalties from the Water Boards.

Hopefully, this information will help take some of the anxiety out of third party lawsuits. The most important "take away" is to be proactive about your pollution prevention program. **The Rain Events** would like to thank Melissa Thorne and her company Downey Brand for this informative interview.

"To Do List" for August

- ☁ Perform the August monthly inspection
- ☁ Start getting ready for the rain season. Yes, we know it's early, but now's the time to check your sample kit and make sure you have everything you need!
- ☁ Schedule this year's pre-storm season training with Aaron Ortiz at aortiz@wgr-sw.com



STORM WATER AWARENESS WEEK

Stormin' Over California

Storm Water Awareness Week is coming next month! Be sure and check out this year's promo video!



Save The Date:
Storm Water Awareness Week
September 23-27, 2019

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Please contact us if you have any questions ...

The Rain Events

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Technical Questions about Environmental Compliance?

Call ...

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Public Training Workshops Industrial Stormwater General Permit 2018 Amendments

Please join State Water Resources Control Board staff at one of the following public trainings to learn about the following adopted Industrial Stormwater General Permit changes going into effect July 1, 2020.

Staff will focus on the following new implementation requirement topics at the training workshops:

- Federally-required use of sufficiently sensitive analytical methods at industrial facilities and for laboratory analysis of samples.
- Watershed or Water Body-specific total maximum daily load identification and compliance requirements for industrial stormwater sources.
- Optional compliance pathways for the capture and use of industrial stormwater.

Date	Location	Details
Monday, August 19, 2019	California EPA Building 1001 I Street, Byron Sher Auditorium Sacramento, CA 95814 Directions and visitor information	9:00am-12:00pm Webcast link will be recorded 250 available seats (first come first serve)
Wednesday, August 28, 2019	Los Angeles Sanitation and Environment Environmental Learning Center at Hyperion Auditorium 12000 Vista Del Mar Playa Del Rey, CA 90293 Directions and visitor information	9:00am-12:00pm 98 available seats (first come first serve)
Wednesday, September 18, 2019	Santa Ana Regional Water Quality Control Board 3737 Main Street, Suite 500 Highgrove Room Riverside, CA 92501 Directions and visitor information	9:00am-12:00pm 75 available seats (first come first serve)

Additional Resources

Fact Sheet on the Industrial Stormwater General Permit changes:

www.waterboards.ca.gov/water_issues/programs/stormwater/docs/industrial/igp_factsheet_final.pdf

Newly adopted Industrial Stormwater General Permit (unofficial copy):

www.waterboards.ca.gov/water_issues/programs/stormwater/docs/industrial/unoff_igp_amend.pdf

Industrial Stormwater General Permit program:

www.waterboards.ca.gov/IndustrialStormwater

For questions on these trainings, please contact the State Water Resources Control Board's Industrial and Construction Stormwater Unit:

Laurel Warddrip, Unit Chief
Laurel.Warddrip@waterboards.ca.gov
916-341-5531

Pushpa Zachariah, Water Resource Control Engineer
Pushpa.Zachariah@waterboards.ca.gov
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2018 Industrial Storm Water General Permit Amendment

The State Water Resources Control Board and Regional Water Quality Control Boards (collectively, Water Boards) regulate runoff of storm water from industrial, construction and municipal sources in California through with National Pollutant Discharge Elimination System (NPDES) permits. Storm water is historically perceived as a nuisance because it mobilizes pollutants such as motor oil, heavy metals, and trash which flow into water bodies either directly or via storm sewer systems, threatening aquatic life and public health. The State Water Board is actively shifting the perception of storm water – from a source of pollution to a water resource.

Statewide Industrial General Permit

The California statewide NPDES Industrial Storm Water General Permit¹ (General Permit) regulates the discharge of storm water associated with industrial activity as defined by the U. S. Environmental Protection Agency (U.S. EPA).

Recent 2018 Amendment to the Statewide General Permit

On November 6, 2018 the State Water Board amended the General Permit to incorporate the following additional requirements. The additional requirements become effective on July 1, 2020.

1. **Sufficiently Sensitive Test Method Ruling:** The U.S. EPA update to the Clean Water Act mandates NPDES permits to require analytical test methods that measure and quantify pollutants at levels identified in the NPDES permit requirements. Facility operators are required to use test methods that are sufficiently sensitive to detect and quantify pollutants at or below the applicable water quality criteria, action levels, or effluent limitations.
2. **Total Maximum Daily Load (TMDL) Implementation Requirements:** TMDLs are adopted U.S. EPA and Regional Water Quality Control Board Basin Plan requirements addressing restoration of impaired water bodies. Attachment E of the General Order contains the translated pollutant-and waterbody-specific TMDL requirements applicable to discharges of industrial storm water within specified geographical locations. Facility operators are required to collect industrial storm water samples for TMDL-related pollutants and comply with applicable requirements if:
 - 1) The facility discharges industrial storm water and/or authorized non-storm water discharges, either directly or through a municipal separate storm sewer system, to impaired waterbodies identified in Attachment E; and
 - 2) The discharge contains the identified TMDL-related pollutants associated with the impaired receiving waterbody.

¹ State Water Resources Control Board Order WQ 2014-0057-DWQ as amended by Orders 2015-0122-DWQ and the 2018 Amendment documents.

Dischargers compare industrial storm water samples to applicable pollutant-specific Numeric Action Levels, TMDL-specific Numeric Action Levels, and/or TMDL-specific Numeric Effluent Limitations. The facility operator must respond to exceedances of one or more Action Levels by implementing best management practices and conducting corresponding reporting. Exceedances of Numeric Effluent Limitations are considered permit violations and may be subject to mandatory minimum penalties as detailed in Water Code section 13385.

3. Statewide Options Incentivizing On-Site or Regional Storm Water Capture and Use: Attachment I of the General Permit includes new compliance options incentivizing storm water capture. Facility operators choosing to implement the on-site compliance option are required to implement best management practices that capture, infiltrate, divert and/or evapotranspire the volume of runoff produced up to, and during, the 85th percentile 24-hour precipitation event based on local historical precipitation data and records. Facility operators choosing to implement the regional compliance option must enter into a local agreement with appropriate municipalities or other entities and participate in the development, implementation and operation of the regional storm water capture best management practice(s) receiving the industrial storm water discharges. Facility operators meeting all implementation requirements for one of the proposed compliance options will be deemed in compliance with multiple General Permit requirements, including those related to TMDL implementation (as applicable).

Next Steps

The new requirements associated with the 2018 amendment of the General Permit will become effective on July 1, 2020.

View and download the 2018 Industrial General Permit Amendment and implementation resources from the State Water Board's website:

https://www.waterboards.ca.gov/water_issues/programs/stormwater/igp_20140057dwg.shtml

Sign up for E-Mail alerts at:

https://www.waterboards.ca.gov/resources/email_subscriptions/swrcb_subscribe.html

Click on 'water quality'

Click on 'Storm Water Industrial Permitting Issues'

Please email questions to: stormwater@waterboards.ca.gov

(This fact sheet was last updated on Feb. 1, 2019)

SEPTEMBER 23-27, 2019



SAVE

THE DATE

STORM WATER AWARENESS WEEK

INDUSTRIAL STORM WATER



Whether it's navigating compliance with industrial storm water permits or defending clients against citizen suits, Downey Brand's Environmental Law team works nonstop to help clients achieve what's most important to them and their business.

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Storm Water Contest...

Each month, we invite our readers to participate in a contest to test their knowledge of the Industrial General Permit and show their storm water compliance program. We enter all submittals to our monthly newsletter question into a drawing and one person is selected at random to receive a \$25 gift card. Last Month's question was:

WHAT IS THE MINIMUM NUMBER OF MAPS NEEDED IN THE SWPPP?

Congratulations R. Hiram Houck, you won! He replied: "The absolute minimum number of maps is one. Attachment D of the Industrial Permit in F.2. lists what information is required in the site map(s). If you can clearly denote the 22 items listed on one map, then that would suffice. If not, you may need to make multiple maps. Notice that they use the 's' in parentheses indicating that one map is possible." Hiram wins a \$25 gift card to Baskin Robbins for a nice ice cream treat!

This Month's Contest Question:

WHERE DOES THE CLEAN WATER ACT GIVE CITIZENS THE RIGHT TO SUE?



Submit your answers by Friday, August 23rd. Email your answer to jtravskis@wgr-sw.com. One winner will be selected by a random drawing to receive a \$25 gift card to Amazon

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