

Expert Panel

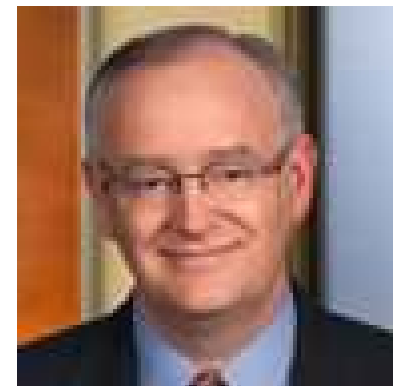
- I. Bill Fischbeck, Esq. – Moderator
Commercial Real Estate & Land Use Law



- II. Cory Jones, PE, QISP ToR –
Civil Engineer,
Stormwater Technical Expert



- III. Stephen Marsh, Esq.
Environmental Law



Agenda

- I. Who needs to comply?
- II. How and what to file?
- III. Can I get out of the permit?
- IV. How Do I minimize cost?
- V. Can I be fined?
- VI. Should I worry about NGO lawsuits?
- VII. What is my liability as a property owner?
- VIII. What steps do I take during purchase and/or lease?

SCS ENGINEERS



Navigating Stormwater Compliance - Part 1

Cory Jones, PE, QSD, QISP ToR, ENV SP,
March 1, 2016

Agenda

- I. Who needs to comply?
- II. How and What to File?
- III. Can I get out of the permit?
- IV. NONA
- V. NEC
- VI. SWPPP

The **IGP** Covers **Industrial Operations** not **Construction**



IGP =
Industrial
General
Permit

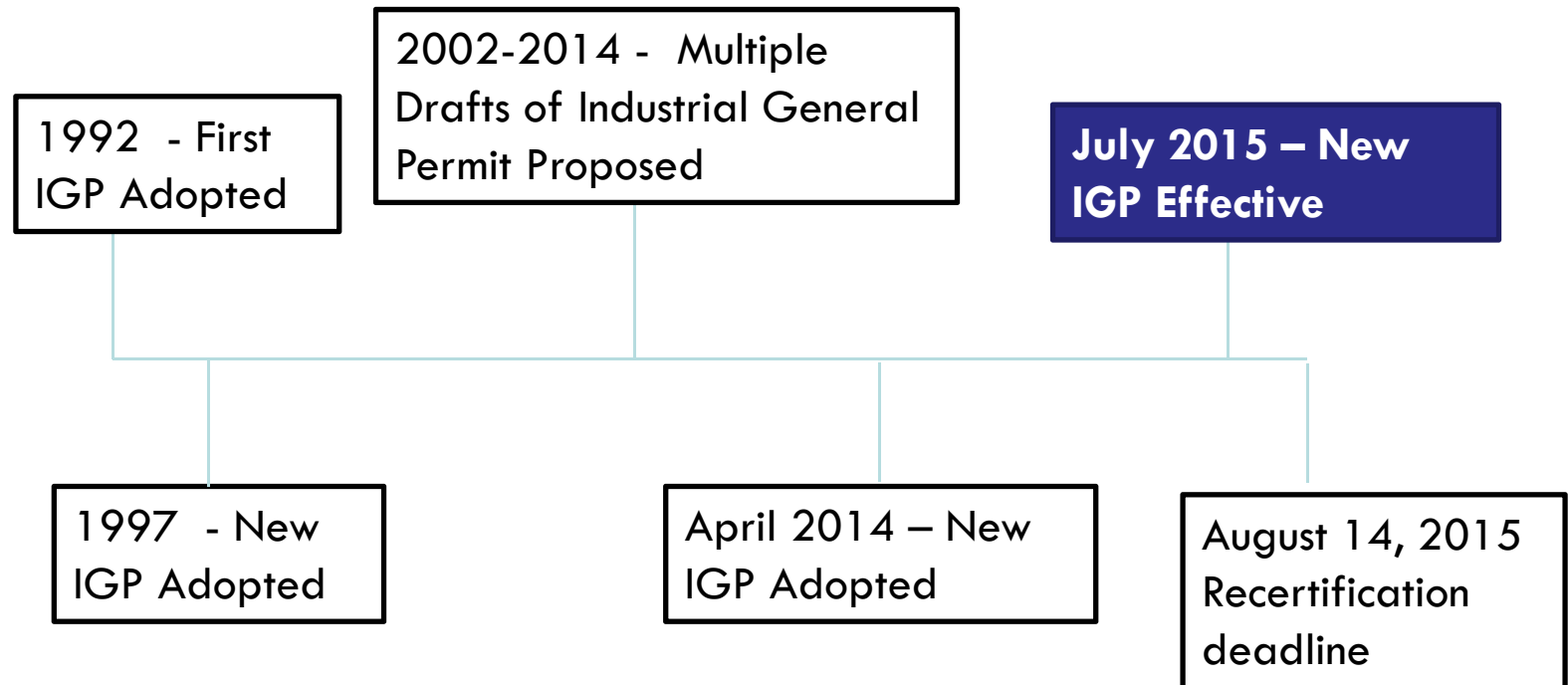


Non-Industrial Facilities

- Covered by Municipal Permits.
- City's are governed by the State Board
- Set up Municipal Code to meet City's Permit with the State.
- Municipal Stormwater Department Inspectors provide Code Enforcement for Municipal Code.
- Issue Violations for facilities discharging pollutants into storm drains.

Industrial Permit Timeline

- Timeline of Events



- \$5,000 Mandatory Minimum Penalty for failure to file by deadline.

Storm Water Regulations- New



- April 2014

- Order No 2014-0057-DWQ supersedes State Water Board Order 97-03-DWQ
- New regulations become effective on **July 1, 2015**
- Applies to “Manufacturing Facilities classified as SICs 20xx through 39xx, 4221 through 4225”
- Broad expansion to Light Industry
 - Impacts approx. 100,000 regulated facilities

Standard Industry Classification (SIC) Codes

- The permit applies to your primary SIC Code?
- Does your facility manufacture or distribute goods?

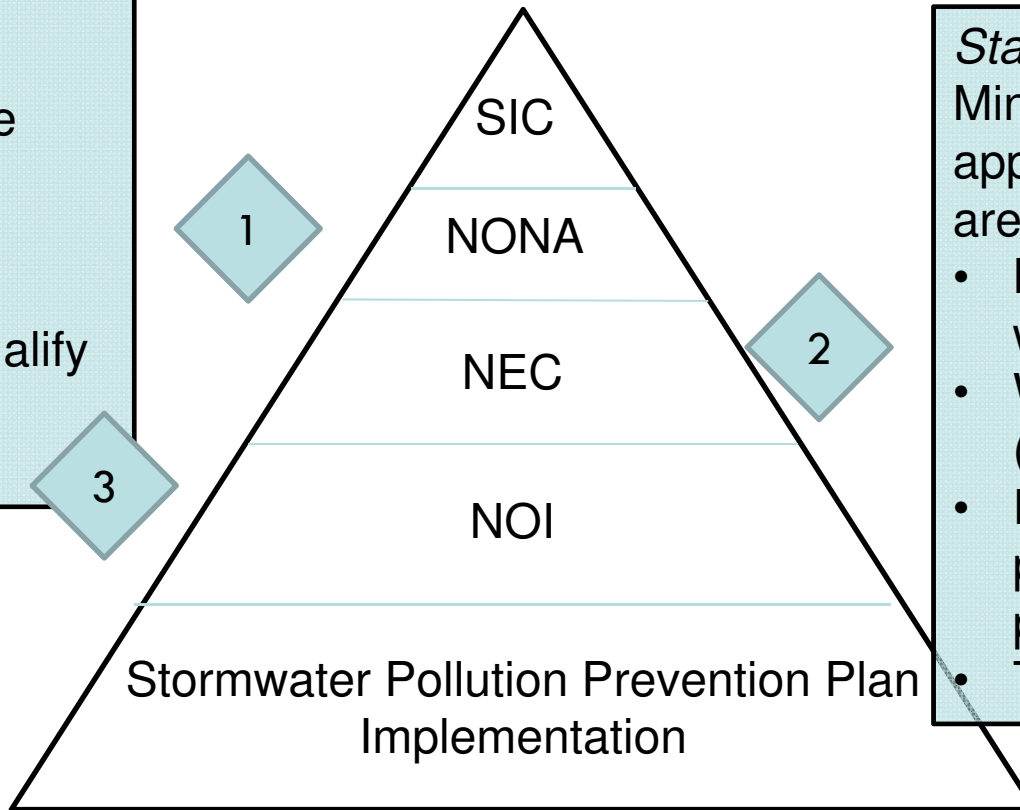


- If YES, you probably need IGP coverage.

Compliance Strategy

Confirm Permit Applicability

- Is the SIC Code covered?
- Does facility discharge?
- Does facility qualify for no exposure certification?



Start Preparing

Minimize number of applicable drainage areas

- Know your watershed.
- What are critical (impairments)?
- Does your facility produce these pollutants?
- Train staff now

Compliance Strategy

- Cost Savings
- The best way to save money is through proper training and operational best management practices
- Staff making the extra effort will save the facility money.

IGP Compliance



1

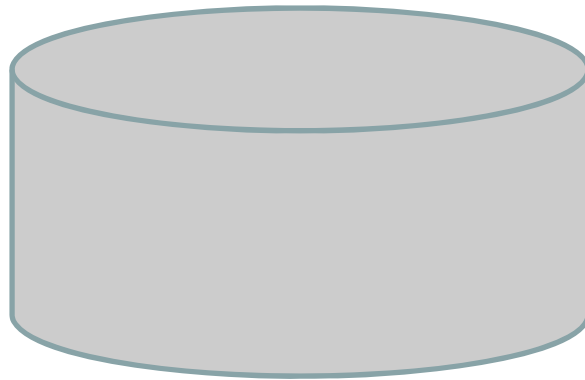
- Notice of Non-Applicability (NONA)
 - Small Facility
 - Completely Contained, or
 - Not draining to “waters of the United States”
 - Submit ***No Discharge Technical Report***

Hydrologic Analysis

- No water will leave the site during “maximum historic precipitation event (or series of events) using the precipitation data collected from NOAA’s website”
- Report must be signed by a California Licensed Professional Engineer

Hydrologic Analysis

Think of
your facility
site as a big
container...



Hydrologic Analysis



How much water can it hold during the largest storm ***ever?***

Hydrologic Analysis

How much water can it hold during the largest storm **ever**?

Before spilling out...
(a.k.a. “discharging stormwater”)

Storm Water Regulations- Think Ahead?



Your Facility
In Here



2

- No Exposure Certification (NEC)
 - Completely indoor facility
 - No contact between industrial process and storm water
 - Submit **Site Plan, Annual Fee, NEC Checklist, and Certification**

Site Map

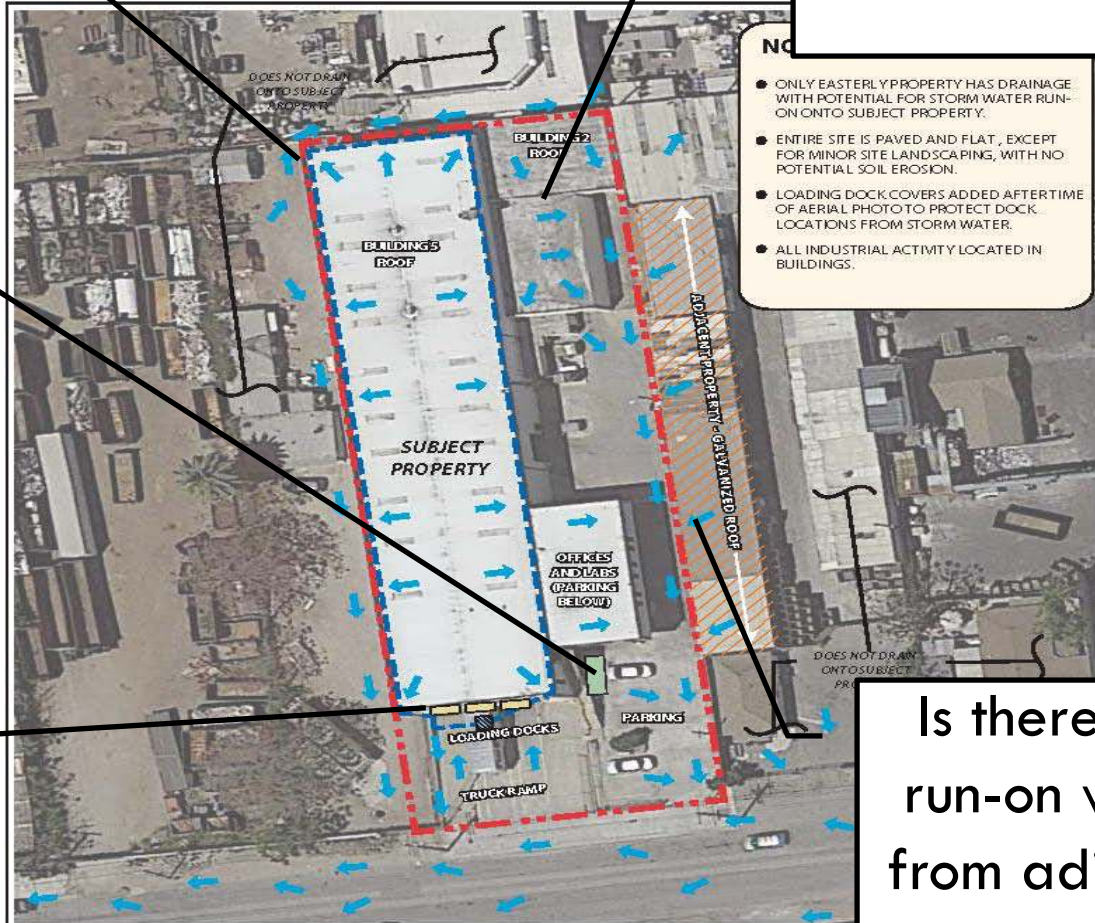
What is the site boundary?

Where does the water go?

Where can water infiltrate?

What outdoor areas are covered?

Is there any run-on water from adjacent properties?



- ONLY EASTERLY PROPERTY HAS DRAINAGE WITH POTENTIAL FOR STORM WATER RUN-ON ONTO SUBJECT PROPERTY.
- ENTIRE SITE IS PAVED AND FLAT, EXCEPT FOR MINOR SITE LANDSCAPING, WITH NO POTENTIAL SOIL EROSION.
- LOADING DOCK COVERS ADDED AFTERTIME OF AERIAL PHOTO TO PROTECT DOCK LOCATIONS FROM STORM WATER.
- ALL INDUSTRIAL ACTIVITY LOCATED IN BUILDINGS.

EXPLANATION

| | |
|-------------------------------------|--------------------------------------|
| --- APPROXIMATE SITE BOUNDARY | ← STORM WATER SURFACE FLOW DIRECTION |
| - - - STORM DRAIN PIPING AND GUTTER | ▨ STORM DRAIN INLET |
| ▭ LOADING DOCK COVERS | ▭ MINOR SITE LANDSCAPING |

SCALE: APPROXIMATE GRAPHIC SCALE IN FEET 1 INCH = 50 FEET

0 25 50 75 NORTH

Outdoor Storage



Is the
filling/emptying
operation fully
contained?

Outdoor Storage

- What other activities do you do outside?



Covered Trash Enclosures

- Good Housekeeping



Hazardous Materials Storage

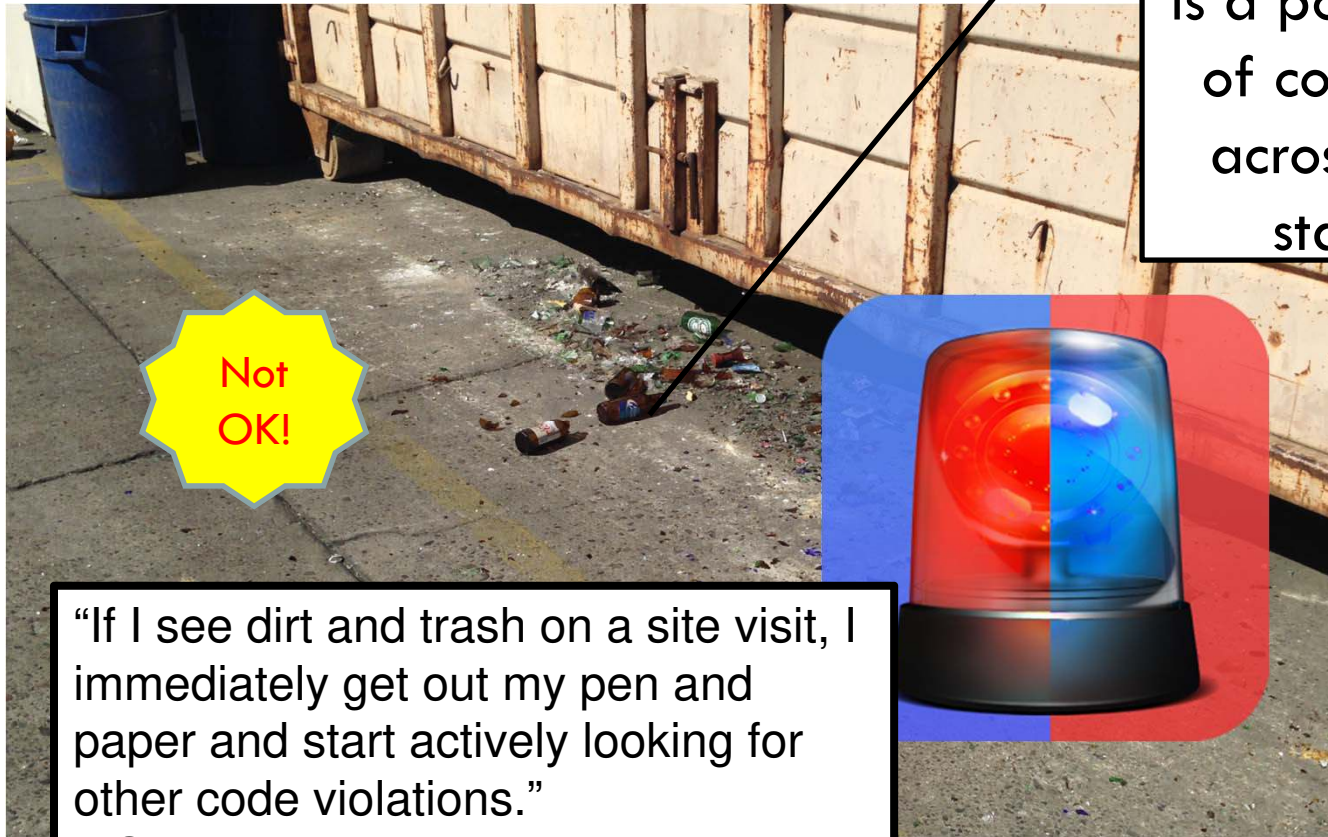
- Good Housekeeping



Good Housekeeping is Required

- Example of Bad Housekeeping

Need to sweep, Trash is a pollutant of concern across the state



“If I see dirt and trash on a site visit, I immediately get out my pen and paper and start actively looking for other code violations.”
– State Water Board Regulator

Stains are indicators of Permit and Municipal Code Violations

- Bad Housekeeping



Staining
indicates
past spills

Past spills = past
non-permitted
discharges to
storm drain

Not Covered Trash Enclosures = Permit and Code Violations

- Bad Housekeeping



No Cover =
Exposed to
Stormwater

So, You have outdoor operations/storage that cannot be covered...

- Develop a SWPPP (follow the permit guidance, or get a qualified person to help you develop one) by July 1, 2015
- Provide Monitoring/Sampling of your site
- Upload Data to SMARTS
- Perform Annual Compliance Evaluation
- Annually Re-certify and Pay Fees by July 1, each year

SWPPP

- Permit Required Documents
 - NOI
 - Legally Binding Certification Statement
 - SWPPP and
 - Site Map

SWPPP

- Five Phases of a SWPPP
 1. Planning and Organization
 2. Assessment
 3. Best Management Practice (BMP) Identification
 4. Implementation
 5. Monitoring

3

SWPPP



Minimum BMPs:

- Good Housekeeping
- Preventative Maintenance
- Spill and Leak Prevention and Response
- Material Handling and Waste Management
- Erosion and Sediment Controls
- Employee Training Program
- Quality Assurance and Record Keeping
- Periodic Visual Inspections
- Site-Specific BMPs



SWPPP

Advanced BMPs

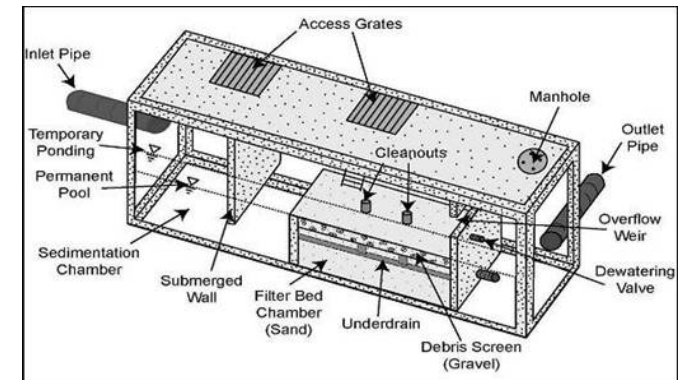
- “to the extent feasible, implement and maintain any advanced BMPs necessary to reduce or prevent discharges of pollutants in its stormwater discharge in a manner that reflects best industrial practice considering technological availability and economic practicability and achievability.”

3

SWPPP

Example of some Advanced BMPs:

- Exposure Minimization BMPs
- Stormwater Containment and Discharge Reduction BMPs
- Treatment Control BMPs
- Other Advanced BMPs



Monitoring

- Objectives of Monitoring Implementation Plan (MIP)
 - Improved Data Quality
 - Reduce Compliance Costs
 - Organization
- Representative Sampling Reduction
- Qualified Combined Samples
- Compliance Groups

Monitoring

- **Components of a MIP**
 - Team Members
 - Visual Observation Procedures
 - Sampling Procedures
- **A Qualifying Storm Event (QSE) is a precipitation event that:**
 - Produces discharge from at least one drainage area; and,
 - Is preceded by 48 hours with no discharge from any drainage area



Monitoring

- **Sampling Requirements**
 - Total Suspended Solids (TSS)
 - Oil & Grease (O&G)
 - pH
- **Any additional parameters required?**
 - Based on SIC Code
- **Sampling Protocols**

Storm Monitoring Strategy

Sources of Stormwater Concentration Variability

Storm

- intensity
- volume
- duration

Sample Collection

- location/time,
- sampling technique
- storm conditions

Laboratory



Storm Sequence

- number of storms
- magnitudes
- time intervals

Antecedent Conditions

- site
- pipes
- BMP implementation

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Field Measurements

- pH has a 15 minute holding time, therefore it is measured in the field
- May use litmus strips if you find, you are in range.
- If you find you exceed the Numeric Action Level, the permit requires the use of a calibrated pH meter.



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Numeric Action Limits Exceedances

Two Types:



1) Annual NAL Exceedance – When the average of the annual sample results for a parameter are exceeded.

Sites can take additional samples (>4 per year) if they want to try to lower their annual average for a sampling parameter.



2) Instantaneous Maximum NAL Exceedance – When two or more results in a reporting year exceed (for TSS and O&G) or outside the pH range

Storm Water Regulations- How it Works

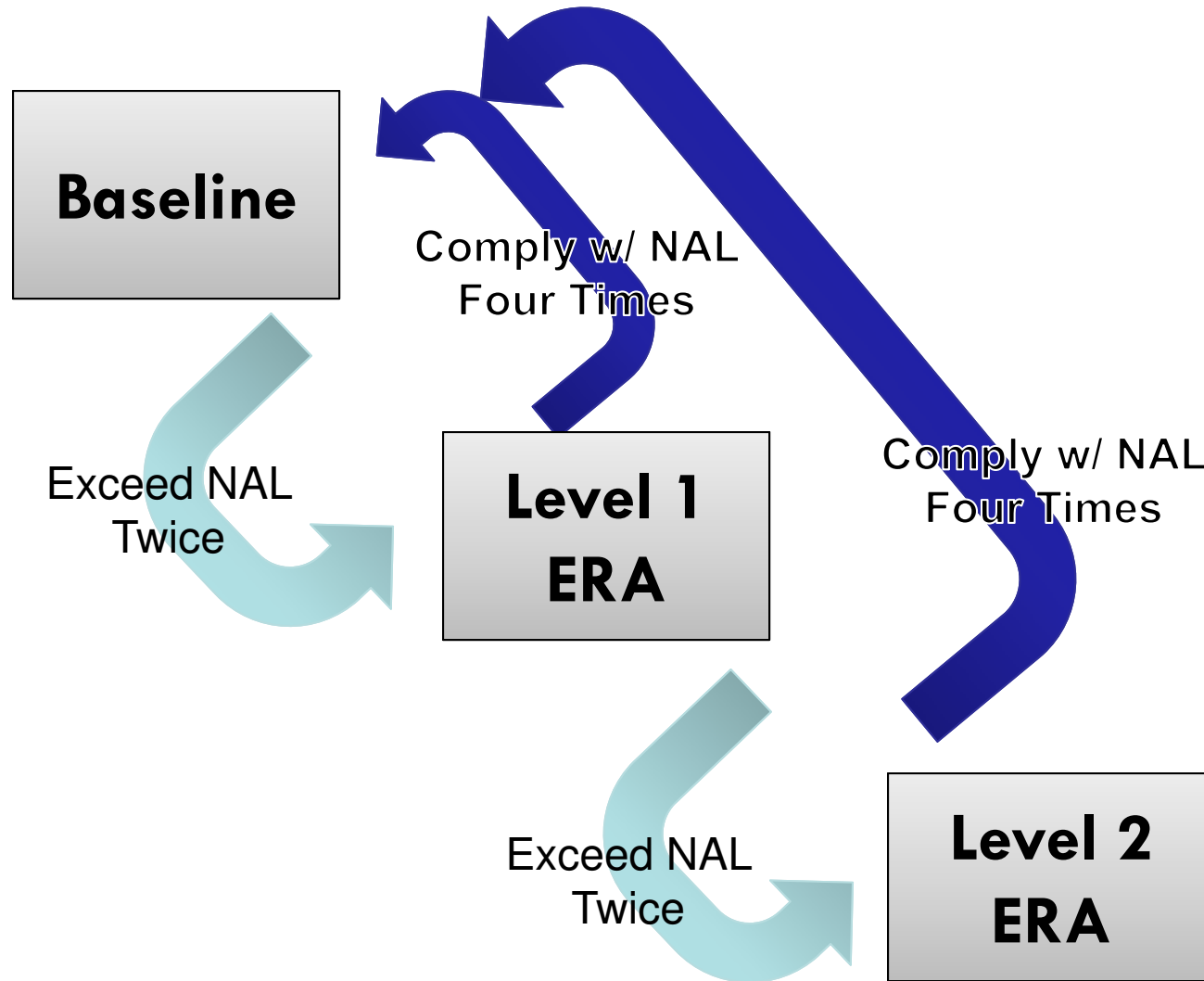
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| | Annual NAL | Instantaneous NAL |
|------------------------------|------------|-------------------|
| pH Level | 6.0-9.0 | 6.0-9.0 |
| Total Suspended Solids (TSS) | 100mg/L | 400mg/L |
| Oil & Grease | 15mg/L | 25mg/L |

- **All Facilities Start at Baseline**
 - Take 4 storm water samples per year; 2 July-Dec, 2 Jan-June
 - Qualifying Storm Event (QSE); enough rain to create drainage
 - Samples taken at every drainage point unless otherwise approved
 - Compare lab results to Numeric Action Levels (NALs)
 - Report on SMARTS
 - If NALs exceeded for 2 QSEs, same pollutant, then proceed to Level 1 ESA

Storm Water Regulations- How it Works

3



*ERA = Exceedance Response Action

Storm Water Regulations- How it Works

3

Baseline



Storm Water Regulations- How it Works

3

Baseline



**Level 1
ERA**



Storm Water Regulations- How it Works

3

Baseline



**Level 1
ERA**

Exceed NAL
Twice

Storm Water Regulations- How it Works

3

Baseline



**Level 1
ERA**



Storm Water Regulations- How it Works

3

Baseline



**Level 1
ERA**



**Level 2
ERA**

Exceed NAL
Twice
For a 2nd
Year

Storm Water Regulations- How it Works

3

Baseline



**Level 1
ERA**



**Level 2
ERA**



Storm Water Regulations- How it Works

3

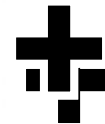
Baseline



**Level 1
ERA**



**Level 2
ERA**



Storm Water Regulations- How it Works

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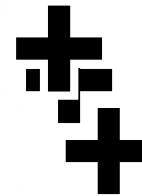
Baseline



**Level 1
ERA**



**Level 2
ERA**



Non-Industrial Source Determination

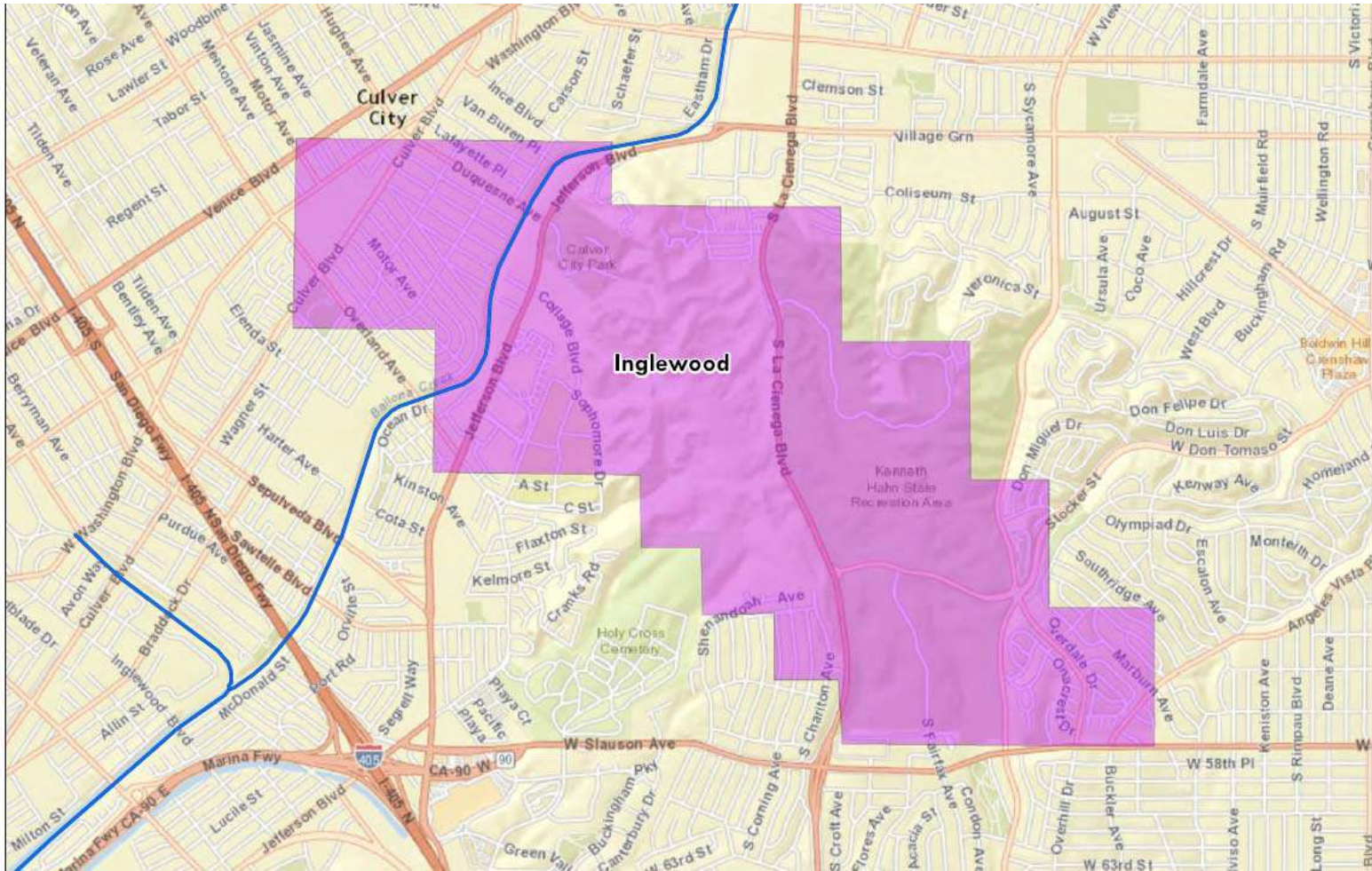
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- Isolate what pollutants are really coming from your facility
- Atmospheric Deposition
- On-flow from adjacent facilities/properties
- Non-industrial pollutant sources

Storm Water Regulations- 303(D) Impaired Water Bodies

3



Storm Water Regulations- 303(D) Impaired Water Bodies

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| | | | | | | | | | | | |
|---|---------------------------------------|---------------|-----------------------------------|----------------|---|---|-------------------|-------------------|----|--|---------------|
| 4 | Regional Board 4 - Los Angeles Region | Ballona Creek | CAR405130 0019980918 142302 | River & Stream | R | 5 | Metals/Metalloids | Selenium | 5B | | Metals Screen |
| 4 | Regional Board 4 - Los Angeles Region | Ballona Creek | CAR405130 0019980918 142302 | River & Stream | R | 5 | Toxicity | Toxicity | 5B | | |
| 4 | Regional Board 4 - Los Angeles Region | Ballona Creek | CAR405130 0019980918 142302 | River & Stream | R | 5 | Trash | Trash | 5B | | |
| 4 | Regional Board 4 - Los Angeles Region | Ballona Creek | CAR405130 0019980918 142302 | River & Stream | R | 5 | Pathogens | Viruses (enteric) | 5B | | |
| 4 | Regional Board 4 - Los Angeles Region | Ballona Creek | CAR405130 0019980918 142302 | River & Stream | R | 5 | Pathogens | Viruses (enteric) | 5B | | |
| 4 | Regional Board 4 - Los Angeles Region | Ballona Creek | CAR405130 0019980918 142302 | River & Stream | R | 5 | Metals/Metalloids | Zinc | 5B | | Metals Screen |

Risk of Liability

- Enforcement from:
 - Local Municipalities
 - Regional Water Quality Control Board
 - District Attorney and State Attorney General
 - US EPA
 - US Dept. of Justice
 - Citizens





Exposure Elimination

- Cover/contain operations
- Alternatives to discharge
 - Infiltration
 - Sanitary sewer
 - Re-use

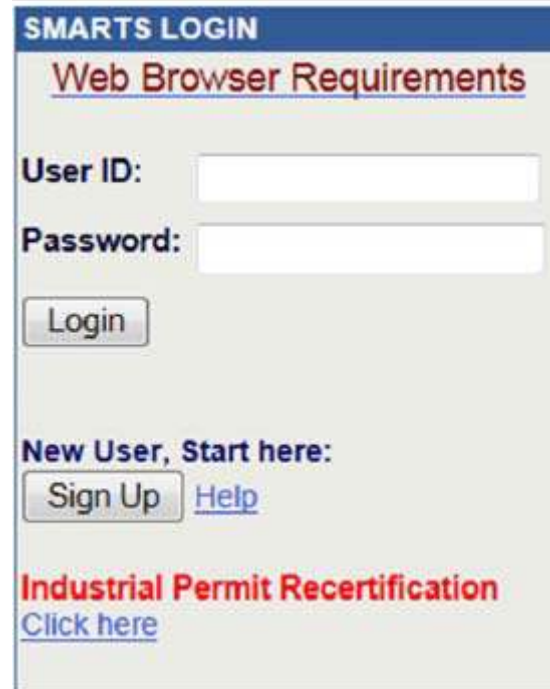


Rainwater collection



How to File Your Permit

<https://smarts.waterboards.ca.gov>



SMARTS LOGIN

[Web Browser Requirements](#)

User ID:

Password:

Login

New User, Start here:

Sign Up [Help](#)

Industrial Permit Recertification

[Click here](#)

What if you don't require an IGP?

- Municipal Permit places requirements on the Local Jurisdiction that requires them to monitor all development types.
- Municipal Codes create code enforcement vehicle – by which Cities send out inspectors – who can issue fines.
- Cities report results annually to the State Board. Reports are publically available – not all data is maintained online.

Municipal Code

- Outdoor Materials Storage
- Hazardous Waste Storage
- Spill Cleanup
 - Do you have oil absorbent materials?
 - Do you know who to call if there is a spill?
- Routine Sweeping
- Trash and Recyclables Collection
- Employee Training
 - Do you have documentation?

Municipal Code

- Catch Basin Cleaning
 - Do you have documentation?
- Advanced Treatment Controls Maintenance
 - Do you have documentation?
- New Facility Improvements –
 - Adding impervious surface?
 - Retain water on-site
 - Address treatment and hydromodification requirements

Navigating Stormwater Compliance - Part 1

Any Questions?



SCS ENGINEERS

*We're here to assist you with
stormwater compliance.*

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ToR, ENV SP

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IGP: Avoiding Enforcement (Legally Speaking)

by Stephen L. Marsh, Esq.
Dentons US LLP

Why Enforcement?

- **“Laws without enforced consequences are merely suggestions.”**

**- Ron Brackin
(Author of “Son of Hamas”)**

Why Enforcement?

- **“If you think compliance is expensive, try non-compliance.”**
 - **Former U.S. Deputy Attorney General Paul McNulty**

What Enforcement?

- **Civil Liability (XXI.Q.)**
 - **Violation of Permit Condition = \$37,500 per day**
(\$13,687,500 per year)
 - **Discharge without Permit**
- **Criminal Penalties (XXI.N.)**
 - **False Report = \$10,000 fine and/or 2 years in prison**



Enforcement

- **Need to Halt or Reduce Activity is Not a Defense**

“it shall not be a defense for a Discharger that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance....” (XXI.D.)

- **Impossibility Is No Defense!**

Enforcement/Compliance

- **Ignorance is No Defense. Study up!**

- **“If you don’t know where you are going, you might wind up someplace else.**

- Yogi Berra

How / Where Enforced?

- **Administrative Actions**
 - Cease & Desist Orders
 - Administrative Civil Liability (“ACL”)
- **Civil Actions**
 - State or Federal Court
 - Injunctions
 - Civil Penalties
- **Criminal Actions**
 - State or Federal

Who Enforces?

- **Regional Water Boards – Primary Enforcer (XIX)**
- **State Water Board**
- **Attorney General – if civil or criminal court action**
- **U.S. EPA – if state fails to enforce**
- **Citizens (NGO) – if state & U.S. EPA fail to enforce
(CWA 505)**
- **If citizen wins: Attorney's fees awarded**

How to Avoid Enforcement

- **Rule #1: Answer this Question:**
“Am I subject to the Permit?”
And get it right!

- **Rule #2: Get Help!**
 - Legal Advice
 - Get a good lawyer
 - Technical Advice
 - Get a good consultant (QISP, PE, RG, etc.)

Compliance Options

- **NOI**
- **NONA**
- **NEC**
- **NOA (None of the above)**
 - **Negotiate own permit**
 - **Get agency advice**
 - **Document the decision**

If Permit Applies

- **Rule #3: Comply with Permit**
 - **Duty to Comply (XXI.A.)**

- **Do Not Violate Permit Conditions**

Violation Examples (to Avoid)

- **Failing to Comply with All Conditions**
- **Failing to file:**
 - NOI** **Quarterly Reports**
 - NEC** **Annual Reports**
 - NONA**
- **Failing to Inspect / Sample a QSE**
- **Failing to have SWPPP**
- **Failing to implement BMPs**
- **Poor Recordkeeping – 5 years**

What is Not a Violation?

- **Exceeding:**
 - Annual Average
 - Instantaneous Maximum
 - Instantaneous Maximum Twice

NAL \neq NEL

NAL = Trigger

- **Avoiding the Trigger**
 - Annual Average: Consider more sampling
 - Instantaneous Maximum: Check QA before reporting

Enforcement Proceedings

- **NOV**
- **ACL**
- **Citizen Suit**
 - **60 Day Notice**

NOV or ACL – What Do I Do?

1. Do Not Ignore It.

- **Penalties Accrue Daily**

2. Do Not Delay

- **Rights May Be Lost**
- **More Serious Enforcement May Come – ACL, Court Action**

3. Call Your Lawyer

4. Call Your Consultant

Citizen Suits – CWA 505

- **60 Day Notice Required**
 - **To Permit Discharger to Comply?**
 - **To Permit Agency to Enforce**

Defendant – **Discharger**
– **Agency: U.S. or State**

Plaintiff – **Any Citizen**
– **NGO (Coastkeeper, Baykeeper, etc.)**

60-Day Notice – What Do I Do?

- 1. Call Your Lawyer**
- 2. Call Your Consultant**
- 3. Investigate Facts**
- 4. Choose Strategy**
 - a. Negotiate Settlement – Consent Order**
 - b. Defend Case – Litigate**
- 5. Beware of Hasty Decisions.**
 - a. and b. can be very expensive.**

Tenant Liability

- 1. Read Lease Provisions**
 - a. Compliance with Laws**
 - b. Violation of Permit = Default**
- 2. Tenant/Facility Operator (applicable sic code)**
 - a. NOI Applicant**
 - b. Subject to Permit**
- 3. Multi-Tenant Property**
 - a. Consider Separate Drainage Areas**
 - b. Industrial v. Nonindustrial**

Property Owner Liability

1. Lease

- a. Include Compliance with Laws
- b. Violation = Default
- c. Indemnification

2. IGP Focus on Operator/Discharger

- a. But CWA Regulates Owners
- b. De Facto Discharger
- c. Contributor

Miscellaneous Legal Considerations: Traps for the Unwary

- **NEC is Not a “Get Out of Jail Free” Card**
 - **Conditional exclusion**
 - **Only excluded from SWPPP and Monitoring**
 - **Must comply with all other conditions**
 - **Annual recertification required**
 - **Must pay annual fees**
- **Regional Board may deny NEC & require NOI**

Miscellaneous Legal Considerations: Traps for the Unwary

- **Anticipated Noncompliance (XXI.M.)**
 - **Advance notice to Regional Board and local MS4 of any planned changes in activity that “may result in noncompliance”**
- **All modifications to Dischargers’ obligations by Regional Board**
 - **Must be IN WRITING**
 - **Filed on SMARTS (XIX.H.)**

Miscellaneous Legal Considerations: Traps for the Unwary

- **PRD Requirements**
 - **Homeland Security Act and other federal security laws (II.B.3.c.)**
 - **Trade Secrets (II.B.3.d.)**
 - **Redacted submittal on SMARTS**
 - **Unredacted papers labeled “CONFIDENTIAL” submitted within 30 days**
- **Certification by unauthorized or ineligible LRP or Duly Authorized Representative**
 - **DOCUMENTS ARE INVALID (XXI.K.3.)**

Thank you!



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