

Response to Issues Raised in CBIA's Motion Requesting Intervening Party Status

On December 18, 2009, the Connecticut Business and Industry Association (“CBIA”) filed a motion requesting to intervene as a party in the proceedings concerning the proposed modifications to the General Permit for the Discharge of Stormwater Associated with Industrial Activity (“General Permit”, “Industrial Stormwater General Permit” or “ISGP”); the motion was subsequently granted by Hearing Officer Kenneth Collette on December 31, 2009. In its motion for intervention, CBIA identified four provisions in the latest (Oct. 29, 2009) version of the General Permit it believes represent substantive changes that could have a direct or indirect impact on its members. The four identified issues are described below, each followed by the Department staff’s response following (page references are based on the “redline” version of the ISGP issued by DEP):

1) CBIA Issue:

“Page 10 of 68, last paragraph of Section 3(b)(9): contains substantive changes restricting authorization under the general permit for new facilities located on an impaired water body (e.g. new or expanded businesses in Connecticut). Specifically, the section reads: ‘if an impairment exists for which an indicator or surrogate pollutant has not been designated but for which stormwater discharges are a potential cause, the industrial activity is not authorized by this general permit.’

This clause is a substantive change to the ISGP as it creates new limitations on applicability of the ISGP not articulated in previous versions. It is a concern to CBIA because it could have direct and indirect impacts on our members by arbitrarily freezing the sighting or expansion of industrial activity along any water body segment designated as impaired by the DEP where the DEP does not know the nature of the impairment but deems that the impairment *may* be related to stormwater discharges.”

Department Staff Response:

This paragraph was added to the general permit after the public hearing to provide further clarification to the above referenced section, but not in response to a public comment. Section 3(b)(9) of the public hearing version of the permit included a general prohibition of

new stormwater discharges that cause or contribute to an exceedance of a water quality standard. The section further specified what documentation was necessary to obtain general permit coverage for discharges with TMDLs or indicator pollutants. In addition to these two categories, CT's list of impaired waters (prepared pursuant to Section 303(d) of the Clean Water Act) also includes impairments where a potential source(s) is identified (in this case, stormwater), but for which a specific indicator pollutant is not. Therefore, to be comprehensive, this paragraph was modified merely to provide clarification that these waters are still considered impaired because of stormwater discharges even though an indicator or surrogate pollutant may not have been designated. In such cases, new stormwater discharges must be restricted if stormwater is a potential source of the impairment.

First, DEP uses the term "potential source" to be consistent with terminology utilized by Sections 303(d) and 305(b) of the Clean Water Act. The term does not indicate a lack of data regarding the nature of the impairment; in fact, DEP must conduct monitoring and assessments to support inclusion of a water body into the impaired waters list.

Second, the clarification of this language would not result in freezing the siting or expansion of an industrial activity as suggested by CBIA. An industrial activity has a number of options for managing its stormwater discharge(s). Such options include the use of Low Impact Development (LID) measures or retention of the stormwater discharge(s), where feasible and appropriate, which would eliminate the need to obtain coverage under a NPDES permit, including this general permit. Additionally, it is also worth noting that this paragraph only states that these new discharges are not authorized under this general permit. These discharges may still occur and be covered by an individual permit. DEP does not consider it to be in a "substantive change to the permit made as a result of the public comment received during the hearing process".

2) CBIA Issue:

"Page 14 and 15 of 68, Sections 4(c)(2)(H) and 4(d): contains substantive changes to provisions regarding electronic submission and internet posting of stormwater prevention plans. The previous ISGP allowed facilities to submit or post their plan with omissions for

‘confidential business information’ in a self-implementing fashion. By contrast, the latest draft states that facilities seeking to omit information from their plans must first submit the plan to the commissioner for written approval reflecting her agreement that information proposed to be omitted constitutes a ‘trade secret’ or other exemption allowed under the state Freedom of Information Act.

Several member companies have expressed concern that sensitive business information, under the latest proposal, would have to be provided to a public agency where its confidentiality could be compromised. Further, some have indicated the ISGP is in direct conflict with regulations of the Federal Homeland Security Agency.”

Department Staff Response:

Sections 4(c)(2)(H) and 4(d) refer to allowances to withhold confidential business information from the Stormwater Pollution Prevention Plan (Plan) that is publicly available.

The version of these sections that was included in the public hearing record referred to an allowance for permittees to withhold information considered to be “confidential business information” (CBI) from the publicly available Plan. This language was adopted from EPA’s Multi-Sector General Permit (MSGP). Subsequent to the public hearing, review with DEP legal staff revealed that, while EPA and the federal government have a legal definition for the term “Confidential Business Information”, the State of Connecticut does not. Therefore, we cannot include a reference to a legal definition that does not exist in our state. The equivalent Connecticut provision for this concept is included in our Freedom of Information Act (FOIA). Connecticut’s FOIA provisions allow an exemption from disclosure requirements for companies to withhold certain “trade secrets” and other confidential business information from documents that would otherwise be required to be made available to the public as a result of the Act. However, the companies are not allowed to make a self determination as to what might qualify for this exemption. Under the FOIA rules, the company must receive a determination from the DEP that the elements they are withholding qualify for the exemptions allowed in the Act.

The process for obtaining such an exemption is fairly straight forward. Prior to submission of their registration, the permittee would submit a request to DEP stormwater staff outlining the information they would like to withhold from the Plan and the specific reasons they believe this meets the FOIA provisions for withholding information. The stormwater staff would consult with DEP legal staff, who would make the determination on whether to allow or disallow the request. If the permittee wishes to appeal DEP's decision, they would be allowed to register with the information conditionally withheld from their publicly available Plan while they appeal to the Freedom of Information Commission. If the FOIA Commission rejects the request, the permittee would then be required to include the information in their publicly available Plan. We reiterate that this information may not be withheld from the DEP.

Staff discussions with EPA have determined that, while it is not stated directly in the MSGP, EPA addresses the issue of CBI in a similar manner (refer to the attached email for EPA's policy). EPA makes the final determination as to what qualifies as CBI and can be withheld from publicly available documents. It is not "self-implementing". Consequently, the change in referring to FOIA instead of CBI does not constitute a "substantive change" to the general permit.

Additionally, CBIA's assertion that previous issuances of this general permit included an allowance for the omission of information in a self-implementing fashion is incorrect; the current and past permits have no language allowing for withholding information.

Incidentally, Plans submitted to DEP from 1992 to present have always been public records available to the public under FOIA provisions and the issue was never previously raised.

Finally, as stated in Comment 119 of the DEP Response to Comments, discussion between DEP staff and CT Department of Homeland Security indicated that there were no homeland security restrictions to this provision.

3) CBIA Issue:

"Page 19 of 68, Section 5(b)(9)(A): contains a substantive change as, for the first time, DEP is recommending language that would require secondary containment for, 'tanks or

containers utilized for the storage of liquid chemicals or for the collection, storage or treatment of waste water.’ This could have costly ramifications for businesses and other entities with such waste water infrastructure at their facilities. This infrastructure is often very sizeable handling many thousands of gallons. They were generally not designed for secondary containment and providing such containment could be extremely expensive or possibly infeasible from an engineering and economic perspective.”

Department Staff Response:

Section 5(b)(9)(A) refers to containment requirements for “tanks or containers utilized for the storage of liquid chemicals or for the collection, storage or treatment of wastewater.”

This section is not a substantive change from the public hearing version of the general permit. The general permit that was public noticed and entered into the record at the public hearing required containment for “storage areas for liquid chemicals existing prior to the date of authorization of this general permit including those specified in the “Spills and Leaks” section (Section 5(c)(2)(D)(iv)) of this general permit, **wastewater** and previously used containers”. The additional language cited in CBIA’s motion that was proposed for this section subsequent to the hearing is merely clarification of what constitutes “wastewater” for containment purposes.

Nevertheless, CBIA’s concern regarding containment requirements for wastewater tanks does indicate to DEP that further clarification of these requirements is necessary. DEP proposes the following revision (highlighted in yellow):

“A) Containment

To prevent unauthorized discharges of liquid chemicals or wastewater from commingling with or polluting a facility’s stormwater discharges, or otherwise causing pollution to the waters of the state, the permittee shall comply with the following requirements, as applicable:

(i) Stationary Storage or Storage Areas

For the purposes of Section 5(b)(9)(A) of this general permit only, **storage area** means an exterior area, which is or has the potential to be exposed to stormwater, that contains one or more tanks or containers utilized for the storage of liquid chemicals or for the collection, storage or treatment of wastewater. Any stationary above-ground tank, container or storage area used: (1) for the storage of liquid chemicals as identified in the “Spills and Leaks” section (Section 5(c)(2)(D)(iv)) of this general permit; or (2) for the collection, storage or treatment of wastewater shall, at a minimum, comply with one of the following types of secondary containment requirements:

- (1) A double-walled above-ground tank or container; or
 - (2) For any storage area, tank or container installed prior to the date of authorization of this general permit, an impermeable secondary containment area which will hold at least 100% of the volume of the largest tank or container or 10% of the total volume of all tanks and containers in the area, whichever is larger, without overflow from such secondary containment area: or
 - (3) For any storage area, tank or container installed after the date of authorization of this general permit, an impermeable secondary containment area which will hold at least 110% of the volume of the largest tank or container or 10% of the total volume of all tanks and containers in the area, whichever is larger, without overflow from such secondary containment area.
- (ii) Mobile or Portable Storage

Any mobile or portable above-ground tank or container used for the collection or storage of wastewater shall comply with the secondary containment

requirements of Section 5(b)(9)(A)(i) above, unless the following minimum requirements are met:

- (1) Such mobile or portable tank or container and related appurtenances (i.e., piping, fittings, valves, gauges, alarms, switches, etc.) are designed, operated and maintained in a manner to prevent releases of wastewater resulting from factors including, but not limited to, physical or chemical damage, tampering or vandalism, freezing and thawing; and
- (2) In addition to the requirements of Section 5(b)(9)(A)(ii)(1) above, for any mobile or portable tank or container and related appurtenances that are affixed to a trailer, such trailer shall be a registered motor vehicle designed, operated and maintained to be capable of on-road transport of wastewater at all times.

(iii) Containment exemption for certain stationary above-ground storage tanks, containers, and areas

The secondary containment requirements of Section 5(b)(9)(A)(i) above do not apply to stationary above-ground storage and treatment tanks and containers, and storage areas if such tanks, containers, and storage areas are associated with a discharge(s) authorized by an individual permit issued pursuant to Section 22a-430 of the Connecticut General Statutes.

(iv) Additional requirements

For industrial activities initiated after October 1, 1992, if an impermeable secondary containment area is required by 5(b)(9)(A)(i) or (ii) above, such containment area shall be roofed in a manner which minimizes stormwater entry to the containment area, except for a containment area which stores tanks or containers of 100 gallon capacity or more, in which case a roof is not required.

Stormwater that may accumulate in a containment area may be discharged only after the permittee conducts testing to confirm that it contains none of the relevant pollutants stored therein. For petroleum storage containment areas, visual inspection for a sheen fulfills this requirement. If testing is not conducted or if it indicates the presence of a relevant pollutant, this containment water must be treated and/or disposed of according to DEP and federal regulations.”

4) CBIA Issue:

“Page 31 of 68, Section 5(e)(1)(B)(ii): contains a substantive change whereby the compliance “benchmark” for zinc is reduced from 0.3 mg/l to 0.160 mg/l. Zinc is present in natural soil at levels that typically range from 10-300 ppm. We understand the average level of zinc in soil is 50 ppm. Companies will likely be faced with additional operating cost to prevent the migration of natural soil during rain storms. In many cases this cost will be unrelated to their actual storm water exposure from operations, thereby placing an unnecessary and costly burden on Connecticut employers, which does not relate to the use of a site. According to one laboratory’s review of recent stormwater testing, changing the compliance benchmark to 0.16 ppm could result in an approximately 20% increase in the number of facilities exceeding the zinc threshold and triggering additional compliance costs.”

Department Staff Response:

There has been no change in the zinc monitoring benchmark since the public hearing. The change in this benchmark from 0.300 mg/l to 0.160 mg/l was introduced at the public hearing in the permit that was entered into the record. DEP staff also explained in testimony at the hearing that there had been a typographic error in the version of the permit that was public noticed. CBIA personnel were present at the public hearing. During the development of the general permit, DEP staff, in conjunction with the stakeholders, determined that the benchmarks for the metals (copper, lead and zinc) would be set at a level above which a discharge would result in the exceedance of the DEP’s Water Quality Standards (WQS). The metals benchmarks were corrected at the public hearing to reflect

that agreement. This provision did not apply to the other monitoring parameters where numeric water quality criteria were not available for a parameter. Furthermore, in their comments submitted on July 1, 2009, there was no mention by CBIA of the zinc benchmark.

In accordance with the agreement between DEP staff and the stakeholders, the Department offers the following explanation of the calculation of the Water Quality Benchmarks (zinc, copper, and lead). The benchmarks were calculated using the freshwater acute water quality criterion for a parameter. An assumption of 5:1 dilution was made to estimate potential dilution during a storm event. This is equivalent to an Instream Waste Concentration of 20%. Department staff used the methods for developing water quality based limits as specified in the Technical Support Document for Water Quality Based Toxics Control (EPA/505/2-90-001) to derive the monitoring benchmarks for parameters with water quality criteria.