

Workshopping the CII Permit

Topic 2: Developing an Option 1 Agreement Template

On November 20th the Los Angeles Regional Water Quality Control Board (RWQCB) held a workshop to consider improvements to the draft CII Permit. After receiving a briefing from RWQCB staff and comments from stakeholders, the Board asked staff to engage with stakeholders to consider possible improvements to the Permit. Some of the provisions that the Board directed staff to focus on included:

- Who should be the permittee -- the facility owner or operator?
- What should be in the Option 1 contract between the permittee and the Watershed Management Groups?
- Permit implementation timing
- Exemptions for residential properties identified as mixed use
- Sampling requirements

This memo considers the steps necessary to develop an Option 1 contract template. As an initial matter, the author recognizes that each Watershed Management Group (WMG) and its Fiduciary Agent (FA) will have unique issues that are best addressed individually. The purpose of this memo is to consider those issues that will be universal to all contracts and how they can be best addressed. The draft permit addresses or partially addresses some of these issues. However, the author believes that a great deal more specificity is necessary.

1. Who must execute the agreement?
2. How is availability of a project determined?
3. What factors need to be considered in the attestation that no downstream project is available?
4. How is the funding level determined?
5. How is the pollutant level factor in the funding formula determined and applied?
6. How will the life of the agreement be determined?
7. How will the discharger comply with its annual reporting obligations?

In order to address these questions, the author suggests several modifications be made to the permit.

First, the permit must address the question of how to calculate the necessary capacity. The draft Permit does not include any assessment regarding how many acre feet of capacity will be necessary to meet the demand by dischargers wishing to participate in Option 1. This could leave the WMGs in the uncomfortable situation of having either too

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much or too little capacity to meet the demand. However, the WMG can estimate demand only after they have clear understanding of two factors. These are:

1. How many of the facilities does the WMG reasonably believe will participate in Option 1 for planning purposes?
2. How many acres of facilities will be subject to the Permit?

For the purposes of this exercise the author suggests that the WMGs assume that all dischargers will wish to avail themselves of Option 1. This assumption appears to be supported by antidotal evidence from various potential discharger groups when they consider the costs and feasibility of Options 2 and 3. Moreover, planned over capacity need not be built, while undercapacity could result in rationing and market disruptions.

The actual capacity demand can only be accurately addressed once there is a clear understanding of the number and size of facilities that will be enrolled in the permit. The previous memo on enrollment suggests a methodology by which the WMGs would have a clear understanding of the number and size of potential Option 1 users. In addition, to the number and size of the facilities, the WMGs will need to geolocate the facilities to determine the 85th percentile storm event, without which they will be unable to calculate the required capture volume associated with each facility.

If enrollment were to occur during year one of the permit based on the previous memo, the permit could then provide the WMGs with the information necessary to demonstrate capacity during year 2 as they prepare to calculate other key terms of the agreements including pricing.

Once the WMGs have an accurate sense of demand, in year two they can then go on to identify the specific projects intended to address that demand as well as the cost to design, permit, build, administer and maintain those projects into perpetuity. However, converting those costs into a price per gallon is complicated by both the pricing structure, and the pricing formula.

The draft Permit suggests that the WMGs will design, permit, build, administer, and maintain the projects into perpetuity. The costs associated with these activities fall into two distinct categories: the cost to design, permit, and build the facilities (capital costs) and the cost to administer and maintain the facilities into perpetuity (operating and depreciation costs). The author suggests that the draft permit require that these costs be calculated and presented separately in any agreement approved by the Regional Board and that the operation and depreciation costs assume a 40-year life cycle.

The pricing formula also requires additional clarification. As proposed, it includes Pollutant Level Factor. The Pollutant Level Factor is defined at footnote 11 of the draft Permit as follows: "The pollutant level factor is a value characterizing a given CII facility's site-specific conditions relative to the larger watershed management area. This value must be produced by S. Wayne Rosenbaum, Partner at the Environmental Law Group and does not represent the opinions of others."

be consistent with model inputs to the reasonable assurance analysis for that watershed or sub watershed”. At present there does not appear to be any analysis as to how the Pollutant Level Factor will be applied to each facility within the watershed. This results in the possibility of either overfunding or underfunding depending on how the Pollutant Level Factor is applied to various classes of dischargers and the number acres represented by each class. To correct for these unanticipated consequences, the author suggests that an additional provision be added to the permit which states that the WMGs shall publish a list of pollutant level factors to be applied to each facility type during the second year of the permit and that the weighted average of the Pollutant Level Factors for any watershed shall be 1.

Once the issues described above have been resolved, the draft Permit can then be revised to address the procedural issues for example:

1. All signatories to the agreement and attestation should meet the criteria of a Legally Responsible Person as defined in the permit.
2. The annual reporting requirements will be met via additional screens to be developed in SMARTS during year two of the permit.