



O R A N G E C O U N T Y
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Sent via Electronic Mail: madackapara@waterboards.ca.gov

Santa Ana Regional Water Quality Control Board
3737 Main Street, Suite 500
Riverside, CA 92501-3348
Attn: Michael Adackapara

RE: Comments on Scrap Metal Recycling Facilities Sector Specific General Permit for Storm Water Associated with Industrial Activities, Order No. R8-2011-0011, NPDES Permit No. CAG618001

Dear Regional Board Members and Staff:

Orange County Coastkeeper (Coastkeeper) is an environmental organization with the mission to preserve, protect, and restore the watersheds and coastal environment of Orange County. After careful review of the latest iteration of the Scrap Metal Recycling Facilities Sector Specific General Permit for Storm Water Associated with Industrial Activities, Order No. R8-2011-0011, (Permit) NPDES Permit No. CAG618001, Coastkeeper maintains significant reservations about the adequacy of the Permit and strongly encourages the Regional Board to recommend significant revisions.

In 2010, Coastkeeper, the Scrap Metal industry, and Regional Board staff participated in a collaborative process to develop a scrap metal categorical permit. The purpose of the stakeholder committee effort was to develop a permit superior to the Statewide General Industrial Stormwater Permit, both in terms of water quality protection and improvement, and in terms of certainty for industry. This stakeholder committee process developed agreed permit terms, and these terms were submitted to Regional Board staff for conversion into permit terms for consideration by the Regional Board.

As detailed below, the draft permit generated by staff is inconsistent with the agreed terms of the stakeholder committee, and importantly is inconsistent with the requirements of the Clean Water Act. The draft Permit is *less* stringent than the proposed General Industrial Stormwater Permit, does not ensure compliance with Water Quality Standards (WQS) or TMDL requirements, and fails to reduce regulatory uncertainty for scrap operators.

For these reasons, Coastkeeper reluctantly opposes adoption of the draft Permit as proposed by staff, and requests the Regional Board direct staff to re-write the draft Permit to be consistent with the terms agreed by the stakeholder committee, and consistent with the requirements of Federal and State law.

I. The Draft Permit is Inconsistent with the Stakeholder Generated Permit Terms

The stakeholder process resulted in an agreed framework and terms for a sector specific stormwater permit for the scrap recycling industry in the Santa Ana Region. While all parties compromised in achieving agreed permit terms, the following basic elements ensured compliance with the Clean Water Act and Porter-Cologne, water quality will be substantially improved, that feasible pollution management practices will be implemented on a reasonable schedule, and that scrap operators will have clear standards for determining compliance. Unfortunately, some issues were either not fully addressed or ignored in the draft Permit. Those include:

- 1) The acknowledgement that dischargers who chose not to engage in the iterative process articulated in the Permit shall be subject to California Toxics Rule (CTR) standards at end of pipe to determine compliance;
- 2) Numeric Effluent Limits will apply immediately for a representative set of parameters to determine compliance;
- 3) Numeric Action Levels for a broader range of pollutants associated with the scrap category will trigger tightening BMP regimes where exceeded; *and*
- 4) Heightened monitoring will be used to evaluate compliance and to develop water quality standards based on BAT using advanced media filtration

Finally, the draft Permit misinterprets applicable case law and argues CTR is not applicable to storm water, undermines the applicability of the NELs, and compromises the value of the monitoring program by providing vague compliance standards. Therefore, Coastkeeper strongly encourages the Regional Board to direct staff to redraft the Permit to reflect the terms agreed to during the stakeholder process.

II. The Draft Permit is Inconsistent with the Requirements of the Clean Water Act and Porter-Cologne

The draft Permit is inconsistent with the requirements of the Clean Water Act and Porter-Cologne and must not be adopted by the Regional Board without significant revisions. In summary:

- (I) The Fact Sheet misstates the applicability of CTR and other water quality criteria to storm water discharges;
- (II) Vague and contradictory language and confusing permit structure makes the Numeric Effluent Limitations (NELs) unenforceable;
- (III) The Permit Illegally Authorizes New and Existing Discharges to Impaired Waters without a TMDL

A. The National Toxics Rule and California Toxics Rule are Applicable to Storm Water Discharges

The Permit and Fact Sheet mischaracterize the applicability of the NTR and CTR to storm water discharges. For example, the Fact Sheet incorrectly states the applicability of CTR to storm water discharges is still a matter of debate. In fact, three Federal Courts in California have held storm water discharges must comply with CTR. Both the Northern District and the Central District have confirmed the 9th Circuit's holding that stormwater NPDES permits for industrial discharges must and do require

strict compliance with applicable WQS. *See* 33 U.S.C. § 1342(p)(3)(A); 1311(b); 1342(b); *see also* *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1164-65 (9th Cir. 1999)(internal quotation marks and alterations omitted). Most recently, the United States District Court for the Central District of California—the Federal Court with jurisdiction over dischargers to be regulated under the draft Permit—confirmed the applicability of CTR end of pipe at a scrap facility. *Santa Monica Baykeeper v. Kramer Metals, Inc.*, 619 F. Supp. 2d 914, 927 (C.D. Cal. 2009). To reiterate, the Clean Water Act specifically requires permits for discharges of storm water associated with industrial activity to include provisions that ensure compliance with WQS, which includes CTR.

Recently, the Federal Court rejected the Regional Board’s assertion that footnote 1 of the Policy for the Implementation of Toxics Standards precludes the application of CTR to storm water discharges. *See Baykeeper v. Kramer Metals*. According to the Court,

The CTR expressly applies to “all waters” for “all purposes and programs under the Clean Water Act.” By noting that the Implementation Policy does not apply to storm water discharges, the Implementation Policy does not purport to exempt storm water dischargers from the limits imposed by the CTR, a federal regulation. [Further], the CTR criteria apply ‘end of the discharge pipe, unless the State authorizes a mixing zone.’ The General Permit authorizes no mixing zone.

Santa Monica Baykeeper v. Kramer Metals, 619 F. Supp. 2d at 927. This is controlling law, and the Regional Board’s statements in the Fact Sheet to the contrary are incorrect. All dischargers covered by the Permit must ensure their discharges comply with CTR. The Fact Sheet should be revised so that it presents an accurate statement of the law.

B. Imprecise Language and Confusing Permit Structure Render Numeric Effluent Limits (NELs) Unenforceable

Imprecise language and inconsistencies make the Permit susceptible to misinterpretation and may result in needlessly complex enforcement actions due to multiple interpretations of Permit sections. Throughout the draft Permit, the staff appropriately discusses NELs and NALs in tandem, however, the exceedance of an NEL should clearly and unambiguously be referred to as a violation of the terms of the draft Permit and may subject the discharger to mandatory minimum penalties.

Coastkeeper agrees that an exceedance of an NAL is a trigger for corrective action as outlined under Phases I, II, and III. However, by not stating clearly that an exceedance of the NELs in Table 1 is a *violation* of the Permit, the Permit allows for the argument that exceedances of the NELs simply result in a need to follow the Phase I, II, and III processes. The Permit should be revised to state “Any exceedance of any NEL in Table 1 (or the adopted alternative NELs) is a violation of the Permit.”

Coastkeeper is concerned with the conclusion of the Phase III Corrective Action Plan (Plan) conclusion in Section III.D.6.c, which states, “[t]he Permittee will be deemed to be in compliance with the effluent limitations once the Phase III [Plan] is fully implemented.” This is only true if the discharger is able to satisfy either the standards found in the “Numeric Action limits” table in attachment B of the draft permit or revised NAL’s derived from the proposed monitoring process to determine water quality that can be achieved using BAT advanced media filtration. If the Regional Board was to hold otherwise it would undermine the core requirement that water quality standards set in NPDES permits be met.

C. The Permit Illegally Authorizes New and Existing Discharges to Impaired Waters without a TMDL

The Permit impermissibly allows the discharge of impairment causing pollutants to impaired waterways without following the procedures and requirements of 40 C.F.R. § 122.44(d). *See* Permit, Section III.E.2. Under the guidelines established by the Permit, there has been no pre-permitting determination that any facility's SWPPP will, in fact, ensure that the discharge will not cause or contribute to the ongoing impairment of the relevant waterbody.

Section III.F of the Permit is susceptible to misinterpretation and may be read to allow the authorization of a new discharge to an impaired waterbody that does not yet have a promulgated TMDL. This is not permissible under the Clean Water Act's implementing regulations found at 40 C.F.R. § 122.4(i). *See Friends of Pinto Creek v. Env'tl. Prot. Agency*, 504 F.3d 1007 (9th Cir. 2007). The Permit should be clarified to make it clear that no new authorization to discharge a listed pollutant to an impaired waterbody is permitted, even if the waterbody does not yet have a TMDL in place for that pollutant. The Permit's Fact Sheet and Definitions section should also describe and define "New Permittee" consistent with the requirements of the Clean Water Act and its regulations in order to provide clarity on the issue.

Conclusion

Coastkeeper has a unique distinction of being the impetus behind the development of the draft Permit and believe the adoption of a robust and responsible Permit can provide the State Water Resources Control Board with guidance on how best to design a scientifically-based Permit of statewide application. The draft Permit offers the stakeholders the potential to markedly improve water quality through the gathering of relevant storm water discharge information. Coastkeeper recognizes the value in the process of developing this draft Permit, however, the goal of improved water quality cannot be ignored or forgotten. Prior to adoption, the Regional Board must clarify the distinction and enforceability of NELs/NALs, acknowledge the applicability of CTR to storm water discharges in the Central District of California, and revise sections allowing illegal discharges into impaired waterbodies.

With the appropriate modifications that align the draft Permit to the findings of a balanced stakeholder group, Coastkeeper can actively support the adoption of R8-2011-0011. If you have any questions or concerns please contact our office at (714) 850-1965.

Thank you for your consideration,



Garry Brown
Executive Director
Orange County Coastkeeper