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California Water Quality Control Board – Santa Ana Region
3737 Main Street, Suite 500
Riverside, CA 92501
ATTN: Michael Adackapara

RE: Sector-Specific General Permit for Storm Water Runoff Associated with Industrial Activities from Scrap Metal Recycling Facilities Within the Santa Ana Region: **Order No. R8-2011-0011**

Dear Michael Adackapara,

The Santa Ana Regional Board drafted a Sector-Specific General Permit to regulate storm water discharges associated with scrap metal recycling facilities (hereinafter referred to as the "Scrap Metal Permit") upon the recommendation of the Metal Recyclers Water Quality Standards Committee. We have reviewed the fifth draft of the proposed Scrap Metal Permit. Although certain revisions were incorporated into this latest draft, we stand firm in our position that the proposed Scrap Metal Permit contains requirements and standards that are unsubstantiated, costly, punitive, unduly burdensome, and most importantly, outside of the law. The dramatic increase in costs, coupled with the inconsistencies and subjective gaps in the draft, will detrimentally impact the metal recyclers to the extent that compliance will cause an undue burden, be economically impractical, and, in some cases, be economically impossible.

Our concern for our clients and all scrap metal recycling facilities that are potentially subject to the proposed Scrap Metal Permit is paramount. Pursuant to the fifth draft of the proposed Scrap Metal Permit as revised on October 14, 2011, we respectfully submit the following comments for your consideration, action, and resolution:

Points of Issue:

1. There is still a concern about how and why the Metal Water Quality Standards Committee was formed. It is unclear as to how exactly affected industries within this Region were represented, in what capacity they were represented, if they were accurately represented, and, ultimately, if they were fairly represented. The fact that the Committee was not organized by the State or any State agency, and that the Regional Board staff participated in the Committee meetings at the request of this stakeholder group, raises questions about the need for this sector-specific permit and the agenda of the Committee. If the information being used to justify the content of this permit is coming directly from the Regional Board, then why didn't the Regional Board independently determine the need for such a permit? In this instance, the stakeholder group drafting the proposed sector-specific permit formed itself rather than the Regional Board assessing a need for the permit and conducting an unbiased selection process, including a fair representation of members from the affected industry, to form a committee. Therefore, Regional Board should publically release the methods, processes, and findings of the committee to demonstrate "good faith" and clearly illustrate how and why the contents of the permit were determined and, ultimately, how the "affected" group was represented during the permit writing process.

   Committee members are described as local scrap metal recyclers, environmental organizations, consultants, and vendors of storm water treatment technologies. It is not uncommon for certain stakeholders within an industry to desire that more stringent requirements be put in place if these requirements could cause competitors within the industry to have an increased financial burden or even go out of business. Are the environmental organizations on the committee involved to create more stringent regulations in order to facilitate more litigation? Will the consultants and vendors on the Committee potentially benefit financially from increased business due to more stringent regulation?

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2. With each iteration of the proposed Scrap Metal Permit, 53 facilities are listed in Attachment A as being subject to its potential regulations. Only 1 facility has been removed from the list in Attachment A, and it was only removed in the fifth draft. Foam Zone, a company which does not engage in any type of metals recycling, is still listed in Attachment A as a facility potentially subject to the regulations of the proposed Scrap Metal Permit.

- Penalties / Enforcement
  - Regulations/actions available under current Industrial General Permit:
    - Section 309 of federal Clean Water Act (CWA), which allows for a maximum of $25,000 per day per violation "as well as any other appropriate sanction provided by Section 309 of the CWA." [Section C.15.a (Page 50)]
    - Regional Boards have also been utilizing Section 13385 of the California Water Code (CWC) to assess penalties, which allows for a maximum of $10,000 per day per violation plus an additional $10/gallon (maximum) of any unauthorized discharge over 1,000 gallons.
    - Sample results are indirectly enforceable through a failure to respond to notices (e.g. benchmark value exceedance letters, etc.) and/or failure to revise SWPPP/Monitoring Program, which are violations of the Industrial General Permit. [Section C.4 (Page 5)]
    - Includes a "no violation" provision if facilities document and implement BMPs that achieve BAT/BCT standards. [Section C.3 (Page 4)]

  - Regulations/actions available under draft Industrial General Permit:
    - Section 309 of federal Clean Water Act (CWA), which allows for a maximum of $37,500 per day per violation "as well as any other appropriate sanction provided by Section 309 of the CWA." [Section XXVII.P (Page 54)]
    - Section 13385 of the California Water Code (CWC), which allows for a maximum of $10,000 per day per violation to be assessed administratively, plus an additional $10/gallon (maximum) of any unauthorized discharge over 1,000 gallons. [Section I.A.3 (Page 1)]
    - Sample results are enforceable through NELs as NEL exceedances constitute a violation of the draft Industrial General Permit. [Section I.E.43 (Page 7) and Sections V.C-D (Pages 14-15)]
    - Exceedances of NALs are not considered a violation of the proposed Scrap Metal Permit, but will require a NAL Exceedance Evaluation Report to be submitted to SMARTS for review. [Section XVII.B-C (Pages 38-41)]

  - Regulations/actions available under proposed Scrap Metal Permit:
    - Section 309 of federal Clean Water Act (CWA), which allows for a maximum of $37,500 per day per violation "as well as any other appropriate sanction provided by Section 309 of the CWA." [Section VIII.P (Page 35)]
    - Section 13385 of the California Water Code (CWC), which allows for a maximum of $10,000 per day per violation to be assessed administratively, plus an additional $10/gallon (maximum) of any unauthorized discharge over 1,000 gallons. [Section VIII.A (Page 32)]
    - Sample results are enforceable through NELs as NEL exceedances constitute a violation of the proposed Scrap Metal Permit. [Section II.G.30 (Page 11)]
    - Exceedances of NALs are not considered a violation of the proposed Scrap Metal Permit, but will require a Corrective Action Plan to be submitted to the Regional Board for review. [Section III.D.6.b-c (Pages 26-27)]
    - Includes a "safe harbor" provision if facilities choose Option 1. [Section III.D.6 (Page 22) and Section III.D.6.c.2 (Page 26)]

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- Statistics (as of 10-20-11)
  - 0 Administrative Civil Liabilities (ACLs) have been issued to the 52 subjected facilities.

  - 24 Notices of Violation (NOVs) have been issued to 17 different facilities in the last 11 years dating back to 2000. [approximately 33% of subjected facilities]
    - Of the 24 NOVs, only 3 were issued in the last 5 years. [⅛ of NOVs issued in last 11 years]
    - Grand total of 1 NOV issued this year. [Premises Metals – 3/28/11]
    - Of the 17 facilities that received an NOV, 6 received one or more NOVs. [approximately 35% of offending facilities; approximately 11% of subjected facilities]
    - 5 of those 6 facilities that received multiple NOVs were issued in the years 1999-2002. [All State Paper is the lone exception – 12/7/01 and 11/26/08]

  - 16 Staff Enforcement Letters (SELs) have been issued to 8 different facilities in the last 11 years dating back to 2000. [approximately 15% of subjected facilities]
    - Of the 16 SELs, 9 were issued in the last 5 years. [approx. ½ of SELs issued in last 11 years]
    - Of the 8 facilities that received an SEL, 2 received multiple SELs for different violations
      [All State Paper – 8/23/01, 9/9/03, 9/10/08, and 11/26/08 for deficient BMPs]
      [Vi Cal Metals – 7/25/01, 9/19/01, and 10/31/01 for deficient BMPs; 5/19/02 for unauthorized NSWD]
      - *Note:* SEL refers to violations such as a late Annual Report, non-payment of annual fees, etc. For our purposes, we looked at the more serious violations of deficient BMPs, deficient/no SWPPP, and unauthorized NSWDs.

3. Some added costs of this Permit include:

- Sampling
  - Each permitted facility shall collect at least 4 samples of runoff per year from qualifying storm events from EACH discharge point. [MRP Section III.B.1 (Page 54)]

  - Cost of analysis would average between $650-$800 per sample point. A site with only 2 discharge points would have to pay $5,200-$6,400 per year, which does not include ancillary fees such as training, labor to collect samples, courier fees to lab, etc. Under the current Industrial General Permit, the cost of analysis is roughly between $315-$400 per sample point; therefore, a site with two discharge points would cost roughly between $1,230-$1,600.
    - *Note:* There has been no quantitative data or evidence presented to justify the increase in required testing parameters [MRP Table 3 (Page 56)]. Why not just continue to test for the parameters required under the current Industrial General Permit? At the very least, there is existing historical data available to provide actual justification for sampling the currently required parameters.

- Documentation
  - New documentation required by this proposed Scrap Metal Permit will likely require the services of QSD/QSP certified consultants. These documents include:
    - New or updated SWPPP.
    - Rain Event Action Plan (REAP).
    - Spill Response Procedure.
    - Corrective Action Plans.
    - Monitoring and Reporting Plan consisting of a QAPP and QAMP, which must additionally be prepared by a qualified individual with SWAMP experience.

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- BMPs
  - Some of the following are Preventative Measures required under Option 1, Phase 1. [Section III.D.6.a.2 (Page 22)] Keep in mind that "Best Professional Judgment" will be used to determine which measures are necessary, practicable, etc. The costs of just the listed measures below can be severe.
    - Paving of industrial areas.
    - Low impact development type of BMPs, such as: onsite infiltration (including percolation and retention basins), pervious pavement, evapotranspiration and onsite storage, "green" roofs, vegetated swales, bioretention facilities, etc.
    - Divert run-ons and flows from non-industrial areas away from industrial areas using berms, curbs, sub-surface piping, grading, or other structural controls.
    - Minimize exposure of industrial activities to storm water by roofing or other types of covers.
    - Consolidate all industrial area discharges to as few discharge points as practicable, preferably to one discharge point, and divert all non-industrial area runoff away from industrial areas. Manage run-on to the facility by diversion or other means.

  - Some of the following are Mitigative Measures required under Option 1, Phase 1. [Section III.D.6.a.3 (Page 25)] The costs of just the listed measures below can be severe as well.
    - Develop and implement a treatment system for oily scrap metal from the site, such as an oil-water separator, and implement a plan for proper operation and maintenance of those systems; identify its location on the site map, person responsible for its maintenance, and maintenance frequency. An oil-water separator is not needed if there is no potential for oil-contaminated wastes to be processed at the facility.
    - Evaluate the need for advanced media filtration (or equivalent systems) during the planning stages by evaluating the monitoring reports for the last 3 years. An advanced media filtration system may not be needed if the monitoring results were below the triggers specified above. Given the nature of the scrap metal industry and the challenges associated with minimizing metals as potential pollutants, it is almost guaranteed that treatment with advanced media filtration will be necessary for most facilities.
    - A general cost estimate for an average 95th percentile storm event within this region can be found in the table below:

	1 Acre	*3 Acres*	*5 Acres*
Water Volume (gal)	81,500	244,000	407,000
Recommend Containment (gal)	10,000	10,000	20,000
Flow required to remove in 24 hours (gpm)	53	163	272
Mechanical Filtration	$ 15,000	$ 20,000	$ 25,000
Containment	$ 20,000	$ 20,000	$ 35,000
Media System	$ 20,000	$30,000	$ 40,000
Total Capital Investment *	**$ 55,000**	**$ 70,000**	**$ 100,000**
Maintenance (1 - 2 years)	**$ 10,000**	**$ 15,000**	**$ 25,000**

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* These costs do not include additional fees for consultants, engineers, hydrologists, contractors, and potential adjustments or upgrades as the NELs within the proposed Scrap Metal Permit may change or better technology is discovered.

4. Some issues concerning the Permit imposed deadlines and the QSD/QSP certification requirement:

   - Section III.D.5 on Page 21 of the proposed Scrap Metal Permit states "Permittees who had prepared a SWPPP as required under the General Industrial Permit shall update the Plan (if necessary), prior to uploading PRDs for coverage under this Order." Section III.I.2 on Page 29 of the proposed Scrap Metal Permit and MRP Section I.A on Page 51 additionally state "All facilities currently regulated under the State's General Industrial Permit shall update/recertify its MRP in accordance with the requirements specified in this section within 90 days of adoption of this Order." These statements seem contrary to Section III.D.5.a on Page 21, which states "Within 18 months of Permit adoption, all Corrective Action Plans and SWPPPs shall be developed and certified by those who have completed a State Board or Regional Board sponsored or approved Qualified SWPPP Developer (QSD) program and a Qualified SWPPP Practitioner (QSP) shall implement the SWPPP." The proposed Scrap Metal Permit seems to say that a facility has 18 months to have their SWPPP properly created by a QSD/QSP; however, facilities will only have 90 days after adoption of this proposed Scrap Metal Permit to upload an updated SWPPP. Is the deadline 90 days or 18 months? Will facilities have just 90 days for an employee to become QSD/QSP certified? This needs to be clarified. We interpret this as saying existing facilities will be put into a position to spend money hiring a QSD/QSP certified individual to create an appropriate SWPPP within 90 days of Permit adoption.

   - Section III.D.5.a on Page 21 also states "If the State Board does not develop an industrial QSD/QSP certification program as part of the General Industrial Permit within 18 months of adoption of this Permit, the Regional Board proposes to organize the development of a scrap metal-specific QSD/QSP certification program." This is confusing to us because if SWPPPs must be created by a QSD/QSP within 18 months of Permit adoption as stated, how does it help any of the existing facilities to create a scrap metal-specific QSD/QSP certification program after the 18 month deadline? Again, is there 90 days or 18 months to submit a complying SWPPP? It would make more sense for the Regional Board to have a certification program in place well before any submittal deadlines so that facilities could choose to get educated and certified themselves, affording facilities the capability to create a SWPPP and other required documents on their own to meet any proposed Scrap Metal Permit deadlines. As it stands now, it seems facilities will be forced incur more costs with the hiring of consultants, which is yet another way this proposed Scrap Metal Permit is not conducive to mitigating costs of affected facilities.

5. Implementing a regional, sector-specific permit prior to the finalization of the draft Industrial General Permit yields not only the appearance of inconsistency, but also one of a particular segment being targeted or penalized, which creates an uneven playing field amongst industries. This raises serious policy issues, and these concerns are actually expressed in a comment letter from Thomas Howard, **Executive Director of the State Water Resources Control Board**. Mr. Howard's comment letter is currently posted on the Water Board's Region 8 website and is included as an attachment to our comments as we vehemently agree with them.

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Conclusion:

We urge the Regional Board not to act in haste in adopting a permit that is premature, incomplete, and overly burdensome. Alternative options in regulating the industry should be further explored. Specifically, any action regarding the proposed Scrap Metal Permit should be delayed until the passage of the draft Industrial General Permit has been finalized so that it can be utilized as guidance for and comparison against these proposed regulations. An unbiased committee should be formed in order to review the information provided by the Regional Board, environmental organizations, consultants, and vendors of storm water treatment technologies so that the necessary research can be performed to establish consistent requirements. The proposed regulations must be further examined in the context of the issues and obstacles that scrap metal recycling facilities will face in complying with the new standards in a timely and cost effective manner. In addition to framing the necessary regulations, the costs and size of the facility, as well as other relevant factors, should be reviewed as it is crucial in promulgating fair and reasonable regulations that can be successfully implemented.

Currently, the proposed Scrap Metal Permit is premature, rushed, and unsubstantiated. The absence of sound, reliable, and defensible data to justify the implementation these proposed and substantial provisions/ requirements sets a dangerous and unconstitutional precedent. A scientific report detailing the data and analysis methods is a prerequisite to any such implementation. Additionally, unless a clear definition with specific criteria listed is used to describe the term "best professional judgment," its subjective meaning can vary from inspector to inspector, region to region, and even day to day. At some point, the mandate for additional procedures, samples, parameters, equipment, documentation, plans, and so on and so forth will need to be reduced as businesses cannot continue to shoulder the increased cost. Simply passing the buck and creating an undue burden, without any evidence or indication of long-term, sustainable benchmarks or economic practicality, will simply force many scrap metal recycling facilities to close their doors. At what cost must these facilities achieve or try to achieve compliance?

We hope that these crucial issues will be re-evaluated and a feasible, alternative plan can be established for this industry.

If you have any questions, please don't hesitate to contact me via the phone/fax numbers listed below or via my e-mail address: terry@frogenv.com.

Sincerely,

10/27/11

Terry J Balog
President

cc: Ms. Carey A. Miller, Esquire

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State Water Resources Control Board

TO: Kurt V. Berchtold
Executive Officer
Santa Ana Regional Water Quality Control Board

FROM: Thomas Howard
Executive Director
STATE WATER RESOURCES CONTROL BOARD

DATE: October 21, 2011

SUBJECT: METAL RECYCLERS STORM WATER PERMIT

On October 28, 2011, the Santa Ana Water Board will consider the adoption of a sector specific general storm water permit for metal recyclers. I believe the adoption of such a permit raises policy and fiscal issues that merit review by the State Water Board.

As you know, the State Water Board adopted a statewide general industrial storm water permit some time ago, and it is presently in the process of revising and readopting the permit. There are several advantages to adopting a single statewide general permit, including a level playing field for all industrial facilities in the state and a more efficient regulatory process. Multiple general permits have both direct costs associated with permit development and induced costs associated with management of multiple permits. Some regional water boards have elected to adopt individual storm water permits for facilities that pose a particularly acute water quality threat, and the State Water Board has supported this approach. However, I believe this is the first time that a regional water board has elected to adopt a general storm water permit covering multiple facilities.

The fact that the permit is sector specific raises policy issues as well. For some time, there has been recognition that sector-specific permits may be a preferable permitting approach for storm water regulation. Sector-specific permitting may result in more precise designation of management measures and better control of storm water discharges. If this is true in this case, the State Water Board may want to adopt the subject permit on a statewide basis rather than have it apply only regionally.

Please feel free to call me at (916) 341-5603 if you have any questions.