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CRWQCB - REGION 8
MAY 31 2011

May 27, 2011

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. However, rather than promoting the beneficial uses of surface waters and groundwaters, the proposed Scrap Metal Permit will result in regulations that are inconclusive, broad, punitive and so costly, it is doubtful that compliance will be attainable. The draft Scrap Metal Permit fails in a critical sense to weigh the requirements and compliance period with the impact on the normal course of business of scrap metal recycling facilities, leaving them in an untenable situation. There are so many requirements, standards, costs, and inconsistencies, it becomes questionable whether a facility acting with due diligence will or can achieve full compliance or success. In effect, the draft Scrap Metal Permit is setting up an entire industry to fail.

Although there is no doubt the industry can and should be regulated, such regulations cannot be designed so as to make compliance impossible and burdensome. Contrary to what the Fact Sheet indicates, there is little flexibility in the measures that must be exercised or constructed and in the time limits imposed by which these measures must be implemented. In failing to justify many of the costly and inconclusive measures required, and in ignoring the critical feasibility factors of cost and financial strain, personnel, size, and operations of facility, the regulations are unduly burdensome to scrap metal recycling facilities. The Supreme Court of the United States has ruled that a regulation violates the unduly burdensome constitutional standard if that regulation unduly burdens a sector or the industry in matters where uniformity is necessary. *Morgan v. Commonwealth of Virginia,* 328 U.S. 373 (1946). A burden may be 'undue' either because it is too severe or because it lacks a legitimate, rational justification. *City of Akron v. Akron Center for Reproductive Health,* 462 US 416 (1983). In this instance, the undue burden is a significant difficulty or expense. As such, it should be evaluated relative to the business or industry's overall resources. The costs and difficulty in achieving compliance with the draft Scrap Metal Permit, without considering the resources available in the industry, constitutes placing a burden on scrap metal recycling facilities that is too severe in its constraints and completely lacks a legitimate, rational justification. As such, the draft Scrap Metal Permit should be stricken or modified in its current form.

This path to failure must be stopped and more thoroughly researched so that a fair and reasonable set of regulations can be implemented. The resolution of the Industrial General Permit, which has been researched and disputed for some time, is crucial because it will provide a measuring stick by which a fair and reasonable comparison can be made. Regional Board should be more concerned with implementing sound, uniform regulations that resonate in the industry rather than furthering its agenda to push through a sector-specific permit at the detrimental cost to business. The Industrial General Permit should be finalized with sector-specific requirements drafted from it for a consistent solution/outcome.

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In conversations with our clients in the scrap metal recycling industry, the general outlook on the proposed requirements is grim. Like much of America and the State of California, these scrap metal recycling facilities are living, operating, and conducting business in a strained economy. When faced with the onerous and costly burdens set forth in the draft Scrap Metal Permit, along with the prospect of further dependence on experts and agency input, the outlook is not very encouraging. These clients are forced to face yet another financial hardship in the immediate future with the impending approval of the draft Scrap Metal Permit.

As a consultant for many scrap metal recycling facilities in the Santa Ana Region, we have serious concerns for our clients, as well as for the future of the industry in general, if this draft Scrap Metal Permit is adopted. Pursuant to the draft Scrap Metal Permit as revised on April 29, 2011, we respectfully submit the following comments for your consideration, action and resolution:

General:

1. In reviewing the significant provisions and requirements set forth in the draft Scrap Metal Permit, along with the imminent compliance deadlines, it is obvious there is an overriding goal to rush this Permit into effect. The initial comment period for the first draft of the Scrap Metal Permit was too brief and ill-timed as it overlapped with the deadline for the comment period for the draft Industrial General Permit, which concluded on April 18th. Moreover, the comment period for the second draft of the Scrap Metal Permit would have only had a window of 20 days for comments to be submitted had it not been for the cancellation of the June 3rd meeting. There is also a short period of time for implementation between Phase I and Phase II. This is a bit disturbing when taking into consideration that the draft Scrap Metal Permit itself states that a significant purpose of Phase I is to gather information (investigative) to determine Numeric Action Levels (NALs) and Numeric Effluent Limits (NELs), which will likely have major consequences once they are established and may, in fact, contradict or change the requirements set forth in the draft Scrap Metal Permit. As such, approving the draft Scrap Metal Permit at this time is premature, if not unconstitutional. If the Scrap Metal Permit is intended to be fair and successful, adequate research should be utilized to formulate standards that will have such a significant impact on the future of the scrap metal recycling industry.

2. The adoption of the draft Scrap Metal Permit should be delayed until the passage of the draft Industrial General Permit has been approved as the Industrial General Permit serves as the foundation/basis for storm water compliance throughout all industries and regions. 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. Delaying the adoption of the draft Scrap Metal Permit would, at the very least, give the appearance that this regional, sector-specific permit took the new Industrial General Permit into consideration and would display that there is a structured, sound, unified, simplified, and streamlined process for implementing regional, sector-specific permits. This would be a fair and good precedent to establish as the proposed requirements and stringent compliance period are unduly burdensome to the individual metal recycler. There has been no mentioned consideration of the significant hardship and impact on the industry collectively or to the individual business owner. A sector-specific permit should be tailored to that industry; it should not be punitive in nature nor set that industry up for failure.

3. 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. It would go a long way in terms of demonstrating "good faith" to further explain how the "affected" group was represented during the permit writing process. Frog Environmental maintains numerous scrap metal recycling facilities as clients in this region, none of whom were consulted during this process to provide input; nor were their consultants, who could have provided helpful and accurate information to the Regional Board.

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4. There are numerous instances throughout the draft Scrap Metal Permit which mention the use of "best professional judgment" to make a particular determination. While the Regional Board has made an effort to clarify the process used in establishing best professional judgment in the latest revision of the draft, many questions still remain about its definition, and there is no authority for using it as a standard. If there is no criteria that defines, outlines, or limits what best professional judgment is, then the judgment becomes an arbitrary term that can vary depending on the professional and his/her experience, biases, etc. There should be an objective definition for best professional judgment, and minimum requirements should be established for "professionals" that can use their "best judgment" to make determinations that could potentially be costly and/or significant that may even affect the future of businesses. More importantly, best professional judgment or any other subjective standard should not be prematurely substituted for actual data and scientific information that will show a true representation of discharges from scrap metal recycling facilities. Requiring scrap metal facilities to take onerous and costly actions in response to such subjective standards, when Regional Board has admitted these standards may change in the near future, is inconceivable and a serious detriment to the success of the industry.

5. The mechanics of the multi-purpose Phase I offer a dubious solution to a problem that hasn't been fully identified. It is counterintuitive to implement a discovery period (Phase I) to determine the baselines/standards moving forward while simultaneously assessing the new information and applying it almost immediately in real-time to dictate what a facility must do in Phase II. If there is a basis being determined during a set timeframe, it is logical to first evaluate the data gathered, formulate the guidelines to be put into place, and then institute those formulated guidelines prior to beginning the process of enforcement/compliance. A time period prior to Phase I (a "pre-Phase I" period, so to speak) should be set aside to conduct the appropriate research and analysis in a traditionally fair and practical manner. The adoption of the draft Scrap Metal Permit should be delayed until after the Regional Board has completed its evaluation of scrap metal facilities and provides a scientific report detailing which scrap metal facilities, the number of scrap metal facilities visited, the scope of its evaluation, and the findings as they relate to Best Management Practices (BMPs), NALs/NELs, proven available treatment technologies, etc. This report should also include an analysis about cost-effectiveness, availability, efficacy, and practicality with regards to significant provisions within the draft Scrap Metal Permit (BMPs, additional monitoring frequency and parameters, observations, NALs/NELs, treatment control measures, QAPP, REAP, SWAMP, etc.). Currently, the language and requirements in the draft Scrap Metal Permit would add an undefined cost to businesses without providing a clear solution, and this may quickly drain resources that are already strained within the scrap metal recycling industry.

6. The Fact Sheet accompanying the draft Scrap Metal Permit is required to detail the regulatory basis for each requirement of the draft Scrap Metal Permit and should be clear and reflective of the actual draft Scrap Metal Permit; the Fact Sheet should not be offering conflicting and/or contradictory information. Rather, scrap metal facilities should be able to rely on the companion document as a resource for accurate information regarding the terms and conditions of the draft Scrap Metal Permit. Some of these inconsistencies will be mentioned in the following comments.

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Specific:

1. Section IV of the Fact Sheet (p. FS3) states that "approximately 50% of the facilities exceeded the USEPA's benchmark levels for one or more metals" within the Regional Board's jurisdiction during the years of 2005-2010. The following page (p. FS4) continues along the same theme, citing deficiencies such as "(1) approximately 10% of the facilities do not implement the minimum control measures (BMPs) specified in the State' *[sic]* General Industrial Permit; (2) approximately 85% of the Storm Water Pollution Prevention Plans (SWPPPs) are not site-specific; (3) the employees are not properly trained in storm water pollution prevention methods; and (5) *[sic]* only about 20% of the facilities had any kind of storm water treatment systems installed." Regional Board should release a separate report detailing the data used to compile their statistics. One very important reason for releasing this report to the public is to allow for a peer review to determine the proper context for these statistics. For example, how many facilities actually sampled during this period? What if only 16 out of 100 facilities sampled consistently over the five year period, and only half of those 16 facilities experienced an exceedance? In that case, the 50% statistical figure would be skewed. What if a facility barely exceeded a benchmark once in 2005 and did not exceed again in the following years; will that facility be incorporated into the 50% statistical figure? If a site has not updated a contact name in a SWPPP, would this constitute as a non-site-specific plan? Regional Board should provide the industry with transparent information to ensure a fair analysis of data was conducted and to instill confidence among the affected group.

2. There is contradictory language within the draft Scrap Metal Permit itself with regards to exceedances. Table 1 (p. 18) lists the effluent limits of four parameters: pH, turbidity, specific conductance, and oil & grease. Two columns and two different sets of NELs are provided (Effluent Limit and Instantaneous Maximum). However, the values provided in the Instantaneous Maximum column do not match up with the statement made in Section III.D.3.b (p. 19): "If a single sampling event (either a grab sample from a storm event or a composited sample from a single storm event) exceeds the NEL or NAL by two times the specified Permit limit (except for pH), it is considered an exceedance that would require additional steps." Regional Board should provide the reasoning behind the larger Instantaneous Maximum values (more than two times). This ambiguity also highlights the uncertainty surrounding the use of "best professional judgment" and underscores the importance of utilizing sound data in establishing NALs/NELs.

3. Additionally, the draft Scrap Metal Permit does not specify which set of NELs listed in Table 1 (Effluent Limit or Instantaneous Maximum) to treat as NALs while the Regional Board conducts their study during Phase I implementation. Regional Board should clarify which set(s) of NELs should be treated as NALs during the data validation period.

4. There is contradictory language within the draft Scrap Metal Permit itself with regards to the design for treatment control measures. Section III.D.4 (p. 19) states that "all treatment systems shall be sized and designed to allow no more than 5% bypass of average annual runoff … this design storm magnitude will be roughly equivalent to the 95th percentile storm." However, this definition does not match up with the statement made in Section III.D.6.b.3) (p. 24): "The design volume [of the treatment system] shall be greater than or equal to 95% of the annual average runoff volume." Regional Board should clarify which treatment control design criteria should be used and be specific when explaining this design criteria. It may make sense to remain consistent with the usual compliance storm event standard utilized in other permits by using storm intensities (e.g. 2-year, 24-hour storm event) when shaping its definition. *It is crucial to point out that, from a civil engineering standpoint, the new proposed design criteria is extremely undesirable due to the amount of effort involved just to determine a flow rate and/or volume. The purpose of the established events outlined in the County hydrology manuals, WQMP guidance documents, etc. were to eliminate this type of effort.* Perhaps Regional Board should provide the reasoning behind its deviation from the usual compliance storm event standard. If the reasoning for the proposed design criteria were explained, some of this confusion would likely be alleviated.

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5. Section III.D.6.a.3).iv (p. 23) of the draft Scrap Metal Permit states that a treatment system should be developed specifically for oil contaminated wastes, but does not provide clear guidance for facilities that do not have oil contaminated wastes on site. Should this be interpreted as facilities without oil contaminated wastes on site are not required to have a treatment system? Additionally, Section VI.C of the Fact Sheet (p. FS11) states that treatment controls may or may not be required, indicating that structural treatment controls could be optional even though treatment appears to be a minimum BMP requirement in the actual draft Scrap Metal Permit. Regional Board should clarify whether or not treatment controls are mandatory and whether or not its requirement is hinged on the presence of oil contaminated wastes on site. If treatment is a mandatory BMP, or if treatment is mandatory for sites with oil contaminated wastes, Regional Board should provide consideration for facilities that have a consistent and documented history of clean sample results.

6. There is contradictory language within the draft Scrap Metal Permit itself with regards to the Phase II Corrective Action Plan. Section III.D.6.b.3) (p. 24) states "it is expected that the Phase II Corrective Action Plan will focus on Preventative Measures." However, the same section also states "the facility shall select and design an advanced media filtration system or an equivalent treatment system" by May 30, 2012, with implementation to take place within 90 days of approval. Furthermore, Section VI.D.2.c of the Fact Sheet (p. FS16) lists a different date for submittal (June 15, 2012) and does not require the use of an advanced media filtration system or its equivalent. Regional Board should clarify its stance and requirements for the Phase II Corrective Action Plan and whether or not it will focus on advanced media filtration systems or preventative measures.

7. Section III.D.5.a (p. 19) of the draft Scrap Metal Permit states that "the Regional Board proposes to develop and sponsor a scrap metal-specific QSD/QSP certification program," but makes no mention of an expected date for its availability. Regional Board should provide a clear timetable for when this program will be available, list the qualification(s) that are required to sit for the sponsored program, and, to the extent practicable, describe the differences between the Regional Board sponsored program and the upcoming draft Industrial General Permit QSD/QSP program. It would be helpful if this certification program were to be available by the time the draft Scrap Metal Permit goes into effect.

8. Within the same section (Section III.D.5.a), the draft Scrap Metal Permit states that "in the absence of such a program, other equivalent programs or professional experience and other certifications may be considered by the Executive Officer." However, in its current form, the use of the term "equivalent" to describe the minimum criteria of a qualified person is analogous to the use of "best professional judgment" to establish NALs/NELs. Regional Board should clearly list the other certifications and/or professional experience (e.g. CPSWQ, mechanical engineer, etc.) that may be substituted. This will enable the affected group to better plan and prepare, especially considering the haste with which the Scrap Metal Permit is intended to go into effect.

9. While the Regional Board has made an effort to expand and broaden its definition of a qualified person in the latest revision of the draft Scrap Metal Permit in Section III.D.5.a (p. 19), Regional Board should base its criteria on that of the upcoming draft Industrial General Permit QSD/QSP program to provide a consistent, unified, simplified, and streamlined approach. This uncertainty also highlights the importance of delaying the adoption of the draft Scrap Metal Permit until after the passage of the draft Industrial General Permit has been approved.

10. In its current form, the draft Scrap Metal Permit does not specify the number of analytical results to include with the initial submission of a No-Exposure Certification (NEC) in Section III.I.1.b (p. 26). Regional Board should clarify the number of sample results required to be included with an NEC submission (i.e. four samples from each discharge point over the course of a year or a single grab sample from each discharge point).

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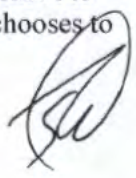
11. In its current form, the draft Scrap Metal Permit defines a "no discharge" facility as one that does not discharge storm water associated with industrial activities to surface waters in Section III.I.1.a (p. 26). Within the same section, it states "if the discharge is to a retention facility, it should have the capacity to hold at least the volume of runoff from a 100-year, 24-hour storm event." Moreover, the Monitoring and Reporting Program (MRP) requires samples to be collected and analyzed from these retention facilities, such as percolation basins, infiltration gallery, etc., in MRP Section III.B.1 (p. 52). Regional Board should provide the reasoning behind its extreme retention facility design criteria as well as its requirement to sample storm water retained on site. Will facilities be penalized for exceedances if the water/sample from a retention facility does not discharge?

12. Section I (p. 5) of the draft Scrap Metal Permit states that "an exemption certification is required for facilities that do not have any exposure of industrial activities to storm water or if there is no discharge of storm water or authorized non-storm water to surface waters." This implies that "no discharge" facilities may need to apply for a separate certification. A placeholder is located within the draft Scrap Metal Permit for a No Exposure Certification form; however, there is no placeholder for a No Discharge Certification. Regional Board should clarify whether or not facilities that do not discharge will need to submit a separate certification form. Furthermore, there are no observation form templates available to review; there is not an Annual Report template available; nor NOI or NOT forms; or QAPP or REAP templates/examples. These forms/templates would help provide a full and clear picture of what will be expected of scrap metal facilities. Much as the current Annual Report illustrates how the requirements are to be reported and conducted. This is yet another reason why the draft Scrap Metal Permit should not be finalized until all aspects, including forms and templates, are finalized and provided as part of the review process.

13. In its current form, the draft Scrap Metal Permit requires the collection of four samples (up from the two samples as currently required by the Industrial General Permit) from all discharge points, even if the water is retained on site as specified in MRP Section III.B.1 (p. 52) and regardless of facility size and discharge points. Regional Board should clarify this statement. Furthermore, the additional parameters listed in Table 2 (p. 53) appear over-inclusive. Currently, facilities with an SIC code of 5093 are required to test for pH, Specific Conductivity, Total Suspended Solids (TSS), Total Organic Carbon (TOC) or Oil and Grease (O&G), Zinc, Aluminum, Iron, Lead, Copper, and Chemical Oxygen Demand (COD). The draft Scrap Metal Permit further requires that Turbidity, Benzene, Ethyl Benzene, Naphthalene, Toluene, Total Petroleum Hydrocarbons, Methyl-tertiary-butyl Ether (MTBE), Total Xylenes, Chromium, Cadmium, and Arsenic be tested as well. Regional Board should provide the reasoning behind its inclusion for the new parameters incorporated into the draft Scrap Metal Permit. There should be some type of scientific study/report which explains data reviewed and the process used to justify the requirement of these additional parameters.

14. In addition to analyzing the increased number of additional parameters, field tests will also be required for pH, turbidity, and specific conductance as noted in MRP Section I.K (p. 50). Sourcing, maintaining, calibrating, and ensuring the proper operation of specialized field equipment unfairly places an additional cost and burden on scrap metal facilities. In a sense, the draft Scrap Metal Permit appears to require that scrap metal recycling facilities maintain mini-laboratories on site. Regional Board should provide the reasoning for its requirement to retest field-tested parameters at a lab. It appears that the Regional Board should just require one or the other and not both.

15. As the objective of the monitoring program is to collect and develop reliable data as stated in MRP Section II.A (p. 50) and MRP Section VII.A (p. 56), Regional Board should provide the Quality Assurance Program Plan (QAPP), or a template of a QAPP, to all facilities listed in Attachment A to ensure uniform and consistent procedures are implemented, regardless of whether a facility chooses to participate in a group or individual monitoring program.



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16. There is conflicting language within the draft Scrap Metal Permit with regards to Permit Registration Documents (PRDs). Section III.I.2 (p. 27) lists the Permit Registration Documents (PRDs) as consisting of the following items: Notice of Intent (NOI), site-specific storm water plan (SWPPP), site map, and filing fee. However, Section VII of the Fact Sheet (p. FS21) also lists the Rain Event Action Plan (REAP) as a PRD. Regional Board should clarify whether or not the REAP should be uploaded as part of the PRDs.

17. Section III.D.6.a.2).iv (p. 21) of the draft Scrap Metal Permit does not specify whether or not a qualified person should sign the REAP. Regional Board should clearly define the person(s) able to sign the REAP.

18. In its current form, the draft Scrap Metal Permit does not specify the figure for the filing fee. Regional Board should clearly list the cost of the filing fee, if applicable.

19. Section VI.F of the Fact Sheet (p. FS19) states that "the group leader (the entity or person proposing the group monitoring program) shall be a professional with experience in the SWAMP program, industrial storm water runoff characterizations, and must have received a certificate of completion … from a certified laboratory." As SWAMP is a state board program, Regional Board should provide information about this certification as well as a list of laboratories that would be able to provide this certification.

Conclusion:

Currently, the draft Scrap Metal Permit is premature, rushed, unsubstantiated, and unfinished. 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,

5/27/11

Terry J Balog
President

cc: Ms. Carey A. Miller, Esquire

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