Public Comment
Draft IGP
Deadline: 4/29/11 by 12 noon

California Metals Coalition

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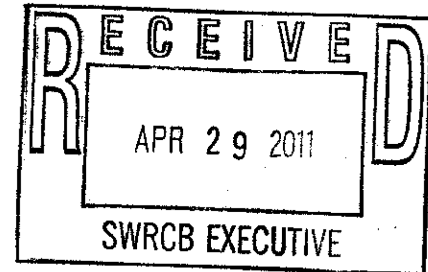

April 29, 2011

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814
commentletters@waterboards.ca.gov

RE: COMMENTS ON JANUARY 2011 DRAFT INDUSTRIAL STORM WATER PERMIT

Dear Ms. Townsend and Members of the Board:

The metalworking industry is comprised of nearly 6,000 facilities, employing over 250,000 Californians with living wage jobs and benefits. 8 out of 10 employees in the metalworking sector are considered ethnic minorities or reside in communities of concern.

The metalworking sector is a mature industry. Those facilities that have chosen to continue operating in the state of California have proactively made site improvements to match the state's environmental and regulatory expectations.

One area where the metalworking industry has been a leader is in storm water. CMC members have been active participants in storm water compliance efforts since the first permit was issued almost twenty years ago. CMC members are also one of the pioneers in group monitoring by establishing a state water board approved Metal Casting Storm Water Monitoring Group ("MCSMGI") in 1992.

The California Metals Coalitions' comments are submitted with the members' desire to meet their compliance obligations in a manner that will result in protection of California's waters without placing unrealistic and arbitrary compliance burdens on industrial dischargers.

The January 2011 IGP, however, contains numerous elements with which CMC members have expressed deep concern:

- The 2011 IGP was issued as an incomplete draft without proper notification;
- After a 5-year period since the last issuance, the current 2011 IGP was issued without any invited input from our industry.

- The informal hearings in February and March were limited capacity;
- The web access for the informal hearings were unreliable;
- After the January 2011 IGP release, water board staff and board members were inaccessible.
- The 2011 IGP inappropriately relies on multi-sector general permit benchmark values and incorrectly implements Numeric Action Levels ("NALs") and Numeric Effluent Limits ("NELs");
- There is a failure to provide any economic analysis in the 2011 IGP's BAT/BCT discussion. With the public and private sector cutting significantly, the State Water Board needs to acknowledge this crisis with an economic analysis of their proposal;
- The 2011 IGP eliminates receiving water provisions that are in the existing 1997 IGP that provide a safeguard from third party citizen suit litigation for industrial dischargers;
- The 2011 IGP fails to take into account background levels in the stormwater sampling scheme; and
- The 2011 IGP imposes onerous additional monitoring and reporting requirements that provide no assurance for greater water quality protection.
- Group monitoring was eliminated without sufficient justification;

I. <u>The 2011 IGP Was Issued as an Incomplete Draft Without Proper Notification</u>

The 2011 IGP was issued without proper notification. For example, the SWRCB has embraced the industry input for over twenty years (which is an extension of the EPA's 1990 final stormwater application rule), yet, the SWRCB proposes to capriciously move forward after issuing an incomplete permit draft with three public workshops and one public hearing – all over a span of 90 days.

Not only was the 2011 IGP issued without proper notification, it was issued as an incomplete draft.

By way of example, the 2011 IGP was issued with reference to the implementation of Total Maximum Daily Loads ("TMDLs"). As reference, to the 2011 Draft Industrial General Permit Order ("2011 IGP") at 7 ("Regional Boards may impose more stringent water quality based effluent limitations through the implementation of TMDLs or through other Regional Board actions"); <u>id.</u> at 8 ("Dischargers located within the watershed of a 303(d) impaired water body, for which a Total Maximum Daily Load (TMDL) had been adopted by the Regional Water Board or US EPA . . . Attachment G of this General Permit provides links to the applicable TMDLs.") However, Attachment G is incomplete. <u>Id.</u> at Attachment G ("The below list is <u>*not a final or complete list*</u> of the TMDL segments possibly applicable to dischargers, but illustrates what the final Attachment will contain for all industrial related TMDLs. More work is needed with TMDL staff to develop final list") (emphasis added).

The idea that the Regional Boards may impose more stringent water quality based effluent limitations through the implementation of TMDLs – without a final or complete list – is wholly unfair and unreasonable.

At the very least, to achieve a more transparent and less arbitrary permit issuance process, CMC requests that the SWRCB record and provide a recording or transcript for future question and answer sessions (workshops) pertaining to drafts of the industrial general permit and make these transcripts available online.

II. The 2011 IGP Proposes Elimination of Storm Water Monitoring Groups Without Sufficient Justification

Since the 1990s, group stormwater monitoring has served numerous functions – that of which was initially to bring facilities into industrial permit coverage. Throughout the years, group monitoring has evolved into not only ensuring industrial permit coverage but being able to provide reliable monitoring data on an industry-by-industry basis and providing tailored best management practices ("BMPs"). Not to mention, groups prepare and submit Annual Group Evaluation Reports ("AGERs") that provide the SWRCB and regional water boards with a snapshot of the facilities on an annual basis. Furthermore, the majority of group leaders, who provide guidance and oversight, are licensed professional engineers or working under professional engineers. It is thus evident that the monitoring groups have benefitted SWRCB and California's water quality in general. Therefore, eliminating storm water monitoring groups without sufficient justification and notice, is wholly unfair to the group members who have steadfastly complied with the industrial general permit since its inception.

The 2011 IGP makes only ***one*** reference to the elimination of group monitoring – that of which is not sufficient to eliminate group monitoring after industries have relied on group monitoring for twenty years. The 2011 IGP fails to acknowledge the benefits of group monitoring including: industry-specific compliance and data gathering and group quantitative and narrative data developed under professional and experienced guidance.

The SWRCB has capriciously and arbitrarily eliminated group monitoring without balancing the additional benefits that monitoring groups provide to California's stormwater program – including increased, more reliable stormwater quality data that is centered on a specific industrial activity and reduction of inspections which relieves resource-strained regional water boards and MS4s.

III. The 2011 IGP's Use of the Multi-Sector General Permit Benchmark Levels as Numeric Effluent Limits ("NELs") or Numeric Action Levels ("NALs") is Misapplied and Misinterpreted[1]

The 2011 IGP's use and reliance of the benchmark values in the EPA's Multi-Sector General Permit for Stormwater Discharges Associated With Industrial Activity ("MSGP")[2] as NELs/NALs is inappropriate given the fact that the EPA never intended that the MSGP benchmarks be effluent limitations. In fact, the MSGP and its Response to Comments state clearly and unequivocally ***twice*** that benchmarks are not effluent limitations:

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[1] The legal argument for Section II of this letter brief is authored, in part, by the California Stormwater Quality Association (CASQA) Industrial Permit Subcommittee.

[2] 73 Fed. Reg. 56572 (September 29, 2008).

> The **benchmark concentrations are not effluent limitations**; a benchmark exceedance, therefore, is not a permit violation. Benchmark monitoring data are primarily for your use to determine the overall effectiveness of your control measures and to assist you in knowing when additional corrective action(s) may be necessary to comply with the effluent limitations in Part 2. MSGP at Part 6.2.1 (emphasis added).
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> EPA notes that Part 6.2.1 emphasizes that the benchmark thresholds used for monitoring **are not effluent limits**, but rather information that is primarily for the use of the industrial facility to determine the overall effectiveness of the control measures and to assist in understanding when corrective action(s) may be necessary.[3]

Despite these clear and unequivocal statements, finding 42 in the 2011 IGP states that "The State Board finds that the USEPA benchmarks serve as an appropriate set of technology based effluent limitations that demonstrate compliance with BAT/BCT." Moreover, the United States Central District federal court held in *Santa Monica Baykeeper v. Kramer Metals* (C.D. Cal. 2009) 619 F.Supp.2d 914, 924 that:

> "[a]lthough the Benchmark levels are useful objective guidelines, the Court is not persuaded it would be appropriate to hold that samples showing concentrations in excess of the Benchmark levels constitute a violation of Effluent Limitation B(3) simply by virtue of exceeding those Benchmark levels. Doing so would effectively – and inappropriately – turn these Benchmarks into numeric effluent limitations."

Given the express intent of the EPA in drafting the MSGP, in conjunction with *Kramer Metals*, relying on the EPA benchmarks is clearly a whimsical, misapplied, and misinterpreted attempt to apply effluent limitations without any evidentiary support.

IV: The 2011 IGP's Use of NALs/NELs May Not be Imposed Without Complying with Due Process and Regulatory Requirements

Introducing an incomplete draft permit that imposes more stringent obligations and opens up the flood gates to third party citizen suits with only three informal public workshops and one public hearing, over a four month period violates the group members' due process rights. In addition, the 2011 IGP fails to provide any evidentiary support as to the adoption of the NELs as technology-based effluent limitations.

In addition, the 2011 IGP has not discussed with specificity the factors set forth in the Clean Water Act, section 304 or the regulations pursuant to 40 C.F.R. 122.44(a)(1) and 125.3. Although the 2011 IGP states that "[e]xceedances of an NAL are not a violation of this General Permit" – an NAL exceedance may very well lead to a violation of the General Permit and may subject the discharger to mandatory minimum penalties. 2011 IGP at 14-15. More specifically, "[d]ischargers in Corrective Action Level 3 . . . are subject to a numeric effluent limitation (NEL) that will be the same numeric value as the applicable pollutant NAL. A daily average exceedance of the NEL is *a violation* of this General Permit and may subject the discharger to mandatory minimum penalties." Id. at 15 (emphasis added). As such, imposing NALs/NELs without proper and sufficient notice and satisfactory compliance with the

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[3] 73 Fed. Reg., 56572, 56574.

applicable regulations in mandating these NALs/NELs, constitutes a violation of the group members' due process rights.

V. The 2011 IGP Fails to Provide Any Economic Analysis in the BAT/BCT Discussion and the SWCRB Should Consider Industry-Specific NALs/NELs

Moreover, the 2011 IGP's common theme is that industrial discharges should achieve BAT/BCT compliance. See, e.g., 2011 IGP at 18 ("BMPs shall be selected to achieve BAT/BCT"); 2011 Fact Sheet at 7 ("[a]ll dischargers subject to Baseline Compliance and Level 1 and Level 2 corrective actions are subject to the narrative, technology-based effluent limitations or BAT/BCT.") However, the IGP fails to provide any economic analysis as to what constitutes BAT/BCT – let alone of what constitutes BAT/BCT on an industry-specific basis.

CMC thus suggests, consistent with the Blue Ribbon Panel report, that the SWRCB establish NALs/NELs based on the technology that is available and particular to industry types. Simply put, BAT/BCT differs for various industry sectors. Similarly, the NALs/NELs are based on a one-size-fits-all approach – meaning some (if not all) NALs/NELs are set far below of what is attainable for industries – thus, placing a disproportionate burden on industrial dischargers at a time when California can least afford it. Group monitoring, however, provides the SWRCB with the necessary and accurate data it needs to establish NALs/NELs on a sector by sector basis.

VI. Receiving Water Provisions Should be Retained From the Existing 1997 IGP

The 2011 IGP contains a standard provision that prohibits discharges that cause or contribute to a water quality exceedance. 2011 IGP at 15. The Fact Sheet to the 2011 Draft Permit appears to refer to a process regarding potential receiving water quality exceedances (observed by the Regional Water Board or discharger) that is identified in Section V.6 of the Draft Permit. 2011 IGP Fact Sheet at 8-9. Section V.6 does not exist.

The 1997 IGP analogue is Receiving Water Quality Limitation in Section C.2. 1997 IGP at 4. During the 1997 permit proceedings there were significant concerns over the interpretation of what "cause or contribute" means.[4] The State Water Board established a process, codified in Section C.3-4 of the 1997 IGP to allow the Regional Water Board or a discharger, upon identifying a potential water quality limitation exceedance. It involved the submittal and approval of a Report with additional BMPs to be implemented at the facility. As noted in the State Water Board's Response to Comments on the General Industrial Stormwater Permit April 17, 1997:

> Implementation of BMPs that achieve BAT/BCT involves (1) considering economics and (2) the BMPs generally adequate for treatment or source control of storm water discharges. The procedure in Section C.3. requires taking additional steps necessary to achieve water quality standards. These steps go beyond the standard BMPs that would be adequate at most sites because of the impact on receiving waters. Examples of BMPs might include treatment or no longer using a material that is causing the impact.

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[4] It is MCSMGI's belief that there is no bright line standard for "exceeding a water quality standard." As is outlined in other sections of MCSMGI's comments, receiving water quality standards are not, and should never be, applied as numeric, end of pipe limitations.

Furthermore, in *Kramer Metals*, 619 F.Supp.2d at 927, 929 although the court wrongly held that the "CTR criteria apply end of the discharge pipe" – the court also held that section C.3 provides a "safe harbor" for industrial dischargers who cause or contribute to an exceedance of a water quality standard such as the CTR. Thus, a facility operator "will not be in violation of Receiving Water Limitation C(2) as long as the facility operator has implemented BMPs that achieve BAT/BCT and follows a reporting procedure." Id. (internal quotation marks omitted).

The 1997 IGP C.3 provision, that was upheld by the *Kramer Metals* Court, is necessary to protect the industrial dischargers from the influx of third party citizen group suits. More importantly, it provides a mechanism for the regional water board to decide compliance – rather than allowing the citizen groups, in effect, to become the judge and the jury as to what constitutes stormwater compliance. Third party citizen suits typically result in significant costs to the industrial dischargers – anywhere from $100,000 to $300,000 after attorneys' fees and environmental project costs are paid. Thus, in order to allow the industrial dischargers to focus on the end-game – better water quality in California – it is necessary for the 2011 IGP to include the 1997 IGP's C.3 provision.

Thus, to be consistent with the 1997 IGP and in light of the *Kramer Metals* decision, it is CMC's recommendation that Section VI. be amended to include a new section E. as follows:

> New Section VI.E.1. A facility operator will not be in violation of Receiving Water Limitation Section VI.A. as long as the facility operator has implemented BMPs that achieve BAT/BCT and the following procedure is followed:
>
> a. The facility operator shall submit a report to the appropriate Regional Water Board that describes the BMPs that are currently being implemented and additional BMPs that will be implemented to prevent or reduce any pollutants that are causing or contributing to the exceedance of water quality standards. The report shall include an implementation schedule. The Regional Water Board may require modifications to the report.
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> b. Following approval of the report described above by the Regional Water Board, the facility operator shall revise its SWPPP and monitoring program to incorporate the additional BMPs that have been and will be implemented, the implementation schedule, and any additional monitoring required.
>
> 2. A facility operator shall be in violation of this General Permit if he/she fails to do any of the following:
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> a. Submit the report described above within 60 days after either the facility operator or the Regional Water Board determines that discharges are causing or contributing to an exceedance of an applicable water quality standard;
>
> b. Submit a report that is approved by the Regional Water Board; or
>
> c. Revise its SWPPP and monitoring program as required by the approved report.

In addition, CMC requests that the 2011 IGP add an unequivocal, clear statement that CTRs are not end of pipe numeric limitations.

VII. Background Levels Must Be Taken Into Account in Any Stormwater Sampling Program

Furthermore, the NALs/NELs (as discussed above) do not take into account background levels and natural occurrence of many regulated constituents such as metals or their prevalence in our cities in the form of common building construction materials, vehicles, and day-to-day human activities. For example, aluminum in the form of aluminum oxides is present on painted buildings and zinc is common in buildings with galvanized metal siding or roofs, cyclone fences, and automobile tires and undercoating. In fact, it is almost certain that facilities not falling into an SIC Code regulated by the IGP could achieve the NALs/NELs if they were required to conduct storm water sampling and analysis. Thus, it is simply inequitable to place an unfair burden on industrial dischargers – that of which is beyond their practical ability to control – while other businesses in non-regulated SIC Codes with similar infrastructure are not required to employ any storm water management practices.

VIII. CMC Opposes the Onerous Monitoring Requirements that the 2011 IGP Imposes

The 2011 IGP requires significantly more monitoring requirements than the current 1997 IGP. By way of example, the IGP requires that dischargers "collect water samples from the first qualifying storm event of each calendar quarter." 2011 IGP at 30. Moreover, dischargers subject to level 2 corrective actions must "collect samples from the first 2 qualifying storm events each quarter" and dischargers subject to level 3 corrective actions must "collect samples from each and every qualifying storm event in a quarter." Id. In addition, the IGP eliminates the option to reduce the number of sampling locations based on representative substantially identical drainage areas. This increase in sampling is quite arbitrary – not only does it increase costs for the individual facilities but it does nothing to ensure water quality is more protected.

In addition, there is significantly more documentation required in the 2011 IGP – including (but not limited to) various pre-storm event inspections, inspection of outdoor areas and equipment that come into contact with industrial materials or wastes, equipment inspections, and weekly inspections (for outdoor/exposed areas, BMPs for controlling material tracking and rinse/wash water activities, covering and containing stored industrial materials, and diverting stormwater from industrial process areas). Id. at 23, 24, 29-30.

Although CMC takes its environmental stewardship seriously, it believes these exhausting requirements to conduct repetitive sampling and reporting will result in a waste of human and financial resources without very little assurance that water quality will be more protected. Not only will these additional requirements increase the cost of business when California can certainly not afford to, there is little guarantee that environmental quality will actually improve.

IX. Fees and Enforcement:

CMC has concerns with how its members' permit fees are being spent. CMC, thus, requests that the SWRCB, in its next draft of the industrial general permit, provide a budget illustrating the allocation of resources dedicated to the following: enforcement of non-filers who are wholly not complying with the general industrial permit, site reviews/inspections of industrial dischargers who have filed notices of intent ("NOI"), and industrial dischargers who seek the assistance of the regional water boards through the 1997's IGP's C.3 mechanism. CMC believes that the SWRCB should focus its

resources on the facilities that have not filed an NOI and/or facilities that are obviously and visibly in non-compliance with general permit requirements.

X. Conclusion

In conclusion, the California Metals Coalition strongly advocates for a suspension of the current proceedings and to engage all stakeholders before releasing a new draft industrial permit. Stopping proceedings will free up the staff and board to meet with impacted businesses, cities, schools, and other stakeholders.

The key components of this current draft permit have been acknowledged by leaders in the private and public sector as being significantly cost prohibitive without any data showing a measured benefit in water quality.

It is perplexing and alarming that during the worst economic recession in decades, millions of fellow Californians out of work, the state cutting essential services, and budget crises all over the state, that the State Water Board and staff is holding to the position that it does not have to conduct an economic analysis of its draft permit.

We appreciate the opportunity to present these comments. If you have any questions or comments, please feel free to contact our office.

Sincerely,

James Simonelli
Executive Director