Heal the Bay

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April 29, 2011

Mr. Hoppin, Chair and Board Members
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814
Via email [commentletters@waterboards.ca.gov]

Re: Comments on Draft National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges Associated with Industrial Activities

Dear Chair Hoppin and Board Members:

On behalf of Heal the Bay, we submit the following comments on the State Water Resources Control Board's ("State Board") proposed Draft General Permit for Storm Water Discharges Associated with Industrial Activities ("Draft Industrial Permit" or "Draft Permit"). We appreciate the opportunity to provide comments.

We have a number of concerns regarding the Draft Industrial Permit. The current approach in the Industrial Permit (Order No. 97-03-DWQ) adopted in 1997 has not led to sufficient water quality improvement and water quality standards attainment over the last 14 years. Thus it is critical that the Draft Permit take a much more aggressive approach to protect California's water bodies, including the following:

- Enforceable Numeric Effluent Limits ("NELs") must apply to all industrial dischargers immediately
- The Draft Industrial Permit should include NELs for additional contaminants and parameters common in industrial discharge
- All California TMDLs that apply to industrial discharges must be included in the Draft Industrial Permit
- The Draft Permit should require BMP performance evaluations and include BMP maintenance criteria
- Monitoring requirements must be strengthened
- The Draft Industrial Permit must further address plastic pellet pollution

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These and other concerns are detailed below.

I. The Draft Industrial Permit must require enforceable numeric limits for all storm water discharges associated with industrial activity

A. The Draft Industrial Permit should abandon the three-level approach for imposing NELs

In order to better protect aquatic life and human health, the Draft Industrial Permit should include numeric effluent limits that are immediately enforceable. The three tiered approach used in the Draft Industrial Permit allows three reporting years of exceedances of NALs before the NAL becomes an NEL. In the meantime, NAL exceedances simply trigger three levels of iterative BMP upgrades that may do little or nothing to improve water quality. We have found this iterative approach to BMP upgrades to be ineffective in other storm water programs, such as the MS4 permit program and the current industrial program, where BMP performance and pollution removal efficiency are rarely considered when BMPs are installed. The State Board should remove the NAL scheme from the Draft Permit, and instead, include immediately enforceable NELs.

There can be no reasonable dispute that numeric effluent limitations are feasible. As a result, the State Board may no longer rely upon an industrial stormwater permit that relies exclusively on BMPs. See 40 C.F.R. § § 122.44(k)(3). As the technical panel convened by the State Board in 2006 found, "[t]he Panel believes that Numeric Limits are feasible for some industrial categories. Industries have control over their facilities. They control access, construction practices, product substitution to affect pollution prevention and the types of treatment systems to be used to mitigate stormwater runoff." Storm Water Panel Recommendations to the California State Water Resources Control Board, "The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities," p. 19 (June 19, 2006). In light of these characteristics inherent to industrial discharges, limits in the permit should be enforceable immediately.

Numeric effluent limitations are entirely appropriate and indeed mandated under Sections 301, 304 and 402(p) of the CWA, 33 U.S.C. §§ 1311, 1314, 1342(p). The presumption under the Clean Water Act is that numeric effluent limits will be the tools used to limit the discharge of pollutants, particularly toxic ones. Further, the Ninth Circuit has expressly upheld the State's authority under the Clean Water Act to establish numeric limits for industrial storm water discharges. Defenders of Wildlife v. Browner (1999) 191 F.3d 1159. As another example on December 13, 2006 in State Board Order WQ 2006-0012 the State Board upheld the inclusion of numeric effluent limits for storm water discharges from the Santa Susana Field Laboratory facility in response to a petition submitted by Boeing Company. As upheld by the State Board,

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the State and regional boards have full authority to establish enforceable effluent limits for discharges.

At a minimum, the State Board should simplify and expedite the process for a NAL becoming an NEL. Specifically, Level 1 and Level 2 should be combined. Separating Level 1 operational source controls and Level 2 structural and/or treatment controls into separate phases of corrective actions is unnecessary. The first two levels of corrective action should have been completed many years ago by all dischargers and, given the express deadlines for achieving BAT and BCT in the CWA as well as the 19 years that have passed since the State's adoption of the original general permit, the State Board cannot justify any compliance schedule. BAT and BCT already are mandated by the current permit, and the new permit should continue to require BAT and BCT immediately upon adoption. There is no legitimate policy reason to coddle dischargers who have failed to implement BAT and BCT 19 years after the requirement was adopted in a permit. There is no authority in the CWA for the State Board to adopt a schedule of compliance to achieve a technology-based effluent limitation. Effluent limitations achieving BAT and BCT were required to be implemented not later than March 31, 1989. 33 U.S.C. § 1311(b). Hence, the State Board has no authority to extend that firm compliance deadline established by Congress. With this in mind, there is no reason a discharger should delay a year after an exceedance before implementing structural and/or treatment controls. Dischargers who have not already accomplished the actions listed out in the proposed Level 1 corrective actions are in blatant violation of the existing permit. At a minimum, two NAL exceedances during the first two years should automatically lead to a NEL.

B. The Draft Industrial Permit inappropriately allows dischargers to request a Suspension of Numeric Effluent Limitations ("SNEL")

After the very high bar is met to trigger a NEL, the Draft Permit allows the discharger to get out of the NEL entirely. Indeed, if a discharger achieves the limits within two years, they would never be subject to the effluent limits. This provision is not protective of water quality and should be eliminated. Specifically, the State Board should delete the language in section XVII.D.4 and XVII.D.5 of the Permit that allows dischargers to request a SNEL (Draft Permit Page 41). The State Board should not allow any industrial discharger to be exempt from meeting the triggered numeric effluent limitations. Further, the Draft Permit states that a discharger need only demonstrate that the discharge is not discharging to an *impaired* water body to have NELs suspended. The State Board must protect water quality in all state waters; allowing for discharges above benchmarks will lead to increased impairments in currently unimpaired water bodies. Thus we urge the State Board to eliminate the SNEL provision entirely.

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C. The Draft Industrial Permit should not include the Conditional Exclusion for Dischargers that implement Green Storm Waiver Impact Reduction Technology ("G-SIRT")

The Permit should not contain any exclusion based upon the implementation of LID. The Draft Permit includes a provision to allow dischargers to apply for conditional exclusion to the SWPPP and monitoring requirements of the Permit if they design and implement improvements to their facility design that satisfy future-adopted and State Board approved G-SIRT standards (Draft Permit Section XXIII Page 48). While we support the State Board providing an incentive to implement low impact development ("LID") measures, we do not support reduction in SWPPP and monitoring requirements, especially for those discharges to impaired waterbodies.

The Board has provided absolutely no justification for allowing an exemption from the Permit's otherwise applicable requirements, including those in the SWPPP and/or monitoring requirements. It is impossible to even evaluate this proposal, as the current draft of the Permit fails to include any standards or other provisions that would be required under the G-SIRT program. The Permit must be supported by evidence that justifies the Board's decision to include, or not to include, specific requirements. Currently, the Permit's exemption for projects using G-SIRT requirements are not supported by necessary evidence, and the Board has failed to explain its decision to allow for complete exemption from the Permit's otherwise core SWPPP requirements, including requirements to meet NELs, conduct adequate monitoring, or implement controls to meet the Clean Water Act's required BAT standard. The lack of substantial evidence to support the Tentative Order renders it unlawful. (See, e.g., Bangor Hydro-Elec. Co. v. F.E.R.C. (D.C. Cir. 1996) 78 F.3d 659, 664.) Including this exception would provide relief from the numeric limitations, which would entirely defeat the permit's purpose of reducing storm water to levels based on BAT and complying with water quality standards. While LID/GI techniques can have a place in some properly-designed facilities, their use does not translate to excluding BMPs from the permit. For example, to the extent LID refers to infiltration basins, such features should be monitored and controlled within the proposed permit or with individual permits. Infiltration is not the same as treatment. Simply allowing polluted water to flow into the ground can end up transferring the pollution problem to groundwater. The permit should also ensure that industrial dischargers who implement LID features consisting of water treatment and release techniques comply with water quality limits.

II. The Draft Permit should require BMP performance evaluations and establish BMP maintenance criteria

In order to ensure that BMPs are truly designed to BAT/BCT, we suggest that the Draft Permit require a performance evaluation for all structural best management practices used by the discharger to comply with the Permit (including retrofits and iterative requirements).

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Specifically once per permit cycle, the discharger should submit a report to the State Board that includes a BMP performance evaluation. The report will identify three structural BMPs to reduce loads and concentrations for each targeted pollutant of concern. Then it should detail an analysis on the efficacy of those BMPs for removing pollutants of concern (pollutant removal efficiency and effluent water quality) for various pollutants of concern. The discharger would then select the best performing BMP in the specific pollutant category. This evaluation will help determine the structural management practices that are truly best management practices rather than just structural management practices. In addition, all BMPs installed should be required to be properly maintained, and maintenance requirements should be outlined in the Draft Permit. This process will help move the state towards water quality standards attainment.

III. TMDLs must be incorporated directly into the Draft Industrial Permit.

Heal the Bay supports the language in Section VI. of the Draft Permit, which states that dischargers must comply with approved TMDLs (Draft Permit Page 15 *Receiving Water Limitations*). However, other aspects of the permit fall short of ensuring the TMDL wasteload allocations and requirements are met by industrial dischargers.

For instance Finding 54 simply defers to the Regional Board and an appendix with links to TMDL requirements. This is inappropriate. Federal law clearly commands that the Board integrate already adopted TMDLs into the effluent limitations of appropriate NPDES permits. Specifically, federal regulations require that:

> Effluent limits developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, are consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA pursuant to 40 CFR 130.7.[1]

Further, implementation schedules actions must be included in the Permit, as they are vital steps in ensuring that dischargers are on-track for ultimate compliance with the waste load allocations.

Attachment G is not complete and only includes examples of TMDLs that would be included from Region 1. This is a critical part of the permit that should have been included before the

[1] 40 CFR § 122.44(d)(1)(vii)(B).

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Draft Permit was released for public comment. This incomplete information makes it difficult for the public to fully evaluate the Draft Permit. We have encountered many examples in other NPDES permits where critical TMDLs were erroneously omitted from lists of applicable TMDLs. It is often a result of stakeholder comments detailing the omissions that these TMDLs have been properly included in these permits. In addition to containing a complete list of TMDLs, the permit should also include all milestones and actions contained in TMDL implementation plans. The State Board should work with all regional boards to ensure that all TMDL wasteload allocations and other requirements are included within the Draft Permit.

IV. The Draft Industrial Permit contains inadequate benchmarks for critical industrial pollutants.

A. The Draft Industrial Permit excludes numeric limits for numerous industrial pollutants.

The Draft Permit should contain NELs, or at a minimum NALs, for *all* pollutants likely to be present in industrial discharge. Unfortunately, the list of benchmarks in Table 4 omits various common industrial pollutants. For example, semivolatile organic compounds such as total PAHs are notably absent. Chromium and total PCBs, industrial contaminants of particular concern, are also absent. The State Board should include NALs/NELs and require monitoring for these critical parameters that are often found in industrial runoff and have caused receiving water quality impairments.

B. The NAL/NEL values for mercury and pH in the Draft Permit are too high.

The NAL/NEL for mercury is set too high to be protective of receiving waters. The CTR criterion for mercury is 0.00005 mg/L, whereas the Draft Permit includes a NAL/NEL value of 0.0024 for total mercury. At a minimum, the Draft Industrial Permit should contain limits as protective as CTR values. The pH NEL is also set inappropriately. The range of 6.0 to 9.0 for pH is too great, and again, is not protective of receiving waters. Of note, this range is not consistent with the NEL for aluminum. We urge the board to revise the NEL pH range to 6.5 – 8.5, which is consistent with Regional Basins Plans such as Regions II and IV.

C. The Draft Industrial Permit should clarify how to determine which hardness value to use for hardness-dependent NELs.

Certain NALs/NELs in the Draft Permit are hardness dependent. Staff's proposed method for addressing hardness is arbitrary and errs as a matter of law. First, staff applies the hardness measurements to its proposed BAT effluent limitations. Hardness only applies to the permit's receiving water limitations which prohibit facilities from causing or contributing to any exceedance of hardness dependent metal standards. The BAT effluent limitations are technology-based and the anticipated performance is not dependent on hardness. Further in Appendix I, the Draft Permit outlines the hardness data ranges that can be applied, but not how

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the specific hardness value should be chosen. For instance as drafted, a discharger could select the median or average hardness instead of the tenth percentile hardness or hardness value during critical conditions, which would result in a weaker, less protective target. This should be clarified within the Draft Permit. Lower hardness allows a higher proportion of dissolved metals in the water column, which poses a greater threat to aquatic life. Calculating limits based on the tenth percentile hardness value would provide more protection to aquatic life by requiring a lower proportion of dissolved metals in the water column. Median hardness values would only be protective half the time. We recommend calculating the tenth percentile hardness during the critical period, wet-weather, to be more protective.

V. The Draft Industrial Permit needs stronger monitoring requirements

The Draft Permit's monitoring program should be significantly strengthened. Unfortunately, the State Board has failed to develop and require a standardized monitoring program for industries as required by SB 72, authored by Sheila Kuehl and sponsored by Heal the Bay, which passed in 2001. Thus, the Draft Permit must clearly assign strong monitoring requirements that provide adequate information on industrial discharges.

We support the State Board requiring electronic reporting through the State Water Board's Storm Water Multi-Application and Report Tracking System (SMARTS) website and the inclusion of additional monitoring parameters from the current permit. Data submitted through SMARTS should also be made available to public.

A. The Draft Permit's monitoring requirements should include additional parameters

The State Board should place significant focus on the industrial monitoring program in the Draft Permit. As noted by the Expert Panel, "The current industrial permit has not produced such a database for most industrial categories because of inconsistencies in monitoring or compliance with monitoring requirements. The Board needs to reexamine the existing data sources, collect new data as required and for additional water quality parameters (the current permit requires only pH, conductivity, total suspended solids, and either total organic carbon or oil and grease) ...." Thus, it is critical that the Draft Permit help establish a sufficient dataset of industrial discharges.

As mentioned above, PCBs, PAHs, and chromium should be added to the monitoring requirements. These are common industrial pollutants. The Draft Permit should also contain toxicity and bioassessment monitoring requirements to ensure industrial discharges are not impacting ecological health in the receiving water.

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B. The Draft Industrial Permit should not allow for a reduction to the number of annual qualifying sampling events

The Draft Industrial Permit allows for a reduction to the number of annual sampling events for dischargers who can demonstrate "consistent compliance" with the permit requirements. Sampling is required for the first qualifying storm event of a quarter. However, the permit allows for a decrease in this frequency after ten events that do not cause corrective action triggers. With frequent inconsistencies in discharges and anomalies in sampling, the first sample may not be representative of the actual level of pollutants coming off a particular facility. Thus, the Board's proposed sampling reduction scheme could permit a discharger to continue negatively impacting water quality while slipping under the radar of the Permit's monitoring scheme. Also, decreased monitoring frequencies will decrease the likelihood of finding exceedances, which would make it even more difficult to trigger a NEL. The reduced sampling proposal is not justified. Annual sampling would not demonstrate anything meaningful in terms of water quality protection and at best would allow dischargers a way to avoid a requirement to take affirmative action regarding the actual impact of their storm water discharges. Quarterly sampling is already a low frequency considering the potential risks of industrial discharge. Consistent monitoring should remain throughout the permit cycle in order to track trends and to adequately understand the discharge. Thus, we urge the State Board to remove this provision. And we urge the State Board to analyze existing monitoring data to determine status and trends of industrial stormwater discharges by region, sector, and facility.

C. The Draft industrial Permit should not allow multiple dischargers to collect samples of combined discharge.

The Draft Permit allows dischargers to combine samples from as many as four catchment areas (Draft Industrial Permit Section XXI.B.). Such combinations would not be representative of discharge quality and would only serve to mask the potential pollutants contained in storm water discharges. Instead, monitoring should be performed in each facility's effluent at the point of discharge. This makes it much easier to trace exceedances and hold individual industrial dischargers accountable. Composite samples may save money but they do not accurately describe effluent water quality and lead to gross underestimates of facility impacts to receiving waters. Also, the Draft Permit must specify that samples be collected at the point of discharge, not downstream or in receiving waters. Allowing dischargers to monitor their combined effluent in receiving waters is not appropriate, as inland surface water dischargers are rarely if ever subject to dilution credits under the State Implementation Policy (SIP).

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VI. The Draft Industrial Permit inadequately protects water quality from plastic pellet pollution

Industries that handle or manufacture plastic pellets (also called "nurdles") pose an enormous threat to beneficial uses. These pellets look identical to food sources to wildlife, and as a result, are often mistakenly ingested. Section XXIV and Finding 63 of the Draft Permit attempt to address this critical pollution source, but do not go far enough. The Draft Permit should include more specific detail regarding BMP requirements in Section 13367 of the Water Code, which was incorporated into the law with the passage of AB 258 in 2007. The Draft Permit should also outline specific BMPs needed to prevent nurdles from being released into the environment. Specifically, we urge the State Board to include language requiring specific BMPs for plastic pellet pollution prevention to Section VIII.H. of the Industrial Permit. As a provision of the bill, the State Board shall require the following best management practices in all permits issued under the national pollutant discharge elimination system (NPDES) program that regulate plastic manufacturing, handling, or transportation facilities:

(1) Appropriate containment systems shall be installed at all onsite storm drain discharge locations that are down-gradient of areas where preproduction plastic is present or transferred. A facility shall install a containment system that is defined as a device or series of devices that traps all particles retained by a one millimeter mesh screen and has a design treatment capacity of not less than the peak flowrate resulting from a one-year, one-hour storm in each of the down-gradient drainage areas. When the installation of a containment system is not appropriate because one or more of a facility's down-gradient drainage areas is not discharged through a stormwater conveyance system, or when the regional board determines that a one millimeter or similar mesh screen is not appropriate at one or more down-gradient discharge locations, the regulated facility shall identify and propose for approval by the regional board technically feasible alternative storm drain control measures that are designed to achieve the same performance as a one millimeter mesh screen.

(2) At all points of preproduction plastic transfer, measures shall be taken to prevent discharge, including, but not limited to, sealed containers durable enough so as not to rupture under typical loading and unloading activities.

(3) At all points of preproduction plastic storage, preproduction plastic shall be stored in sealed containers that are durable enough so as not to rupture under typical loading and unloading activities.

(4) At all points of storage and transfer of preproduction plastic, capture devices shall be in place under all transfer valves and devices used in loading, unloading, or other transfer of preproduction plastic. (5) A facility shall make available to its employees a vacuum or vacuum type system, for quick cleanup of fugitive preproduction plastic.

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In summary, the current industrial stormwater permitting scheme has not moved the state forward sufficiently in water quality protection over the last 19 years. Thus, the State Board must significantly strengthen the Draft Permit. Specifically, the State Board should require enforceable numeric limits for all industrial dischargers, or at a minimum, significantly streamline the proposed tiered approach to trigger a NEL. Further, the NALs and NELs that are selected must be protective. In addition, the Draft Industrial Permit should include all TMDL WLAs and associated requirements that are applicable to industrial dischargers. Also the monitoring requirements must be strengthened to track success, and the Draft Permit must be consistent with AB 258, the plastic pellet law. In order to ensure that the permit requirements are actually met, permit fees should be adequate to ensure a Regional Water Board inspection at least every other year. Currently, most of the facilities rarely, if ever, get inspected. Without these changes to the General Permit, beneficial uses or California's waterways will not be adequately protected from industrial discharges.

If you have any questions or would like to discuss any of these comments, please feel free to contact us at (310) 451-1500. Thank you for your consideration of these comments.

Sincerely,

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