



February 14, 2018

Chair Felicia Marcus and Board Members  
c/o Jeanine Townsend, Clerk to the Board  
State Water Resources Control Board  
1001 I Street, 24<sup>th</sup> Floor  
Sacramento, CA 95814

Public Comment  
Industrial General Permit Amendment  
Deadline: 2/14/18 by 12 noon

Sent via electronic mail to: [commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)



**RE: Comment Letter – Industrial General Permit Amendment**

Dear Chair Marcus and Board Members:

California Coastkeeper Alliance (CCKA) unites local Waterkeeper programs, including Los Angeles Waterkeeper, to fight for swimmable, fishable and drinkable waters for California communities and ecosystems. On behalf of CCKA and Los Angeles Waterkeeper, thank you for the opportunity to comment on the proposed TMDL Waste Load Allocation (“WLA”) incorporation into the General Industrial Stormwater Permit (“General Permit”).

When the latest General Permit was adopted in 2015, staff and the Board described the permit as a “bridge” until WLAs could be incorporated as the means for making real progress to reducing impairment in receiving waters. Now, nearly three years later, there is a significant risk the bridge permit adopted in 2015 is leading nowhere. Staff proposes essentially two paths to compliance. First, staff proposes a series of “TMDL based Numeric Action Levels” (“TNALs”) rather than Water Quality Based Effluent Limitations (“WQBELs”) for TMDL WLAs. Unfortunately, the TNALs are only notionally related to the WLAs articulated in the applicable TMDLs and are explicitly defined in the draft as *not* the required WQBEL. Second, the permit defines implementation of onsite retention of stormwater up to the 85<sup>th</sup> percentile 24-hour storm event as compliant with all applicable WLAs. There is an inadequate analysis to demonstrate that stormwater retention up to the 85<sup>th</sup> percentile storm will reduce discharges of pollution sufficient to meet the WLAs. As such, the scheme proposed in the draft permit amendments to incorporate the applicable WLAs into the permit are inconsistent with the requirements of the Clean Water Act and are therefore illegal.

CCKA is engaged in ongoing negotiations with State Board staff and industry to develop permit terms that comply with the Act and will achieve the required pollutant reductions from industrial dischargers. CCKA is hopeful those negotiations will result in permit amendments that will meet the requirements of the law. However, if adopted in its current form, the permit amendments would be illegal for at least the reasons summed up below.

**I. THE CLEAN WATER ACT REQUIRES INCORPORATION OF WASTE LOAD ALLOCATIONS FROM TMDLS INTO NPDES PERMITS AS WATER QUALITY BASED EFFLUENT LIMITATIONS, NOT TNALS.**

Once a TMDL with WLAs is developed, the permitting agency *must* incorporate the WLAs into applicable NPDES permits as WQBELs. See 40 C.F.R. § 122.44(d)(1)(vii)(B); 40 C.F.R. § 130.2(h). In doing so, the permitting agency must ensure that the effluent limits of the NPDES permit “are consistent with the assumptions and requirements of any available wasteload allocation [WLA] for the discharge”. 40 C.F.R. § 122.44(d)(1)(vii)(B).

The draft Permit Proposes TMDL Action Levels rather than Numeric Effluent Limitations:

77. The NALs/TNALs are not intended to serve as technology-based or water quality based numeric effluent limitations. The NALs/TNALs are not derived directly from either BAT/BCT requirements or receiving water objectives. NAL/TNAL exceedances defined in this General Permit are not, in and of themselves, violations of this General Permit.

Because the TNALs are not effluent limitations the WLAs cannot be incorporated via the TNALs. TNALs are facially inconsistent with the Clean Water Act.

**II. THE 85<sup>TH</sup> PERCENTILE 24-HOUR DESIGN STORM WILL NOT MEET REQUIRED WLAS.**

The Draft Amendment proposes an alternative compliance path, providing for retention BMPs to eliminate discharges up to a design storm of the 85<sup>th</sup> percentile 24-hour storm. Where a facility implements those BMPs, compliance with all WLAs is assumed.

The California Waterkeepers support retention, and specifically infiltration, as perhaps the most important multi-benefit solution to stormwater pollution. However, the design storm must be adequate to meet the WLAs set out in the TMDLs. Analyses to-date have failed to demonstrate that the 85<sup>th</sup> Percentile 24-hour storm will meet the WLAs set out in the TMDLs.

Assuming that meeting the copper TMDL WLA in the Los Angeles River, a stringent limitation, would assure compliance with all other applicable WLAs, staff relied on a study by industry consultants concluding that the 85<sup>th</sup> percentile storm would achieve compliance. However, a review by California Waterkeeper consultants indicates that the industry analysis relied upon by staff is inaccurate. Use of more representative pollutant concentration data indicates that compliance with the copper WLA for the Los Angeles River will require capture of at least the 95<sup>th</sup> percentile 24-hour storm.

**Table 1. Estimated Rates of Compliance (% of Storm Events) with the Los Angeles River Industrial Stormwater**

Waste Load Allocation for Different Retention Facility Design Storms and Effluent Copper Levels

<u>Design Storm</u>	<u>Copper Level</u>	<u>Compliance</u>
85 <sup>th</sup> percentile, 24-hour	Low (28.5 µg/L)	92% <sup>1</sup>
	Medium (40.8 µg/L)	90%
	High (78 µg/L)	87%
90 <sup>th</sup> percentile, 24-hour	Low (28.5 µg/L)	96% <sup>2</sup>
	Medium (40.8 µg/L)	94%
	High (78 µg/L)	92%
95 <sup>th</sup> percentile, 24-hour	Low (28.5 µg/L)	98% <sup>3</sup>
	Medium (40.8 µg/L)	97%
	High (78 µg/L)	96%

<sup>1</sup> GSI estimates using the South Gate rain gauge and copper effluent concentration = 28.5 µg/L are 94, 97, and 99 percent for the respective 85<sup>th</sup>, 90<sup>th</sup>, and 95<sup>th</sup> percentile, 24-hour events.

<sup>2</sup> GSI estimates using the South Gate rain gauge and copper effluent concentration = 28.5 µg/L are 94, 97, and 99 percent for the respective 85<sup>th</sup>, 90<sup>th</sup>, and 95<sup>th</sup> percentile, 24-hour events.

<sup>3</sup> GSI estimates using the South Gate rain gauge and copper effluent concentration = 28.5 µg/L are 94, 97, and 99 percent for the respective 85<sup>th</sup>, 90<sup>th</sup>, and 95<sup>th</sup> percentile, 24-hour events.

In follow-up meetings, staff has indicated that industry used the wrong copper WLA for its calculation, based on the old Basin Plan Limit. Because Site Specific Objectives were adopted using a Water Effects Ratio rationale, the Los Angeles River copper WLAs have increased by up to nearly an order of magnitude. Thus, compliance with the Copper WLA can be achieved with much less capture, and staff proposes using zinc, a much less toxic pollutant as an alternative parameter for defining the design storm. However, in doing so staff ignores the original rationale for using the copper WLA for the design storm—the copper limit was so low that compliance with copper made meeting all other WLAs more likely. Neither the Site-Specific Objective based copper WLA for the Los Angeles River, nor the Zinc WLA, are now sufficiently stringent to act as a surrogate for other WLAs in setting the design storm for the stormwater capture BMPs, and staff has proposed no additional justification for the proposed design storm. Because the State Water Board has failed to demonstrate that the 85<sup>th</sup> Percentile 24-hour design storm will achieve the required WLAs, the Draft Amendment is inconsistent with the Clean Water Act.

**III. THE THREE ALTERNATIVES: 85<sup>TH</sup> PERCENTILE STORM, TNALS AND NELS, ARE ALL INCONSISTENT WITH THE WLAS SET OUT IN THE TMDLS.**

Each TMDL to be incorporated into a permit articulates the load allocation by category. While that means the load allocation is measured (concentration, load, days of violation, etc.) varies from WLA to WLA, all provide requirements. Yet, in proposing the compliance mix set out in the Draft Amendment, the State Water Board made no adequate demonstration that the 85<sup>th</sup> percentile design storm, or the TNAL, or the limited NELs will meet the WLAs. We provide two illustrative examples below.

**A. Newport Bay Toxics TMDL.**

The Newport Bay Toxics TMDL provides a WLA for metal, including a specific waste load of zero for one industrial category—boatyards. Yet the draft WLA amendment proposes NELs well above zero for metals for all industrial dischargers—including the five boatyards currently permitting under the General Permit. Therefore, neither compliance alternative proposed – NELs nor the 85<sup>th</sup> Percentile design storm—is consistent with the WLA in the Newport Bay Toxics TMDL.

*Newport Bay Toxic Pollutant TMDLs*

**Table 5-7a. Mass-based Allocation Scheme for Metals in Newport Bay**

Category	Type	Copper	Zinc	Lead	Cadmium*
WLA	Urban runoff	3,043	174,057	17,638	9,589
	CalTrans	423	22,866	2,171	1,185
	Boatyards	0	0	0	0
	Other NPDES permittees	190	17,160	1,154	596
	<b>Sub-total</b>	<b>3,656 lbs/yr</b>	<b>214,083 lbs/yr</b>	<b>20,963 lbs/yr</b>	<b>11,370 lbs/yr</b>
LA	Ag runoff	215	114	0	0
	Boats	4,542	1,056	0	0
	Air deposition	101	606	68	4
	Undefined (open space, existing sed.)	803	11,414	678	428
	<b>Sub-total</b>	<b>5,661 lbs/yr</b>	<b>13,189 lbs/yr</b>	<b>746 lbs/yr</b>	<b>431 lbs/yr</b>
MOS		<b>2,329 lbs/yr</b>	<b>57,068 lbs/yr</b>	<b>5,427 lbs/yr</b>	<b>2,951 lbs/yr</b>
Total TMDL		<b>11,646 lbs/yr</b>	<b>285,340 lbs/yr</b>	<b>27,136 lbs/yr</b>	<b>14,753 lbs/yr</b>

\*values apply to Upper Bay only (estimated as 40% of Newport Bay volume)

PERMIT_TYPE	APP_ID	WQID	STATUS	NOL_PROCESSED_DATE	NOT_EFFECTIVE_DATE	REGION_BOARD	COUNTY	OPERATOR_NAME	FACILITY_NAME	FACILITY_ADDRESS	FACILITY_ADDRESS_2	FACILITY_CITY
Industrial	457818	B 30025767	Active	7/2/15			Orange	Larsons Shipyard LLC	Larsons Shipyard LLC	2705 Pacific Coast Hwy		Newport Beach
Industrial	209212	B 30018696	Active	3/16/04			Orange	Schock Boat Repair	Schock Boat Repair	2818 Lafayette Rd		Newport Beach
Industrial	209207	B 30018669	Active	3/8/04			Orange	Balboa Boatyard	Balboa Boatyard	2414 Newport Blvd		Newport Beach
Industrial	289032	B 30019948	Active	11/23/05			Orange	Basin Marine Inc	Basin Marine Inc	829 Harbor Island Dr		Newport Beach
Industrial	298241	B 30020135	Active	3/10/06			Orange	Bellport Newport Harbor Ship	Newport Harbor Shipyard	151 Shipyard Way Ste 7		Newport Beach
Industrial	460592		Not Submitted				Orange	Salls by Schock Inc dba Schock Boats	Schock boats	2900 Lafayette ave		Newport Beach

**B. Marina del Rey Toxics TMDL.**

The Marina del Rey Toxics TMDL sets a WLA for copper, lead and zinc for individual General Industrial Stormwater permittees in terms of grams of metal per acre of the facility per year.

**Metals per Acre WLAs for Individual General**

**Construction or Industrial Storm Water Permittees (g/vr/ac)**

<u>Copper</u>	<u>Lead</u>	<u>Zinc</u>
1.9	2.6	8.5

Thus, incorporation of the WLA would involve the simple step of applying the g/ac/year WLA via the permit, with appropriate monitoring to demonstrate compliance. Yet the Draft Amendment includes only instantaneous maximum concentration based TNALs, without explanation as to how those concentration based “action levels” are consistent with the clear and readily applicable WLA set out in the TMDL. Similarly, staff makes no effort to demonstrate how the proposed retention design storm would be consistent with the WLA set out in the TMDL. The proposed limits do not implement the WLA for Marina del Rey Toxics and are inconsistent with the Clean Water Act.

**IV. THE DRAFT PERMIT INCLUDES NO MEANINGFUL ANTI-DEGRADATION ANALYSIS.**

The Draft Amendment includes an inadequate anti-degradation analysis. The analysis proposed consists of one paragraph:

5. Anti-Degradation

The inclusion of Compliance Options and incorporation of TMDL-related requirements of this General Permit **will not cause additional degradation of waters of the State**. This General Permit requires compliance with water quality standards through implementation of best practicable treatment or control in the form of BPT/BAT/BCT; this General Permit **does not authorize an increase in waste discharges to waters of the State from the previous permit**.

In engaging in this circular logic, staff is asking the wrong question. In determining whether a full anti-degradation analysis is required, the threshold determination is not whether the changes will *increase* current levels of degradation under the Permit. Instead the question is whether the new Permit will *continue existing* levels of degradation of impaired waters. This was confirmed in the *Agua* decision:

“To the extent that the Order allows historic practices to continue without change, degradation will continue.” *Agua v. RWQCB*, 210 Cal App.4<sup>th</sup> 1255, 1273.

There is no meaningful debate that the proposed TNAL Scheme will allow at least four more years of existing levels of degradation while discharges work their way through tier one and tier two before implementing any additional BMPs. Because the draft permit fails to conduct the required Anti-degradation analysis, it is inconsistent with State and Federal law.

**V. THE PERMIT INCLUDES NO CEQA ANALYSIS.**

The Draft Amendment includes no CEQA analysis. While NPDES Permits/WDR are exempt from Chapter 3 of CEQA, they are not exempt from Chapter 1. CEQA Chapter 1 includes the mandate of PRC § 21002, which forbids a project if less damaging feasible alternatives exist. Yet there is no analysis or findings on alternatives in the Draft Amendment or record. This CEQA analysis is particularly important where, as here, the State Water Board is proposing a TNAL scheme that clearly is more damaging than implementing the TMDL WLAs as enforceable WQBELs.

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We have serious concerns with the Draft Amendment as currently proposed, but we are optimistic that we can continue working with State Water Board staff to address our concerns and fix the legal deficiencies with the Draft Amendment.

Sincerely,



Sean Bothwell  
Policy Director  
California Coastkeeper Alliance



Arthur Pugsley  
Senior Attorney  
Los Angeles Waterkeeper