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July 28, 2017

Russell Kelly, Chief  
Permits and Services Division  
Alabama Department of Environmental Management  
P.O. Box 301463  
Montgomery, AL 36130-1463

**Re: NPDES General Permit ALG020000 (Asphalt)  
NPDES General Permit ALG120000 (Metals Finishing)  
NPDES General Permit ALG200000 (Plastic and Rubber)  
NPDES General Permit ALG670000 (Oil & Gas Pipeline Hydrostatic Test Waters)**

*Via electronic mail only*

Dear Mr. Kelly:

Thank you for the opportunity to provide comments on the Alabama Department of Environmental Management's ("ADEM") proposed reissuance of the General NPDES Permits noticed above. We write on behalf of Black Warrior Riverkeeper ("Riverkeeper"), a nonprofit organization dedicated to protecting and restoring the Black Warrior River and its tributaries, and additional Waterkeeper signatories at the end of this letter. The proposed permits could affect all waters of the state, including those of the Black Warrior River basin, with the exception of waters designated as outstanding national resource water (ONRW), or outstanding Alabama water (OAW).

As we noted in earlier correspondence with ADEM, we only learned of the proposed issuance of this permit by happenstance. "[G]eneral permits are considered to be rulemakings . . . ." EPA, *General Permit Program Guidance* 21 (1988), available at <http://www.epa.gov/npdes/pubs/owm0381.pdf>. As such, it is the responsibility of the Department to ensure that interested parties are notified. Ala. Code § 41-22-5.1. Please include each of us in the notification when the Department issues proposed general permits. Where a state agency like ADEM proposes to adopt, amend, or repeal any rule:

the agency shall make its best efforts to notify the public of the proposed rule. At a minimum, when the agency files the notice of intent, the agency shall post the text of the rule the agency proposes to adopt, amend, or repeal on its website or, if the agency has no website, on a website operated or maintained by the executive branch. *Additionally, when*

*the agency files a notice of intent to adopt, amend, or repeal a rule, the agency shall electronically notify any person who has registered with the agency his or her desire to receive notification of any proposal by the agency to adopt, amend, or repeal a rule.*

Ala. Code § 41-22-5.1(b). We appreciate the Department's willingness to grant us an extension of one week to file these comments.

### *Introduction.*

We are concerned that the current drafts of these permits do not reflect industry best practices nor are they stringent enough to prevent violations of water quality standards. In summary, the permits, as drafted, are deficient in the following ways:

- The draft permits fail to include limitations to meet the applicable technology-based limits (BAT/BCT)
- The draft permits fail to include effluent limitations sufficient to meet water quality standards (WQS)
- The sampling scheme in the permits is wholly inadequate to determine permittee compliance with the permit and state WQS or water quality-based effluent limits (WQBEL)
- The permits fail to properly consider discharges to impaired waters (303(d) & TMDL waters)

We urge ADEM to withdraw and significantly revise these permits to comply with federal regulations.

We would like to acknowledge the California Coastkeeper Alliance, Heal the Bay, and the California Sportfishing Protection Alliance, whose comments to the California State Water Resources Control Board helped to greatly inform this letter where similarities existed between the deficiencies in first drafts of California's Industrial General Permit, and Alabama's General Permits.

### ***(1) As drafted, the permits fail to meet BAT/BCT.***

There are two types of technology-based effluent limitations that apply to industrial stormwater dischargers: "best available technology economically achievable" ("BAT") for toxic or nonconventional pollutants and "best conventional pollutant control technology" ("BCT") for conventional pollutants (e.g., BOD, TSS, pH, oil and grease, e. coli). None of the advertised permits discuss these standards in any meaningful way, much less incorporate specific, enforceable requirements that the Best Management Practices ("BMPs") relied upon by ADEM and the permittees meet these standards. Not only must the permits include appropriate limitations that meet these technology-based limits, ADEM must explain how the limits set by the permits meet these standards. Data is available to define what those standards are, industry by industry, and the Department should consider and apply these standards where appropriate.

Applicable regulation specifies the factors to be used by the permit writer to determine BCT:

- (i) The reasonableness of the relationship between the costs of attaining a reduction in effluent and the effluent reduction benefits derived;
- (ii) The comparison of the cost and level of reduction of such pollutants from the discharge from publicly owned treatment works to the cost and level of reduction of such pollutants from a class or category of industrial sources.
- (iii) The age of equipment and facilities involved;
- (iv) The process employed;
- (v) The engineering aspects of the application of various types of control techniques;
- (vi) Process changes; and
- (vii) Non-water quality environmental impact (including energy requirements).

40 C.F.R. § 125.3(d)(2). Determining BAT requires the evaluation of similar factors:

- (i) The age of equipment and facilities involved;
- (ii) The process employed;
- (iii) The engineering aspects of the application of various types of control techniques;
- (iv) Process changes;
- (v) The cost of achieving such effluent reduction; and
- (vi) Non-water quality environmental impacts (including energy requirements).

40 C.F.R. § 125.3(d)(1).

We cannot see that the Department applied or evaluated these factors in any of the draft permits. ADEM does not examine the industry or process involved and examine whether there are changes to process that could reduce or eliminate stormwater discharges entirely. The Department does not look at the engineering aspects of stormwater controls for the industry or address whether treatment, storage or containment of stormwater might be an option. Instead, the Department (and ultimately any permittee) largely relies upon generic, unspecified BMPs to address stormwater discharges, failing to meet the requirements of the Clean Water Act.

For example, in draft NPDES General Permit No. ALG120000 (discharges associated with metal and metal finishing), the permit rationale fails to define BAT/BCT or provide enforceable requirements that the permittee meet these standards. ADEM only mentions BCT once in this general permit: to support its determination of a 15 mg/L limitation for oil and grease. *NPDES General Permit No. ALG120000 Permit Rationale* at 5. But instead of stating what the BCT requirement is, how it was calculated, then articulating how the proposed effluent limitation meets the standard, ADEM instead

offers a BPJ rationalization: “This limit has been demonstrated through experience by the Department to be best conventional technology (BCT) to be achievable by gravity oil/water separators.”

In addition, NPDES General Permit No. ALG120000 offers few specific BMPs. Permittees are required to inspect the fuel storage area twice per week and clean up any spills using approaches that do not create wastewater; one defined BMP is the use of a portable oil skimmer or similar device. Permit at 8. The permit also specifies that dilution water shall not be added to achieve compliance with discharge limitations, except as authorized by ADEM and that the permittee must maintain a containment system of a certain volume. *Id.* at 18. Finally, the permittee must have a BMP plan, but the permit only requires the most generic of plans. This is so even though the processes used by the industries covered by this permit have the potential to contaminate or influence stormwater discharges with toxic pollutants. *Id.* at 10.

This permissive approach does not comply with the Clean Water Act, which mandates implementation of specific best management practices to control stormwater pollution. Instead, ADEM is impermissibly allowing permittees to self-regulate by selecting their own BMPs without review and approval by the permitting authority -- and public notice, comment, and opportunity for a hearing -- to ensure that these BMPs are in fact stringent enough to meet the underlying statutory or regulatory standard. *Cf. Environmental Defense Center v. U.S. Environmental Protection Agency*, 344 F.3d. 832 (9th Cir. 2003) ( In MS4 context, court held that the lack of review “to ensure that the measures that any given operator ... has decided to undertake will in fact reduce discharges of pollutants to the maximum extent practicable” does not comport with CWA requirements). This core principle holds true for any NPDES permit.

Instead of relying upon vague BMP plans written by permittees, we ask the Department to revise each of the draft general permits to meet BCT/BAT. We ask the Department to take a detailed look at the industries covered by each proposed general permit and require specific control measures and BMPs that will reduce stormwater pollution to the maximum extent practicable.

***(2) As drafted, the permits fail to include effluent limitations sufficient to meet State water quality standards.***

Where technology-based limitations are not enough to ensure that a proposed discharge will not cause or contribute to a violation of State water quality standards, the permit must set effluent limitations or standards to achieve those water quality standards, including narrative criteria for water quality. 40 C.F.R. § 122.44(d). The draft permits neither impose water quality-based effluent limits for most of the industry-specific pollutants identified as likely contaminants, nor provide for the strict enforceability of state water quality standards, which means that they are essentially unenforceable and fail to meet the bar established by the federal regulation.

Each of the draft permits identifies numerous potential contaminants associated with the respective industries governed by the permits. However, facilities are only required only to monitor and

report what is discharged, for the vast majority of those contaminants, without limitations on what is discharged, relying on the unfounded assertion that BMPs alone should be sufficient to remove those contaminants and protect receiving waters. The permit rationales for each of the permits states that these monitoring requirements exist only to test the effectiveness of facilities' BMPs. For ALG020000 (Asphalt Industries) the draft permit identifies the following potential contaminants without imposing limitations:

- Chemical Oxygen Demand
- Total Suspended Solids

For ALG120000 (Metals and Metal Finishing) the draft permit identifies the following potential contaminants without imposing limitations:

- Total Recoverable Aluminum
- Total Recoverable Arsenic
- Total Recoverable Cadmium
- Total Recoverable Chromium
- Total Recoverable Copper
- Total Cyanide
- Total Recoverable Lead
- Total Mercury
- Total Recoverable Nickel
- Total Nitrogen
- Total Organic Carbon
- Total Recoverable Silver
- Total Suspended Solids
- Total Toxic Organics
- Total Zinc

For ALG20000 DSN001 (Plastic Industry) the draft permit identifies the following potential contaminants without imposing limitations:

- Biochemical Oxygen Demand
- Bis(2-Ethylhexyl) Pthalate
- Chemical Oxygen Demand
- Total Recoverable Chromium
- Total Recoverable Lead
- Total Suspended Solids

For ALG20000 DSN002 (Rubber Industry) the draft permit identifies the following potential contaminants without imposing limitations:

- Biochemical Oxygen Demand
- Total Recoverable Chromium
- Total Recoverable Lead
- Total Zinc
- Total Suspended Solids

While general permit ALG670000 DSN002 (Hydrostatic Test Waters from Petroleum Pipelines) does impose limitations for most of the potential contaminants identified, the draft permit identifies the following potential contaminants without imposing limitations:

- Xylene
- MTBE (Methyl Tertiary Butyl Ether)

For any potentially present contaminants that ADEM has identified for each permit, the Department must acknowledge that there is a reasonable potential for those pollutants to cause violations of numeric and/or narrative water quality standards. The Department therefore has a responsibility to establish WQBELs and impose them in the permits, or risk non-compliance with 40 C.F.R. § 122.44(d).

ADEM also needs to state explicitly in the draft permits that any violation of water quality standards is specifically enforceable as a violation of the permit. Currently, the draft permits attempt to skirt the issue of enforceability of water quality standards in Part III.E. of each permit, essentially granting the Department the authority to modify the permit, require a facility to apply for an individual permit, or require a facility to take abatement action in the event that the permit leads to a contravention of water quality standards. However, these specifications do not expressly require compliance with water quality standards and neglect to imbue the Department with traditionally available enforcement tools. This failure to explicitly require compliance with WQS does not comply with 40 C.F.R. § 122.44(d).

***(3) As drafted, the sampling scheme in the permits is wholly inadequate to determine permittee compliance with the permit and state WQS or water quality-based effluent limits (WQBEL).***

To begin with, the prescribed monitoring frequency at the primary, industry-specific outfalls for three of the four proposed permits (ALG020000 [1/6months], ALG120000 [1/year], and ALG200000 [1/6months]) does not begin to provide a proper characterization of the potential contaminants that may be present in the stormwater associated with the relevant industrial activities. Given the relative infrequency of required monitoring compared to the frequency with which discharges occur, neither the permittee nor the state can be assured that discharges from these facilities are consistently meeting water quality-based effluent limits, nor can they be assured that discharges from facilities covered under these permits will not contribute to contraventions of state water quality standards. The monitoring frequencies in each of these permits should be adjusted to a minimum of once per quarter. We note that the monitoring frequency at DSN002 and DSN003 under the permit for hydrostatic test waters from new

and existing petroleum and natural gas pipelines (ALG670000) of once per discharge is sufficient and acceptable.

Additionally, the restrictive requirements for stormwater measurement, under section IV.B. of the permits, could preclude assurance that permittees will in fact collect storm water samples from their facility in a given monitoring period. The draft permits require that “All storm water samples shall be collected from the discharge resulting from a storm event that is greater than 0.1 inches” and “the duration between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event must be a minimum of 72 hours.” These factors are cumbersome and must be assessed before a sample is even required to be collected. If these requirements are not met in a given sampling period, a permittee could legally avoid collecting any samples even though one or more stormwater discharges may have occurred from the facility. The draft permits should be revised so that the stormwater measurement provisions serve as a method for prioritizing the conditions for ideal sample collection, but ensuring that permittees must collect a sample from a discharge even if there are no storm events that meet the given requirements. To remedy this deficiency and ensure that permittees and ADEM have access to more discharge data, the permits should be altered to require that a minimum of four samples of stormwater discharges are collected and analyzed in any given year.

Because the draft permits allow for so little, or perhaps even no discharge sampling, the Department has no way to determine if the discharges from one, or multiple, facilities under the permit(s) may contribute to a contravention of state water quality standards. Therefore, the permits, as written, do not comply with 40 CFR 122.44 (d)(1)(i) requiring states to ensure that “Limitations must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality.”

***(4) As drafted, the permits fail to address impaired (303(d) & TMDL) waters, and include effluent limitations consistent with TDMLs.***

The draft permits fail entirely to protect impaired waterbodies. Instead, ADEM abdicates all responsibility to the permittees for determining if a facility will discharge to a § 303(d) or TMDL waterbody. Meeting any applicable requirements (e.g., a WLA) is also left to the permittees. We think that these portions of the draft permits represent more impermissible “self-regulation” prohibited by the Clean Water Act. *See* discussion at p. 4, *supra*. Where there is a § 303(d)-listed stream without a TMDL, ADEM must demonstrate in the permits that the proposed discharges will not further contribute to the impairment. If there is a TMDL, the permits must demonstrate that any WLA will be strictly adhered to by permittees and will not be exceeded.

The implicit failure of the permits to adequately protect impaired streams is also indicative of a failure to adhere to federal anti-degradation requirements. The case study of Metalplate Galvanizing’s two facilities in Birmingham (ALG120093 & ALG120094) perfectly illustrates this point. The fact that TMDLs exist for siltation, metals (zinc) and pH in Village Creek and that these facilities discharge to

tributaries of Village Creek was never considered or addressed by either ADEM or the permittee under the general permit. There are no permit limitations for zinc or iron and no calculations of WLAs to meet the Village Creek TMDL even though the facilities have been contributing to the further impairment of Village Creek with excessive zinc concentrations in their discharges.

Despite the fact that the TMDL for metals in Village Creek was finalized in 2005, the most recent annual DMR for Metalplate's facility at 4450 7<sup>th</sup> Ave North, filed on 12/31/2016, indicates that the discharge from DSN001-2 registered a zinc concentration of 82.2 mg/L, far exceeding any concentration that would be deemed protective of water quality and similar to the annual recorded discharge concentrations of zinc at the facility over the past 10 years at least. Where, as is the case with Metalplate Galvanizing (ALG120093 & ALG120094), a general permit allows facilities to legally discharge a contaminant (zinc) at levels that contribute to an ongoing violation of water quality standards in a stream (Village Creek) with an established TMDL for that parameter, the permit is directly responsible, at least in part, for the ongoing degradation of that stream, and is therefore in violation of anti-degradation standards. 40 CFR § 131.12.

*Conclusion*

We ask the Department to substantially revise these permits to incorporate all applicable regulations. In order to comply with the Clean Water Act, each of these general permits must document how the final limitations in the permit were determined and how those limitations meet technology-based limits (BAT/BCT), water quality-based effluent limitations (WQBEL) and/or water quality standards (WQS), and properly address discharges to impaired streams to comply with Federal anti-degradation regulations. As currently drafted, the permits fail to do so.

Thank you for your time and attention to these comments. We look forward to the Department's response to our comments, and to receiving notice of the Department's determination.

For the River,



Nelson Brooke  
Riverkeeper  
Black Warrior Riverkeeper



John Kinney  
Enforcement Coordinator  
Black Warrior Riverkeeper





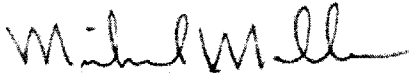
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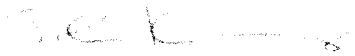
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