

PORT OF STOCKTON

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December 22, 2010

Via U.S. Mail and email to: kschwab@waterboards.ca.gov

Ms. Kim Schwab
Central Valley Regional Water Quality Control Board
11020 Sun Center Drive, #200,
Rancho Cordova, California 95670-6114

Re: Stockton Port District Comments on Tentative MS4 Permit
NPDES PERMIT NO. CAS084077

Dear Ms. Schwab:

The Stockton Port District (Port) greatly appreciates the ability to review and comment on the draft tentative permit in Order No. R5-2011-XXXX, amending waste discharge requirements Order No. R5-2004-0136 (NPDES Permit No. CAS0084077) (Tentative Permit) for the Port's stormwater discharges.

To facilitate the Central Valley Regional Water Quality Control Board (Regional Water Board) being able to address the Port's comments, we have attached redline versions of the proposed Permit amendments, fact sheet, and Monitoring and Reporting Program (MRP) with comments and tracked changes that graphically represent the Port's suggested changes to and comments on these documents. The Port's comments can generally be summarized as follows:

- 1) Justification Needed for Phase I Permit. The Port requests justification from the Regional Water Board for maintaining a Phase I stormwater permit for the Port's activities since the Port does not qualify as a Phase I municipal separate storm sewer system (MS4). Phase I MS4 permits apply to medium-sized cities with more than 100,000 people or large municipal areas with more than 250,000 people. (See 40 C.F.R. §122.26(b)(4) and (7).) The Port has no permanent residents, and a daily transient work force population of only approximately 3,500.

When the Port's initial MS4 permit was first issued, no Phase II permitting option existed; however, now such an option exists, and other ports in California are covered under the Phase II permit (e.g., Port of Oakland). The Phase II MS4 permit was

adopted by the State Water Resources Control Board in 2003 as a General Permit for the Discharge of Storm Water from Small MS4s (WQ Order No. 2003-0005-DWQ) to provide more tailored permit coverage for smaller municipalities with less staff and resources, including non-traditional small MS4s, which are governmental facilities such as military bases, public campuses, ports, and prison and hospital complexes. The Port believes that coverage under the Phase II permit is more appropriately suited to the Port than a Phase I permit.

Alternatively, the Port could be covered under the general industrial stormwater permit (State Water Board Order No. 97-03-DWQ) like other ports in California (e.g., Ports of Los Angeles and Long Beach¹), or covered under the Stockton/San Joaquin County Phase I stormwater discharge (Order No. R5-2007-0173) as are all other portions of the greater Stockton urbanized area. The stormwater data collected by the Port does not provide justification for special treatment and does not qualify the Port as a Phase I MS4 permittee.

- 2) Removal of BAT/BCT Requirements. The Port requests that, if the Regional Water Board intends to continue to regulate the Port as an MS4, the references to requirements for BAT/BCT be removed (e.g., Finding 6 and Provision A.3) and references in the MRP to benchmarks as these legal requirements are not applicable to MS4 discharges, which are required to implement Best Management Practices (BMPs) to the Maximum Extent Practicable (MEP). The MEP standard is the appropriate standard to impose if this Tentative Permit is adopted to regulate the Port as an MS4.
- 3) Removal of Duplicative Requirements. The current Tentative Permit includes no less than three (3) separate requirements regarding not causing or contributing to violations of water quality standards and objectives. (See Tentative Permit at Provision A.2., B.7, C.1.n. and C.2.) In addition, the Tentative Permit also includes many other provisions requiring no adverse affect on beneficial uses (e.g., Provisions A.2., B.7., C.1.c., C.1.h., C.1.i., C.1.l). These requirements are duplicative and unnecessary. There only needs to be one provision regarding applicable water quality standards (which also encompasses beneficial uses). Therefore, the Port requests that Provisions Sections A, B, and C be revised to avoid duplication that could subject the Port to duplicative enforcement actions for a single event.

¹ These ports also fall within the jurisdiction of other city and county MS4 permits issued by the Los Angeles Regional Water Board to the City of Long Beach (CAS004003) and the County of Los Angeles (and co-permitted cities) (CAS004001), respectively. The Port also requests justification why the Port could not be covered by the Stockton/San Joaquin County MS4 Permit (CAS083470).

- 4) Clarification of Receiving Water Limitations (RWL) Section. Findings 36 and 44, and the RWL section of the Tentative Permit must be revised to make clear that immediate and strict compliance with water quality standards is not being required. MS4 discharges are not required to comply with Clean Water Act section 301(b)(1)(C).² (33 U.S.C. §1311(b)(1)(C).) The Port has suggested modified permit language in Provision C.3. to make the RWL section more clear since recent citizen suits against MS4s around the State have brought the meaning of this language into question.

- 5) Removal of Legal Conclusions. The Port requests that legal conclusions, such as the huge paragraph concluding that this Tentative Permit contains no unfunded state mandates (Finding 27), be removed as such conclusions are inappropriate as well as inaccurate. Any mandates contained in this Tentative Permit not required by and more stringent than federal law arguably constitute objectionable unfunded mandates. Recent determinations by the State Commission on Mandates have held as much. (See e.g., Case Nos.: 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21, *Municipal Stormwater and Urban Runoff Discharges*, STATEMENT OF DECISION available at <http://www.csm.ca.gov/sodscan/121.pdf>) Many of the Tentative Permit's requirements are new, constituting a "new program," or creating a "higher level of service" over the previously required level of service that impose additional costs, thereby implicating an unfunded state mandate. The new requirements that are more stringent than required by federal law include sediment requirements, CEQA requirements, requirements for lease document language, post-development and construction requirements, increased inspection requirements, BMP effectiveness assessments, and retention basin monitoring. As such, these requirements could be considered to be unfunded mandates on the Port, which is a public entity.

² See *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1165 (9th Cir. 1999.) Further, the State Water Board has clearly held, when reviewing the template permit language used for the MS4 Permits, that:

“... our language, similar to U.S. EPA’s permit language discussed in the *Browner* case, does not require strict compliance with water quality standards. Our language requires that storm water quality management plans be designed to achieve water quality standards. Compliance is to be achieved over time, through an iterative approach requiring improved BMPs.”

(See SWRCB WQ Order 2001-15 at 7 (emphasis added)(attached hereto as **Exhibit A**); see also Letter from then Chair Schneider, Regional Water Board, June 25, 2004 on meaning and interpretation of Stockton/San Joaquin County RWL language(attached hereto as **Exhibit B**.)

- 6) Remove New Requirements on Port Leases. The new Tentative Permit contains prescriptive requirements on the Port's tenant lease agreements (e.g., Findings 32, 68, 81, and Provision D.6., D.7.a.-d., D.17.c.). This exceeds the boundaries of the Regional Board's authority and constitutes interference with private contracting, which may have economic or other impacts on the Port. As the new Tentative Permit recognizes, the Port has ten (10) less tenants than were recognized in the previous permit (compare Order No. R5-2004-0136, para. 13 to Order No. R5-2011-XXXX at para. 14). No need exists for the Tentative Permit to include this level of prescription related to the terms of private lease agreements and the references to the same should be removed.

- 7) Justify New TMDL Requirements. The Regional Water Board has made no findings as to the results of the numerous studies conducted by the Port. Further, there are no specific findings in the Tentative Permit with supporting evidence to conclude that the Port's stormwater discharges contain the pollutants in the TMDLs at levels high enough to warrant the new requirements (e.g., Provisions C.1.o. and p., D.28.)³ The Port has previously characterized its discharges and the Regional Water Board should make a determination as to whether the Port's discharges are actually contributing to the impairments at issue. If not, then a wasteload allocation and additional program requirements (Provision D.28.a., b., and c.) and monitoring would not be necessary.

If inadequate data exists, then the appropriate requirement would be to conduct additional monitoring for the constituents of concern first to determine the levels contained in the discharge, and then implement a management plan (as recognized by the TMDLs themselves (*see* Diazinon/Chlorpyrifos TMDL Staff Report at 41, para.8)). Instead, the permit frontloads all of the possible requirements when there may be no need for the Port to take any or all of these measures. The Port requests that a more logical step-wise approach be taken, particularly for the mercury requirements where an adaptive management approach has been proposed, since the timeline for compliance spans several decades.

- 8) Impose Only BMPs to the MEP. The Tentative Permit contains several wasteload allocations that read like effluent limitations (*see* Provision B.1.o. and q.). Since MS4s are not required to comply with effluent limitations and strictly comply with

³ For example, the TMDL for Diazinon and Chlorpyrifos at Table 2.8 contains evidence that in 45 samples at the Middle Roberts Island Drain, none of those samples exceeded the 160 ng/L target, and the maximum concentration seen was approximately half that amount. Thus, there is no reason to require additional TMDL-related requirements for diazinon from the Port's discharges.

water quality standards, the Port requests that only non-numeric effluent limitations (e.g., BMPs, source control) be imposed for all TMDL-related requirements under the authority of 40 C.F.R. §122.44(k) and *Citizens for a Better Environment v. SWRCB*, 109 Cal. App.4th 1089, 1102-1108 (2003).

- 9) Modify New Monitoring Requirements. The Tentative Permit's MRP is almost twice as large as the previous permit and includes many more monitoring events and new monitoring programs (sediment toxicity, dry weather monitoring, more frequent toxicity monitoring, and the water quality based programs for pesticides, dissolved oxygen (DO) and methylmercury). The Port, in the attached comments at **Exhibit C** and the Port's markups to the MRP, has suggested a more tailored approach to monitoring that should be adopted for the final draft of the Permit.

- 10) Remove Requirements Unrelated to Stormwater. The Tentative Permit contains requirements for the Port to police direct discharges from ships visiting the Port (e.g., Finding 11 and Provision B.2, D.10.d.), which is unrelated to stormwater and does not belong in this permit. Similarly, the Tentative Permit requires outreach to ship owners about ballast water (e.g., Finding 13 and Provision D.10.d.i.), which is also unrelated to stormwater discharges. The Tentative Permit also wrongfully and unnecessarily incorporates the requirements of the Port's waste discharge requirements (WDR) for dredging (R5-2006-0078)(*see* Provision D.28.b.ii.), which is independently enforceable by the Regional Water Board and does not implicate stormwater. By incorporating these requirements (and others related to sediment removal, e.g., Provision D.28.c.ii) into this NPDES permit, those requirements now become federally enforceable by U.S. EPA and citizens, subjecting the Port to additional liability unintended by the WDR. For these reasons, all of the requirements unrelated to stormwater must be removed from this stormwater permit.

- 11) Explain Deficiencies in Port's Current Development Standards. In November 2005, the Port submitted a Development Standards Plan to the Regional Water Board. The Regional Water Board determined that this Plan met the requirements of the Permit and approved that plan on November 17, 2005 (*See accord* Provision D.19). The Regional Board has failed to explain why numerous additional requirements are being placed on the Port related to Development Standards when its workplan was approved. Without evidence supporting the need for additional requirements, these requirements should be removed (e.g., Provision D.14-18, 20-23, 26.)

- 12) Remove new LID and CEQA Requirements. The Tentative Permit includes new Low Impact Development (LID) and California Environmental Quality Act (CEQA) document requirements that are not required by federal law, and which may not be appropriate for the Port. While LID may be appropriate in residential and commercial situations, these practices (Provision D.16-17) may not be practical or

effective in the more industrial complexes located at the Port, where there are issues related to past contamination from previous Naval activities and where discharges to groundwater may not be recommended (*see* Provision D.24). Further, CEQA already requires checklists that deal with stormwater and infrastructure. It is beyond the authority of the Regional Board to mandate additional CEQA review (*see* Provision D.21) not required in the Natural Resources Code or the CEQA guidelines.

The Port appreciates this opportunity to provide this above information in support of our request that amendments be made to the proposed tentative permit prior to adoption by the Regional Water Board. The Port greatly appreciates your consideration of this matter and thanks you and the other Regional Water Board staff for your continuing assistance.

Please feel free to contact me should you have any questions or concerns regarding this matter.

Respectfully submitted,



Jeff Wingfield