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VIA EMAIL

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Wayne Chiu
San Diego Regional Water Quality Control Board
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340

**Re: Comments - Tentative Order No. R9-2013-0001, Regional MS4 Permit,
Place ID: 786088Wchiu**

Dear Mr. Chiu:

The San Diego Unified Port District (Port) submits the following comments to the revised Tentative Order No. R9-2013-0001, NPDES No. CAS0109266, *National Pollutant Discharge Elimination System (NPDES) Permit and Waste Discharge Requirements for Discharges of Urban Runoff from the Municipal Separate Storm Sewer Systems (MS4) Draining the Watersheds within the San Diego Region* (the Permit). Except to any extent inconsistent with the comments below and other comments submitted directly on behalf of the Port, the Port concurs with the San Diego Copermittees' comments throughout the process. The Port wishes to separately address several issues in the current draft Permit. The Port continues to support the objectives of the Permit and welcomes any opportunity to work with the Regional Board to improve the Permit.

1. Establish Connection between Discharge Prohibitions/Receiving Water Limitations and TMDL Compliance Schedules

The Permit as currently drafted includes specific provisions and schedules for implementation of total maximum daily loads (TMDLs) that have been incorporated into the Water Quality Control Plan for the San Diego Basin. See Permit, Attachment E. These compliance schedules have been incorporated into the Effluent Limitations provision of the Permit. Permit, II.A.3.b. ("Each Copermittee must comply with applicable WQBELs established from the TMDLs in Attachment E to this Order, pursuant to the applicable TMDL compliance schedule.").

However, no similar language is included in the Discharge Prohibitions (II.A.1.) or the Receiving Water Limitations (II.A.2.) provisions. The absence of similar language regarding TMDL compliance schedules in these provisions could potentially result in Copermittees being in violation of the Permit even though the TMDL implementation dates have not passed. In order for a Copermittee to be in compliance when the Permit becomes effective, it must also be in compliance with the applicable TMDL compliance schedule. Where a TMDL is in place, the Permit establishes compliance schedules for Discharge Prohibitions and Receiving Water Limitations that are in conflict with the TMDL compliance schedules.

The Port requests that the Discharge Prohibitions and Receiving Water Limitations provisions of the Permit be revised to make clear that the Copermittee shall not be in violation of these provisions when the Copermittee is complying with the applicable TMDL compliance schedule. Provision II.A.2.c., which appeared in the previous permit draft contains appropriate language linking the TMDL compliance schedules with the compliance schedules for Discharge Prohibitions and Receiving Water Limitations. The Port requests that similar language be included in Provisions II.A.1. and II.A.2. of the Permit.

2. Permit Compliance Should be Based on the Iterative Process and Implementing Provisions of TMDL and the WQIP Rather than Numeric Limits

The Permit provides that the Copermittees must be in compliance with numeric limits in order to meet water quality standards and to avoid violating the Permit. See Permit, II.A.1.a., II.A.1.c., II.A.2.a. The Permit also provides that each Copermittee must engage in an iterative process to implement water quality improvement strategies should water quality exceedances occur to achieve compliance with the discharge prohibitions and receiving water limitations. Permit, II.A.4. However, the Permit states that these provisions are “independently applicable, meaning that compliance with one provision does not provide a ‘safe harbor’ where there is no compliance with another provision.” Permit, Fact Sheet, F-39.

Currently, the Permit creates a situation where the Copermittees may be in violation of the Permit the moment it goes into effect. There may be non-compliance with the Permit by a Copermittee where it is shown that a Copermittee is causing or contributing to an exceedance of water quality standards, even if that Copermittee is actively engaged in the iterative process.

While the Port acknowledges that the Regional Board may choose not to strictly enforce these permit conditions, the Copermittees remain potentially subject to an enforcement action by the Regional Board or a third-party citizen suit unless this point of compliance is clarified. The Regional Board has clear authority under the CWA and State Board policy to issue an MS4 permit that allows for iterative Best Management Practices (BMPs), rather than requiring strict adherence to water quality standards through numeric effluent limitations. See State Water Resources Control Board Order No. 2001-15, at pg. 8; see also *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1163, 165 (9th Cir. 1999).

Accordingly, the Permit should be revised to allow the Copermittees to achieve compliance by actively engaging in a BMP-based iterative process and by complying with implementation provisions of applicable TMDLs. The Port supports using the Receiving Water Limitations Language proposed by the California Stormwater Quality Association (CASQA), attached as Exhibit 1.

3. The Permit Should Clarify the Limits and Basis for Copermittee Liability for Any Exceedances

As noted, the Permit should clarify that Copermittee compliance is achieved through compliance with iterative approaches as set forth in the WQIP and any applicable BMPs, rather than any numeric limits. However, if numeric limits remain in the Permit, certain modifications should be made to avoid improper imposition of liability on Copermittees, consistent with the CWA. As discussed in the Port's comments to the previous draft of the Permit, dated September 14, 2012, the Permit should be revised to make clear that a Copermittee is only responsible for exceedances introduced into portions of MS4 facilities that it owns or operates, not merely discharges into or from all MS4 facilities within that Copermittee's geographical jurisdictional boundaries. There are numerous MS4 facilities and outfalls within the Port's tidelands jurisdictions which the Port does not own or operate. The language of the CWA, repeated in the Permit, confirms that a Copermittee is only responsible for MS4 facilities that it operates. (40 CFR 122.26(a)(3)(vi).)

For this reason, the Port cannot properly be liable for discharges into or from an MS4 facility merely because it is within the Port's tidelands jurisdiction – it must own or operate that MS4 facility. To clarify this point, the Port proposes adding the following language, which could be placed in the cover for the Permit, immediately preceding Table 2:

“The location of an MS4 facility within any Copermittee's jurisdiction boundaries does not, of itself, make the Copermittee an owner or operator of that MS4 facility.”

Furthermore, the Permit must include additional provisions that ensure a Copermittee is not improperly held liable for discharges attributable to other Copermittees' MS4 inputs. Of key concern is the specter of liability for downstream MS4 operators. As one of the farthest downstream jurisdictions, the Port faces greater risk of being downstream of other Copermittees' input and discharges into the upstream MS4 facilities. The Permit should be revised to clarify that each Copermittee is liable for any input and discharges into and from its MS4 that may exceed numeric limits, but not for the input and discharges by other Copermittees, whether upstream or downstream. Unless such provisions are included, Copermittees such as the Port will face the risk of legally improper “end of the pipe” liability, even if it did not contribute any pollutants.

As written, the Permit lacks clarity regarding the appropriate basis for determining that any Copermittee has actually caused or contribute to an exceedance of water quality standards. As the Permit states, “[e]ach of the Copermittees owns or operates an MS4, through which it discharges storm water and non-storm water into water of the U.S. within the San Diego Region.” Permit, Findings, I.1. It further states:

The federal regulations make it clear that the Copermittees need only comply with permit conditions relating to discharges from the MS4s for which they are operators (40 CFR 122.26(a)(3)(vi)). This Order does not require Copermittees to manage storm water outside of their jurisdiction boundaries, but rather to work collectively to improve storm water management within watersheds.

Permit, Findings, I.2. While this language is consistent with the CWA, additional provisions are needed to ensure that one Copermittee does not become liable for input and discharges from other Copermittees. The Port requests that the Permit include language clarifying that each Copermittee is only liable for its share of the excess pollutants that it introduces into its MS4 facilities and which result in exceedances of the receiving water limits.

Such a provision is necessary since a Copermittee on an MS4 permit is only responsible for its own discharges or those over which it has control, not discharges or inputs by other Copermittees. *Jones v. E.R. Shell Contractor, Inc.*, 333 F.Supp.2d 1344, 1348 (N.D. Ga. 2004). Similarly, both the California Water Code and the Clean Water Act contemplates that liability for violations shall fall upon the “person” responsible for the violations. *See* Cal. Water Code §§ 13263(f), 13350(a); 33 U.S.C. § 1319. A Copermittee that does not generate or add pollutants to its MS4 facilities cannot credibly be characterized as having discharged pollutants. Likewise, a Copermittee cannot properly be subject to liability for excess pollutants introduced into segments of the MS4 outside its jurisdiction. Copermittees cannot control such MS4 facilities and the CWA clearly does not require a Copermittee to exert such control.

To alleviate this problem and to ensure compliance with the applicable statutes and case law, the Port requests that the Permit be revised to explicitly state the each Copermittee is only liable for the portion of any excess pollutants that cause or contribute to any violations of the Permit that are introduced into the portion of the MS4 owned or operated by that Copermittee.

a. The Permit Should Include the Appropriate Regional Board Burden of Proof to Establish Liability of a Copermittee for MS4 Discharges

The Permit should also include provisions that will ensure one Copermittee is not held liable for pollutant discharges generated by or introduced into the MS4 facilities by other Copermittees. Without delineating the basis for assigning and/or apportioning liability among the Copermittees, there is an unacceptable risk that “end of pipe” Copermittees may be held liable for violations caused by pollutants generated and introduced into MS4 facilities primarily,

or even exclusively, by “upstream” Copermittees. In particular, as the trustee of the tidelands of the San Diego Bay, the Port is one of the Copermittees located farthest downstream. There is an attendant increased risk that in the event any pollutants are discharged into the San Diego Bay, such pollutants would not have originated from any Port MS4 facilities but from MS4 facilities farther upstream.

To ensure that the Regional Board does not hold Copermittees such as the Port responsible for pollutants introduced into or originating from other Copermittees’ MS4 facilities, the Permit must be revised to include and clarify the Regional Board’s burden of proof for establishing a particular Copermittees’ liability. *See Rapanos v. United States*, 547 U.S. 715, 745 (2006); *see also Sackett v. E.P.A.*, 622 F.3d 1139, 1145-1147 (9th Cir. 2010), reversed on other grounds, *Sackett v. E.P.A.* (2012) 132 S. Ct. 1367 (“We further interpret the CWA to require that penalties for noncompliance with a compliance order be assessed only after the EPA proves, in district court, and according to traditional rule of evidence and burdens of proof, that defendants violated the CWA in the manner alleged in the compliance order.”). The Regional Board must have the affirmative duty to prove that a Copermittee introduced pollutants into the MS4 that are discharged in the violation of the Permit.

In contrast to this legally required approach, the Permit presently states that the Copermittees must comply with certain procedures to come into compliance in the event an exceedance occurs. *See* Permit, II.A.4.a. The language would effectively impose liability on all Copermittees until a Copermittee could prove that it did not contribute to the excess pollutants in the discharge, even though the Regional Board would not have raised, and would not legally be entitled to, a rebuttable presumption that the exceedance resulted from that particular Copermittee’s actions. To prevent a Copermittee being put in the legally untenable position of having to prove its innocence in the first instance, the Regional Board should have an initial burden of proving that the exceedances relate to contribution by a particular Copermittee.

Accordingly, the Port requests that Section II.A.4.a. is revised to read:

If exceedance(s) of water quality standards persist in receiving waters notwithstanding implementation of this Order, *upon a showing by the Regional Board by a preponderance of the evidence that the discharges of pollutant from the MS4 for which each Copermittee is an owner or operator caused or contributed to the exceedance(s) of the water quality standards, those Copermittees must comply with the following procedures: (emphasis added).*

b. Monitoring Requirements Should be Revised to Include Monitoring that Will Ensure Jurisdiction Accountability

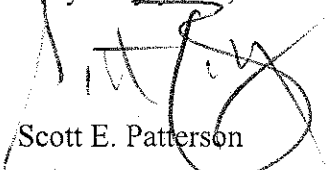
As a further necessary safeguard against improperly broad or joint and several liability for discharges, the Permit must include provisions that will allow the Regional Board and the

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Copermittees to determine the sources of any exceedances discharged to receiving waters. Unless the Permit requires such monitoring, there remains the risk that downstream Copermittees will be held liable for upstream discharges. This issue of identifying and establishing a Copermittee's violation of an MS4 permit is critical and has been the subject of recent judicial attention. The Port requests that the Permit include a monitoring program that meets and satisfies the evidentiary standards discussed in *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc., et al.*, No. 11-460 (U.S. Jan. 8, 2013) and *Natural Resources Defense Council, Inc. v. County of Los Angeles*, 673 F.3d 880 (9th Cir. 2011), necessary to establish a particular Copermittee's discharges and/or violations of the Permit. Without such monitoring, the risk persists that "end of pipe" Copermittees will be held liable for upstream jurisdictional discharges, without proper jurisdictional accountability.

We again emphasize that the Port is dedicated to the protection and enhancement of water quality and that the Port strongly supports the objectives of the Permit. We welcome the opportunity to work with the Regional Board in order to achieve our mutual goals. Please contact us if you have any questions or would like any clarification of the Port's position.

Very truly yours,



Scott E. Patterson

SEP/BPS

cc: William D. McMinn, Esq.

EXHIBIT 1

CASQA Proposal for Receiving Water Limitation Provision

D. RECEIVING WATER LIMITATIONS

1. Except as provided in Parts D.3, D.4, and D.5 below, discharges from the MS4 for which a Permittee is responsible shall not cause or contribute to an exceedance of any applicable water quality standard.
2. Except as provided in Parts D.3, D.4 and D.5, discharges from the MS4 of storm water, or non-storm water, for which a Permittee is responsible, shall not cause a condition of nuisance.
3. In instances where discharges from the MS4 for which the permittee is responsible (1) causes or contributes to an exceedance of any applicable water quality standard or causes a condition of nuisance in the receiving water; (2) the receiving water is not subject to an approved TMDL that is in effect for the constituent(s) involved; and (3) the constituent(s) associated with the discharge is otherwise not specifically addressed by a provision of this Order, the Permittee shall comply with the following iterative procedure:
 - a. Submit a report to the State or Regional Water Board (as applicable) that:
 - i. Summarizes and evaluates water quality data associated with the pollutant of concern in the context of applicable water quality objectives including the magnitude and frequency of the exceedances.
 - ii. Includes a work plan to identify the sources of the constituents of concern (including those not associated with the MS4 to help inform Regional or State Water Board efforts to address such sources).
 - iii. Describes the strategy and schedule for implementing best management practices (BMPs) and other controls (including those that are currently being implemented) that will address the Permittee's sources of constituents that are causing or contributing to the exceedances of an applicable water quality standard or causing a condition of nuisance, and are reflective of the severity of the exceedances. The strategy shall demonstrate that the selection of BMPs will address the Permittee's sources of constituents and include a mechanism for tracking BMP implementation. The strategy shall provide for future refinement pending the results of the source identification work plan noted in D.3. ii above.
 - iv. Outlines, if necessary, additional monitoring to evaluate improvement in water quality and, if appropriate, special studies that will be undertaken to support future management decisions.
 - v. Includes a methodology (ies) that will assess the effectiveness of the BMPs to address the exceedances.
 - vi. This report may be submitted in conjunction with the Annual Report unless the State or Regional Water Board directs an earlier submittal.

- b. Submit any modifications to the report required by the State of Regional Water Board within 60 days of notification. The report is deemed approved within 60 days of its submission if no response is received from the State or Regional Water Board.
 - c. Implement the actions specified in the report in accordance with the acceptance or approval, including the implementation schedule and any modifications to this Order.
 - d. As long as the Permittee has complied with the procedure set forth above and is implementing the actions, the Permittee does not have to repeat the same procedure for continuing or recurring exceedances of the same receiving water limitations unless directed by the State Water Board or the Regional Water Board to develop additional BMPs.
4. For Receiving Water Limitations associated with waterbody-pollutant combinations addressed in an adopted TMDL that is in effect and that has been incorporated in this Order, the Permittees shall achieve compliance as outlined in Part XX (Total Maximum Daily Load Provisions) of this Order. For Receiving Water Limitations associated with waterbody-pollutant combinations on the CWA 303(d) list, which are not otherwise addressed by Part XX or other applicable pollutant-specific provision of this Order, the Permittees shall achieve compliance as outlined in Part D.3 of this Order.
5. If a Permittee is found to have discharges from its MS4 causing or contributing to an exceedance of an applicable water quality standard or causing a condition of nuisance in the receiving water, the Permittee shall be deemed in compliance with Parts D.1 and D.2 above, unless it fails to implement the requirements provided in Parts D.3 and D.4 or as otherwise covered by a provision of this order specifically addressing the constituent in question, as applicable.