

June 18, 2008

Chairman Richard Wright and Board members
San Diego Regional Water Quality Control Board
9174 Sky Park Court, Suite 100
San Diego, CA. 92123-4340



Re: Comments on NPDES Permit Reissuance for Continental Maritime of San Diego, Tentative Order R9-2008-0049

Dear Chairman Wright and Board members:

This letter provides comments on the National Pollutant Discharge Elimination System (NPDES) permit reissuance for Continental Maritime of San Diego ("CMSD") on behalf of San Diego Coastkeeper ("Coastkeeper.") Coastkeeper is a locally-based non-profit organization dedicated to the protection and restoration of the region's bays, beaches, watersheds and ocean.

In reviewing the tentative CMSD permit, we are appreciative of the Regional Board's implementation of a new, more stringent acute toxicity standard. The current standard is ambiguous, and has never been satisfactorily defined as to when and where it applies.¹ The tentative permit however, contains a new acute toxicity standard which appears to be more protective of water quality than the current standard and also provides a clear, definitive test that can be more easily applied and enforced.²

Unfortunately, our review also revealed a deficiency so serious that we urge the Regional Board to promptly correct, or reject the proposed permit.

The tentative CMSD's permit contains an apparent exemption from the well-recognized requirement that storm water discharges comply with the California Toxics Rule (CTR).³ The proposed permit states: "The CTR and NTR criteria implemented are only applicable to non-storm water discharges."⁴ As a legal matter, however, the CTR does apply to storm water discharges and so any exemption from compliance with the CTR would be unlawful.⁵ On that basis, the permit should be revised or rejected.

1 See R9-2002-0282, CA 0109142 at 7,8: "In a 96-hour static or continuous flow bioassay test, the discharge shall not produce less than 90 percent survival, 50 percent of the time, and not less than 70 percent survival, 10 percent of the time, using a standard test species and protocol approved by the Executive Officer."

2 See R9-2008-0049, Fact Sheet at F-23: "For this Order, the determination of Pass or Fail from a single-effluent concentration (paired) acute toxicity test is determined using a one-tailed hypothesis test called a t-test. The objective of a Pass or Fail test is to determine if survival in the single treatment (100% effluent) is significantly different from survival in the control (0% effluent.) [...] [T]he t statistic for the single-effluent concentration acute toxicity test shall be calculated and compared with the critical t set at the 5% level of significance."

3 Application of the CTR to storm water is the standard amongst the community. See R6T-2004-0036, CAG616001 at 2, "Municipalities discharging stormwater must still meet the Water Quality Standards set by CTR" (Lahontan Region); R8-2008-0002, Fact Sheet at F-12 (Santa Ana Region); R1-2008-0039, Fact Sheet at F-19 (North Coast Region).

4 R9-2008-0049, Fact Sheet at F-23.

5 40 CFR 131.38

The California Court of Appeals Has Recognized that the CTR Applies to Storm Water Discharges

In *Divers' Environmental Conservation Organization v. State Water Resources Control Bd.*, Petitioners, an environmental group, challenged the issuance of an NPDES permit by the Regional Board to the Navy for its failure to ensure compliance with the CTR for storm water discharges.⁶ The Court of Appeal affirmed the previous judgment, but stated, "In sum the Regional Board was empowered to enforce the CTR by way of the BMP's and benchmarks set forth in the permit. **Although the CTR governs the entire bay, including the point of any discharge, in employing benchmarks for further action by the Navy, the permit does not in any manner authorize the Navy to violate the CTR.**"⁷ The Court went on, "As the Regional Board points out, it is fully capable of taking enforcement action against the Navy in the event a violation of the CTR occurs."⁸

The Regional Board Has Previously Recognized that the CTR Applies to Storm Water Discharges

In *Divers'*, the Regional Board itself acknowledged the application of the CTR to storm water discharges in its brief:

"The Clean Water Act requires that NPDES permits include requirements that dischargers comply with the state's receiving water quality standards."⁹

"[T]here is nothing in the Permit that allows the Navy to discharge pollutants at levels that violate the California Toxics Rule criteria. The Permit contains a clear and enforceable 'receiving water limitation' that specifically requires that all discharges from the regulated Naval facilities, including discharges of storm water associated with industrial activity, comply with any applicable water quality objective or standards, including those in the CTR. (Permit Provision C.1 at AR 276.) **Therefore, the numeric receiving water quality criteria contained in the California Toxics Rule expressly apply to the industrial storm water discharges.** Any discharge of storm water associated with industrial activity that results in violation of the California Toxics Rule criteria would be a violation of the receiving water limitation, regardless of "trigger" numbers."¹⁰

Notably, in CMSD's current permit, the Regional Board also recognized the application of the CTR to storm water discharges: "the CTR regulations [...] establish numeric criteria for water quality standards for priority toxic pollutants for the State of California"¹¹ therefore, "the CTR and the Implementation Policy are applicable to discharges resulting from ship repair, modification, and maintenance activities that occur at the CMSD facility."¹²

⁶ *Divers' Environmental Conservation Organization v. State Water Resources Control Bd.*, 145 Cal.App.4th 246,250 (Cal.App. 4th Dist. 2006).

⁷ *Id.* at 262. (Emphasis added.)

⁸ *Id.*

⁹ Brief for Respondent at 6, *Divers'* No. GIC819689 (Sep. 29, 2004) (citing 33 U.S.C. § 1311(b)(1)(C); *Defenders of Wildlife v. Browner*, (9th Cir. 1999) 191 F.3d 1159, amended 197 F.3d 1035; *Building Industry Association of San Diego County v. State Water Resources Control Board*, 12 4 Cal.App.4th 866 (2004).)

¹⁰ Brief for Respondent, *supra*, at 14. (citing (Permit Provision C.1 at AR 276)) (Emphasis added.)

¹¹ R9-2002-0282, CA 0109142 at 4, §19.

¹² R9-2002-0282, CA 0109142 at 5, §21. *See* §3: "[W]astes and pollutants are discharged or have the potential to be discharged by a variety of pathways, including **storm water**, tidal action, wind, overspray, spills, and leaks." (Emphasis added.)

Thus, the Regional Board has emphasized application of the CTR to storm water in the past, and has not stated any reasons for deviating from the law. Coastkeeper therefore opposes this unlawful and unexplained deviation from application of the CTR.

Exempting CMSD's Storm Water Discharges from Compliance with the CTR Would Violate the Clean Water Act's Anti-Backsliding Provisions

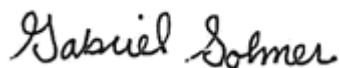
The exemption of CMSD's storm water discharges from compliance with the CTR would violate the Clean Water Act's (CWA) anti-backsliding provisions.¹³ Under these provisions, no permit may contain effluent limitations which are less stringent than the comparable effluent limitation in the previous permit:

[W]hen a permit is renewed or reissued, interim effluent limitations, standards or conditions must be at least as stringent as the final effluent limitations, standards, or conditions in the previous permit (unless the circumstances on which the previous permit was based have materially and substantially changed since the time the permit was issued and would constitute cause for permit modification or Revocation and reissuance under § 122.62) ¹⁴

The proposed permit fails to require compliance with the CTR for storm water discharges, whereas the previous permit did.¹⁵ Without any circumstances calling for an exception under the law, the deletion of the CTR is unlawful backsliding under the CWA. Coastkeeper is very concerned with establishing the precedent that a major category of discharges, storm water discharges, are in effect being exempted from NPDES permit regulation. For these reasons, and the reasons previously stated, the proposed permit must ensure that all storm water discharges comply with the CTR.

Thank you for consideration of our comments.

Sincerely,



Gabriel Solmer
Legal Director

Mary Kate Oehrlein
Legal Intern

13 40 CFR 122.44(l); *See also* 33 USCS § 1342(o)(2), 33 USCS §1313(d)(4)
14 40 CFR 122.44(l)

15 R9-2002-0282, CA 0109142 at 5, § 21 and § 3; *See generally* R9-2002-0282, Monitoring and Reporting Requirements at M-11, §F, "California Toxics Rule Monitoring."