BEFORE THE

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

In the Matter of : California Regional Water Quality Control Board, San Diego Region's Order NO. R9-2009-0081	U.S. NAVY'S PETITION FOR REVIEW, REQUEST FOR STAY and REQUEST FOR HEARING ORDER NO. R9-2009-0081, NPDES NO. CA0109185, WASTE DISCHARGE REQUIREMENTS FOR THE UNITED STATES DEPARTMENT OF THE NAVY NAVAL BASE CORONADO (Cal. Water Code § 13320; 23Cal. Code Regs. §2050, 2053)

I. INTRODUCTION

Pursuant to Section 13320 of the California Water Code and Section 2050 of Title 23 of the California Code of Regulations, the U.S. Navy hereby petitions the State Water Resources Control Board ("State Board") for review of Order No. R9-2009-0081, NPDES No. CA0109185, Waste Discharge Requirements for the United States Department of the Navy, Naval Base Coronado.

II. INFORMATION REQUIRED BY SECTION 2050

In support of this Petition the U.S. Navy provides the following information, as required by Title 23, California Code of Regulations, Section 2050.

A. Name, Address, Telephone and Email Address of Petitioner

Correspondence regarding this Petition should be sent to:

Department of the Navy
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brian.gordon@navy.mil
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B. Regional Board's Specific Action or Inaction for Which Review is Sought

The U.S. Navy challenges several provisions of Order NO. R9-2009-0081 adopted by the Regional Board on June 10, 2009, a true and correct copy of which is attached to Petitioner's Statement of Points and Authorities.

C. Date on Which the Regional Board Acted or Refused to Act

The Regional Board approved the Order in question on June 10, 2009. However, the Navy did not receive an official signed copy of the Order until June 30, 2009; approximately 20 days after the Board acted and after a significant portion of the Navy's appeal period had passed. The Order was not posted on the Regional Board website until early July 2009.

D. Statement of Reasons Why the Action or Failure to Act Was Improper

As explained in greater detail in the attached Statement of Points and Authorities, the Regional Board acted improperly when it adopted an NPDES permit with the following defects:

1. The Toxicity Standard is Overly Conservative, Not Technically Supported, and Improperly Applies WET Test Methods

The toxicity standard in the Order is overly conservative and not technically supported. The standard is applied at the end of the discharge pipe, with no allowance for a mixing zone. The standard is applied to "first flush" samples that must be collected during the first hour of a storm event and are not representative of the storm water discharge. In order for a sample to "pass," the survival rate of organisms used in the toxicity testing must not be significantly different than the survival rate in control samples. The proposed standard requires compliance at the end of the pipe 100% of the time for discharges that are affected by a wide range of factors. It is technically undisputed that storm water discharges are highly variable. Storm water pollutant concentrations and flow rates are variable, therefore corresponding toxicity results will also vary. This standard does not take into account the variability of storm water discharges and applies Whole Effluent Toxicity test methods that were originally designed for process discharges that have consistent flow volumes and pollutant concentrations (see item 2 below for discussion on industrial process water). Evidence that the standard is overly protective can be found in the Navy's four year toxicity study which established a robust dataset for discharges into San Diego Bay and demonstrated that Navy storm water discharges very rarely cause toxic impacts in the bay (only 2 out of over 200 tests).

2. The Toxicity Standard Relies On a Fundamental Mischaracterization That Industrial Storm Water is an Industrial Process Water

A major rationale used by the Regional Board to justify the imposition of the standard is that industrial storm water is "industrial process water" within the meaning of the 1974 Water Quality Control Policy for the Enclosed Bays and Estuaries of California. This 1974 Policy is cited by the Regional Board staff as the primary support for a toxicity standard. Yet this 1974 Policy states that it does not apply to "land runoff." The Regional Board's reliance on this policy is in direct conflict with a June 12, 2002 State Board letter to the Navy which states, "You are correct that the [1974] Policy's provisions concerning industrial process waters do not apply to storm water discharges..." The Regional Board's position in direct conflict with the State Board's position represents a matter worthy of State Board review. Further, this is an issue of state-wide concern in that industrial storm water runoff throughout the state could be at risk if this standard was consistently applied and this also warrants State Board review.

3. The Toxicity Standard is Flawed Because It Ignores Area-Wide Pollutant Sources Over Which the Navy Has Little or No Control

The proposed standard ignores the impacts of area sources of pollutants that are typical in all urban environments and contribute to toxicity in storm water runoff. The contribution of pollutants in storm water runoff from area sources is undisputed and supported by numerous scientific studies. For example, the TMDL study for Chollas Creek and the March 23, 2009 City of San Diego Aerial Deposition Phase II Study found that sources such as automobiles and industrial plant generation provide a significant portion of the copper in the Chollas Creek watershed. The 2006 Air Toxics Hot Spots program report, produced by Air Pollution Control District, estimates that 99% of zinc and 97% of copper comes from mobile area and natural emission sources. A significant portion of these sources are not from the Navy facilities so therefore the Navy has no control over them.

The issue regarding area source pollutants is not just a Navy concern. It has also been recognized by legislature. The City of San Diego is sponsoring SB 346, a Senator Kehoe bill, that would require automobile brakes be designed to eliminate pollutants such as copper and zinc. With regard to this Bill the Senate Environmental Quality Committee analysis noted that "[t]he ubiquity of copper in the urban

environment, and technical difficulty and impracticality of treating storm water to remove it, means compliance with copper TMDLs will not be feasible without source reduction of copper. Costs could go into the billions of dollars to remediate if source reduction measures are not taken." Without any industrial activity these area sources are more than enough to cause toxicity in storm water runoff if measured at the end of the pipe. The Regional Board's own parking lot, which is typical of parking lots across the county, consistently fails the end of pipe toxicity standard. This demonstrates that even a typical parking lot can not pass the end of pipe toxicity standard and speaks to the feasibility of compliance.

4. The Regional Board Has Not Demonstrated that the Toxicity Standard is Technologically or Economically Feasible and Therefore is Contrary to the Porter Cologne Act

The record is devoid of any analysis showing that it is feasible for the Navy to comply with the new toxicity standard. The Navy maintains it is not feasible, and this is confirmed by the lengths to which the commercial Shipyards have gone to avoid application of the standard to discharges rather than comply with the standard by diverting all of their storm water to the City of San Diego sanitary sewer system. From a practical perspective the Regional Board, by requiring end of the pipe compliance with the toxicity standard 100% of the time has established a zero discharge standard that would be analogous to the local San Diego Air Pollution Control District requiring all vehicles in the San Diego area to immediately comply with a zero tail pipe emission standard without evaluating economic impacts or the feasibility of the meeting the standard. To comply with the toxicity standards the Shipyard facilities now collect and discharge all of their storm water to the City of San Diego sanitary sewer system, a method that the Navy could not duplicate. Navy installations are much larger facilities and the City could not accept the higher volume of storm water into their sewer system. The City of San Diego has informed the Navy that they could not accept the full volume of storm water and would require holding storm water for 24 hours after the storm event is over before any storm water is discharged into the City system. Compliance with the acute toxicity standard, if achievable at all, would require that the Navy install infrastructure to collect, and treat/redirect industrial storm water runoff from San Diego area installations

at enormous cost (Estimated at over $300 million in 2005). The Regional Board failed to take Economic Feasibility into account, and the Executive Officer testified that "Cost is not an option" with Respect to the Navy's permit. The Navy has already implemented many of the Regional Board Staff recommendations such as isolating high risk areas for diversion to sanitary sewer or building grassy swales, but the difficulty is that regardless of whether an area is a high risk area or not, storm water discharges can not consistently meet this standard any more than the shipyards, boatyards, or the Regional Board's own parking lot. Storm water discharges are too variable to meet a strict end of pipe acute toxicity limit 100% of the time.

The Regional Board also failed to take economic considerations into account when adopting this incredibly stringent toxicity standard. Porter-Cologne Act, Section 13241 states that the RWQCB "shall take into consideration factors including "economic considerations" and "water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area." The Regional Board has an obligation to provide an economic analysis of the impacts of the new toxicity requirements as required by the Porter-Cologne Act. The Regional Board further should have determined if the City of San Diego sewer system is capable of accepting the large volume of stormwater from the facility, and if so under what conditions. The Regional Board should have done an independent analysis for feasibility. Failure to do so results in an inappropriate and improper act that merits State Board review pursuant to Porter-Cologne Act, Section 13320.

5. The Regional Board Improperly Rejected the Findings of the Navy's Comprehensive Toxicity Study

During the 2002 permit hearings members of the Board had reservations about the current NPDES permit toxicity requirement. They therefore directed the Navy to conduct a storm water toxicity study. "During the 4-year period... the U.S. Navy shall conduct a study of the toxicity in storm water discharges and shall recommend a scientifically valid survival rate for acute exposure..." The purpose of the study was to provide data to support an alternative toxicity standard that is protective of beneficial uses in the Bay and scientifically defensible. The Navy designed and conducted a study as directed by the

Regional Board, spending approximately $1 million dollars and collecting samples over the course of four years. The study methodology was peer reviewed by many notable water quality experts, including EPA Region IX, Southern California Coastal Water Research Program, Wright University, Applied Marine Sciences, Port of San Diego, and the City of San Diego.

The study developed a robust dataset of storm water and receiving water toxicity data to support a scientifically-based acute toxicity threshold for industrial storm water discharges from Navy facilities that is protective of the receiving water. The study shows that: 1) storm water discharges from Navy industrial facilities rarely cause toxicity in bay waters (Over 99% of the 202 receiving water samples did not show toxicity); 2) toxicity measured in end-of-pipe storm water samples is not predictive of toxic impacts in bay waters (toxicity almost never found in bay water regardless of end-of-pipe toxicity); and 3) receiving water measurements properly predict impacts to San Diego Bay.

Based on the extensive data collected during the study the Navy proposed an alternative to the Order's overly stringent toxicity standard that is both scientifically based and protective of beneficial uses. The Regional Board abused its discretion by improperly disregarding the findings of the toxicity study and adopting the current permit with a toxicity standard that is overly protective, inappropriately applied, technologically and economically infeasible, and fails to take the inherent variability of storm water (and contributions from area sources) into account.

6. The Regional Board Improperly Applied the Thermal Plan Limitations for New Discharges to Existing Steam Condensate Discharges That Have Been In Existence Since The 1940's and Where Existing Discharges Do Not Impact Beneficial Uses

The order applies a standard for steam condensate that is from the California Thermal Plan, but incorrectly applies the requirements for new discharges. Steam condensate discharges have occurred at Naval Base Coronado since the 1940s, well before the Thermal Plan was adopted. Steam condensate is an existing discharge as defined under the thermal plan and the appropriate standard for existing discharges is protection of beneficial uses rather than imposition of a strict thermal limitation. Additionally, because the total discharge volume is extremely small, on average approximately 350

gallons per day from numerous discharge points, the steam condensate does not have thermal impacts. The Navy conducted modeling for a similar steam condensate discharges at a pier facility in New Jersey and demonstrated that the change in receiving water temperature would be negligible. The existing discharges at NBC would have a similar effect (negligible change in temperature) on San Diego Bay. The estimate for installing condensate return systems at NBC is $13.3 million. If the same limitation is applied in the NBSD permit, which is expected to be issued later this year, the estimated cost for installing condensate return systems at both NBC and NBSD is approximately $125 million dollars. The Board applied the incorrect standard to the Navy's existing steam condensate discharges.

7. The Regional Board Improperly Imposed Effluent Limits for TCDD Equivalents that are Much More Stringent than Required by the State Implementation Plan

The Order utilizes procedures from the State Implementation Plan for Toxics Standards, otherwise know as the SIP, to develop effluent limits for non-storm water discharges, which is appropriate. However, the Order is more stringent than the SIP and includes effluent limits for all TCDD equivalents (congeners of chlorinated dibenzodioxins), not just 2,3,7,8-tetrachlorinated dibenzodioxins (TCDD) as required by the SIP. 2,3,7,8-TCDD is a specific dioxin that has water quality criteria in the Federal California Toxics Rule and must be evaluated for an effluent limit. The SIP requires monitoring for these other TCDD equivalents, but with the stated purpose to develop future multi-media control strategies, not to develop limits in NPDES permits. This Order has included effluent limits at extremely low limits for TCDD equivalents in the parts per quadrillion. At these levels there is significant laboratory uncertainty that makes using them as permit limits problematic. In southern California significant sources of TCDD equivalents are from the burning of biological materials (forest fires) and combustion of petroleum products (diesel exhaust). These pollutants get into the atmosphere, are deposited over large areas, and are often not under the control the discharger. Navy processes resulting in discharges regulated by this permit are unlikely to generate these pollutants At the hearing the Regional Board technical staff were unable to explain why a more stringent standard was applied in the Navy's

permit. Despite direct inquiries from the Board, this matter was never resolved. Despite this unaddressed issue, the Board approved the permit as written with respect to TCDD Equivalents.

E. Manner in Which Petitioner is Aggrieved

The Order includes a stringent toxicity standard for storm water discharges that will be infeasible to comply with on a consistent basis. The Order also improperly applied a more stringent new source standard to steam condensate discharges that existed prior to the adoption of the California Thermal Plan. Finally, the Order applies an effluent limitation to TCDD Equivalents that is more stringent than what is required by the State Implementation Plan and Board staff were unable to explain or justify the imposition of a more stringent requirement. Deference should not be given to the Regional Board on this matter as they clearly were not properly informed on the totality of the facts to make a legally supportable decision. Further, the cost for facility modifications to attempt compliance with these improper and unnecessary permit conditions has been estimated in excess of $425 million dollars for San Diego Metro area Navy Installations and there is no assurance that this investment would achieve consistent compliance. If the permit conditions are not modified the Navy will almost certainly be out of compliance and subject to enforcement actions and citizen suits.

Further, the Order may lead to long-term impacts to the Navy's national defense mission affecting the country's most strategic Pacific Basin port. In 2005 in a request that the State Board consider the overall stormwater toxicity issue Navy Captain Anthony Gonzales wrote, "A key component of ship homeporting is the ability to do routine maintenance, maintenance critical for ships to meet mission requirements. The inability to meet proposed permit standards either due to cost or San Diego City sewer limitations could create significant scheduling limitations through maintenance that are critical to this homeporting infrastructure." At the Regional Board hearing itself, Rear Admiral Len Hering testified that, "the permit conditions will have a prolonged and long-term impact on our ability to continue operations here in San Diego Bay."

F. Specific Action Requested by Petitioner

Pursuant to Water Code Section 13321 and Title 23, CCR §2053, the U.S. Navy request that the State Board immediately stay the following waste discharge requirements in the Order pending the outcome of this proceeding:

1) Sections IV.A.5 (page 22) and VII.H (page 39), relating to toxicity.

2) Section IV.A.1 (page 20), relating to the temperature limitation for steam condensate discharges.

3) Sections IV.A.1, 2, &3 (pages 20-22), relating to TCDD equivalents.

This Request for Stay is supported by the Statement of Points and Authorities and the Declaration of Brian Gordon, both of which are attached hereto.

Further, for the reasons stated in Section D of this Petition and the accompanying Statement of Points and Authorities, the U.S. Navy requests that the State Board provide an evidentiary hearing on the Order, as authorized by Section 20.50.6(b) of Title 23 of the California Code of Regulations. A hearing is necessary to present evidence and expert testimony regarding the infeasibility of the toxicity requirements and to address issues such as the Steam Condensate Discharge limits and TCDD Equivalent limits that were left unresolved at the Regional Board hearing.

The U.S. Navy further requests that the State Board recognize the gravity and state-wide impact of the toxicity standard at issue in this Petition and take all appropriate action, including vacating or modifying those portions of the Order challenged in this Petition and implementing the Navy's proposed toxicity standard. In the alternative, the Navy requests that the State Board remand the matter to the Regional Board with orders to revise the Steam Condensate Discharge Limits to reflect existing sources, change the TCDD Equivalent limits to those specified in the State Implementation Plan, and demonstrate how the storm water toxicity standard is scientifically based, technologically and economically feasible and necessary to protect beneficial uses in San Diego Bay.

G. Statement of Points and Authorities in Support of Legal Issues in this Petition

The Navy's Statement of Points and Authorities is attached hereto and incorporated by reference into this Petition.

H. Statement that the Petition Has Been Sent to the Regional Board and Discharger

A true and correct copy of this Petition was sent FedEx on July 9, 2009 to the State Board and Regional Board and other interested parties at the following addresses:

State Water Resources Control Board
Office of Chief Counsel
Jeannette L. Bashaw, Legal Analyst

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Mr. John Robertus
Executive Officer
California State Regional Water Quality Control Board
San Diego Region
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I. List of Interested Parties

The following parties commented on the Proposed Order, either during the public comment period or at the Board Meeting on June 10, 2009:

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Briggs Law Corporation
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J. Statement that the Substantive Issues or Objections Raised in the Petition Were Raised Before the Regional Board

The U.S. Navy raised the issues discussed in this Petition as evidenced by the comments, testimony and documentation submitted to the Regional Board prior to and up through the hearing on June 10, 2009.

The U.S. Navy nevertheless reserves the right to present at the hearing additional evidence in support of this Petition, in accordance with Title 23, California Code of Regulations, Section 2050.6(b). This reservation of rights is particularly warranted under these circumstances, as the Regional Board did not provide the Navy with a copy of the adopted order until June 30, 2009, less than 10 days prior the expiration of the Navy's 30 day appeal period. In contrast, BAE Shipyard's NPDES permit, Order No. R9-2009-0080, which was also adopted by the Board on June 10, 2009, was available to BAE representatives on June 18, 2009. Presentation of further evidence is also appropriate because the Regional Board Technical Staff were unable to explain or justify contested provisions, yet the Regional Board approved the Order nevertheless.

K. Reservation of Right to Amend this Petition and the Accompanying Statement of Points and Authorities

Petitioner reserves the right to amend this Petition and the accompanying Statement of Points and Authorities. This reservation is appropriate in light of the above-stated reasons why the Regional Board's action was improper, and particularly in light of the Regional Board's failure to provide the Navy with a copy of the adopted permit in a timely manner to allow preparation of this Petition.

III. CONCLUSION

For the reasons stated above, and in the attached Statement of Points and Authorities, the State Board should issue a stay of the Order's contested provisions pending the outcome of this proceeding and modify the Order issued by the Regional Board as requested. In the alternative, the matter should be remanded to the Regional Board with orders to revise the Steam Condensate Discharge Limits to reflect existing sources, change the TCDD Equivalent limits to those specified in the State Implementation Plan, and demonstrate how their proposed toxicity standard is scientifically based, technologically and economically feasible, and necessary to protect beneficial uses in San Diego Bay. The Navy also requests that the Board approve a Case-by-Case exception from the SIP for Marine Mammal Enclosure cleaning discharges.

Respectfully Submitted on behalf of the U.S. Navy this 9th Day of July, 2009.

L. R. HERING
Rear Admiral, U.S. Navy

BEFORE THE

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

In the Matter of : California Regional Water Quality Control Board, San Diego Region's Order NO. R9-2009-0081	**U.S. NAVY'S STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR REVIEW AND REQUEST FOR STAY** **(Cal. Water Code § 13320; 23Cal. Code Regs. §2050, 2053)**

I. SUMMARY STATEMENT

On June 10, 2009 the San Diego Regional Water Quality Control Board (Regional Board) narrowly approved Order No. R9-2009-0081 (NPDES No. CA0109185), Waste Discharge Requirements for the United States Department of the Navy, Naval Base Coronado ("NBC"). The approved NBC permit includes a stringent toxicity standard for storm water discharges and other requirements that are infeasible with which to consistently comply. The NBC NPDES permit conditions will almost certainly be applied to other Navy permits for facilities in the San Diego metropolitan area, including Naval Base Point Loma (NBPL), Naval Base San Diego (NBSD), and the Graving Dock Facility (GDF) located at NBSD. The cost to install infrastructure to comply, if feasible at all, with the storm water toxicity standard for San Diego metro installations has been estimated at over $300M. The Regional Board has imposed this toxicity standard without providing any analysis or evidence regarding economic and practical feasibility, as well as impacts to national security, and in doing so has disregarded a comprehensive study and alternative standard it directed the Navy to devise as a condition of its last NPDES permit. The Regional Board has abused its regulatory discretion resulting in Regional Board action that is improper and inappropriate and merits State Board review. The permit also includes an improperly applied a thermal limitation applicable to "new" discharges for "existing" steam condensate discharges to San Diego Bay. The thermal limitation would require all steam condensate discharges be eliminated even though the discharges will not have thermal effects in San Diego Bay, will not impact beneficial uses. The cost to install a

condensate return system at NBC and NBSD has been estimated at $125M. The Board also imposed unnecessarily stringent effluent limitations on TCDD equivalents (congeners of chlorinated dibenzodioxins) in excess of those required by the State Implementation Plan, without any justification or explanation.

The Navy believes that this Petition presents significant issues of state-wide significance that the State Board should address, as well as what the Navy believes are clear errors of fact, law, and procedure by the Regional Board that resulted in inappropriate and improper action pursuant to the Porter-Cologne Act Section 13320 and should be corrected. This Petition also contains a request for a case-by-case exception that was not objected to by the Regional Board.

II. BACKGROUND

San Diego area Naval Installations (NBC, NBPL, NBSD, and GDF) discharge storm water and non-storm water (i.e. steam condensate, security boom cleaning water, etc.) to San Diego Bay and the Pacific Ocean in accordance with NPDES permits issued in 2002/2003 by the SDRWQCB. Although the permits expired in 2007 and 2008 (5 year permits) they remain in effect until new permits are adopted by the SDRWQCB. SDRWQCB staff issued a tentative permit for NBC in May 2009 and included it on the 10 June 2009 public meeting agenda for consideration by the Regional Board. The tentative permit included a stringent storm water toxicity standard and a thermal limitation for steam condensate discharges. Navy environmental staff submitted written comments on 27 May 2009. The Navy provided testimony at the 10 June hearing regarding the infeasibility of compliance with the permit standards and proposed an alternative storm water toxicity standard. The Regional Water Board rejected the Navy proposal and approved the permit with minimal changes.

The NBC NPDES permit includes stringent requirements that will be exceedingly difficult if not infeasible to achieve and will set a precedent for other Navy permits that could be issued as soon as August 2009. The most stringent requirements are the storm water acute toxicity standard and the thermal discharge limitation. The NBC permit requires that industrial storm water runoff meet an acute toxicity standard measured at the point of discharge (end-of-pipe). The standard is so stringent it is very unlikely that any Navy storm water (industrial or non-industrial) could consistently meet the toxicity standard. In fact, runoff from the SDRWQCB's own parking lot, a typical municipal parking lot,

consistently fails to meet the standard. From a practical perspective the Regional Board, by requiring end of the pipe compliance with the toxicity standard 100% of the time has established a zero discharge standard that would be analogous to the local San Diego Air Pollution Control District requiring all vehicles in the San Diego area to immediately comply with a zero tail pipe emission standard without evaluating economic impacts or the feasibility of the meeting the standard. This statement is supported by the fact that the only industries with similar toxicity standards in the San Diego area, three commercial shipyards and several smaller boatyard facilities, have implemented zero storm water discharge programs. These facilities do not "comply" with the standard rather they avoid the standard by collecting and discharging all of their storm water to the City of San Diego sanitary sewer system. This compliance strategy is not available to the Navy because the Navy installations are much larger facilities and the City will not accept the higher volume of storm water into their sewer system, which has been calculated at over 40M gallons from a 1 inch storm event at NBC. Compliance with the acute toxicity standard, if technology is found to ultimately meet the standard at all, would require the Navy install infrastructure to collect, and treat/redirect industrial storm water runoff from the installation at enormous cost (Estimated at over $300 million dollars in 2005) and impacts to Naval operations and training at the installation At the 10 June meeting the Navy proposed an alternative toxicity standard that is protective and scientifically defensible, but it was not accepted by the Regional Board. The proposal was based on a comprehensive four year (2002 to 2006) storm water toxicity study performed by the Navy under the direction of the Regional Board.

At the hearing the Executive Officer alleged, and a majority of the board also appeared to agree that it was appropriate to hold the industrial waterfront facilities to a higher standard than inland areas. *See*Transcript Page 121. This statement ignores the fact that storm water flows coming from upstream urban and industrial sources (e.g. Chollas Creek) generate 10-20 times more runoff to San Diego Bay than Navy facilities, impact a larger area of the bay, are more persistent, and have resulted in bay water toxicity (SCCWRP, 2003). The Executive told the board that compliance costs were not a consideration in their decision on this permit because it was an industrial waterfront facility and that standards needed to be more conservative for waterfront facilities until they were confident all beneficial uses of the bay are protected. *See*Transcript Page 121, 123.

This statement implies that costs could be considered for non-waterfront facilities and ignores the fact that the source of Navy funding to implement this zero discharge standard comes from the taxpayer and it is our duty to be fiscally responsible by weighing the costs and benefits to the public when establishing water quality standards. This toxicity standard is not simply an effluent limit in a permit; it is a standard has been established for waterfront facilities as a toxicity threshold and therefore the Regional Board had a legal obligation to consider economic impacts and the feasibility of implementing the toxicity standard, which they have not done.

Further, the Executive Officer made statements during the hearing implying the Navy municipal discharges would not be covered by an NPDES permit if the proposed industrial permit was not applied to all discharges from the facility. *See*Transcript Page 121, 122. This clearly swayed some of the Board members and resulted in a narrow (5-3 vote) approving the permit. What the Executive Officer failed to disclose to the Board was that NBC is currently listed as non-traditional MS4 in the State Board Phase II Municipal permit and that a designation letter from the Regional Water Board would require NBC seek coverage under that permit. When Navy representatives have asked the Executive Officer about a designation letter the response has been that he does not have enough staff resources to designate the NBC facility and conduct the required review and hearings on the NBC storm water management plan. This lack of staff resources has also been apparent in other areas impacting Navy installations. When Navy representatives recently asked Board staff their understanding of Navy compliance with the NPDES monitoring and reporting requirements based on Navy self-monitoring reports the response was that they did not know because they had not reviewed the reports in last 3 years.

The NBC permit also inappropriately applies the "new discharge" thermal limitation from the California Thermal Plan to steam condensate discharges that have been in existence since the 1940s and that have negligible effects on bay water temperature. The limitation prohibits discharges greater than 20 degrees Fahrenheit over the natural temperature of the receiving water (bay or ocean). The limitation does not allow a mixing zone so the point of compliance is immediately before the condensate enters the receiving water. Compliance with this limitation as currently proposed could require the elimination of steam condensate discharges at NBC. NBSD also has steam condensate discharges that will be subject to this limitation. A Navy Utilities Department estimate to install steam condensate return systems at NBC

and NBSD was approximately $125M. At the 10 June meeting the Navy requested a less stringent thermal limitation be applied and provided evidence that the steam condensate was an existing discharge, but the Regional Board did not change the requirement and approved permit.

Finally, the permit also applies an effluent limitation for TCDD Equivalents (congeners of chlorinated dibenzodioxins) that is much stricter than what is required by the State Implementation Plan. When queried by the Board members on this at the hearing Board Staff were unable to explain the reasons for a more protective standard or justify its presence in the Navy permit. The Executive Officer stated to the Board "I want to add that the team writing the permit is a different part of our staff than does the water quality body assessments, so I may have to get someone from elsewhere on the staff to fill in on this." *See*Transcript Page 108. The Executive Officer did not bring in additional staff to answer the Board's questions and the Chair instead requested the Navy technical representative explain the applicable requirements to the Board. *See*Transcript Page 110. The Board abused its discretion by approving the Order with the unreasonably stringent TCDD equivalents limitations, without sufficient staff technical support and information.

III. ARGUMENT

A. The State Board Should Stay the Challenged Provisions of the Order

In order to issue a stay of effluent limitations in the Permit, the State Water Board must find that the Navy has alleged facts and produced proof of: (1) substantial harm to the Navy or to the public interest if a stay is not granted; (2) a lack of substantial harm to other interested persons and to the public interest if a stay is granted; and (3) substantial questions of law or fact regarding the disputed action. (Cal. Code Regs., Title 23, § 2053). The Navy meets those criteria in this case, as described below and in the Declaration of Brian Gordon (attached hereto).

1. The Navy Will Suffer Substantial Harm if a Stay is Not Granted During the Pendency of This Proceeding

The Navy will suffer substantial harm if the Board does not stay the challenged effluent limitations. Specifically, the Navy will be unable to comply with the limitations and will be in violation of its permit. Permit violations subject the Navy to enforcement action from the Regional Board and

citizen suits. The threat of citizen suits is not illusory, as the Navy is currently defending against a suit brought by San Diego Coast Keeper alleging that the Navy has violated its NPDES permit at Naval Base San Diego. Although the Executive Officer stated "you can not fine the Navy." and "As far as shutting down their activity, I can't even imagine taking such a course of action." *See*Transcript Page 123, this is misleading. A court in response to a citizens suit could issue an injuction potentially severely impacting Navy operations and training. This testimony may have influence the Board in approving the permit. Further, the Navy has no means by which to achieve compliance in the short-term. The $300 million dollar cost estimate cited above to attempt compliance with the toxicity standard would require massive infrastructure changes over many years without any guarantee that the standard would be met. The $125 million dollar estimate to eliminate steam condensate discharges would take many years to fund and implement, all for a *de minimis* discharge that has no impact on beneficial uses in San Diego Bay and that the Regional Board is regulating under the wrong standard. Allocation of these funds is subject to Congressional approval that is not within the Department of the Navy's control.

Further, the Order may lead to short and long-term impacts to the Navy's national defense mission affecting the country's most strategic Pacific Basin port. In 2005 in a request that the State Board consider the overall storm water toxicity issue Navy Captain Anthony Gonzales wrote, "A key component of ship homeporting is the ability to do routine maintenance, maintenance critical for ships to meet mission requirements. The inability to meet proposed permit standards either due to cost or San Diego city sewer limitations could create significant scheduling limitations through maintenance that are critical to this homeporting infrastructure." At the Regional Board hearing itself, Rear Admiral Len Hering testified that, "the permit conditions will have a prolonged and long-term impact on our ability to continue operations here in San Diego Bay."

2. Other Interested Persons And The Public Will Not Suffer Substantial Harm If A Stay Is Granted

The Navy's comprehensive toxicity study demonstrates that Navy storm water discharges very rarely cause toxicity in San Diego Bay, and a stay of the toxicity standard will not compromise protection of beneficial uses. The public and other interested parties will not suffer harm, let alone substantial harm,

if the storm water toxicity standard is stayed. The same is true for the challenged steam condensate discharge limits and TCDD equivalent effluent limitations. Neither discharge causes toxicity in San Diego Bay or impairs beneficial uses.

3. There Are Substantial Questions Of Law And Fact Regarding The Regional Board's Action

As described in more detail below, there are substantial questions of law and fact relating to the challenged provisions of the Regional Board's Order. The myriad of problems with the toxicity standard, inappropriate steam condensate discharge standard, and overly stringent and unsupportable TCDD Equivalent effluent limitations are all important issues that cannot be resolved at the Regional Board level. In fact, the Regional Board Executive Officer testified at the permit hearing that "The Navy has options to pursue these additional matters of toxicity in the petition process, and I'm reluctant to say this, but on occasion I do, sometimes issues cannot be resolved by this Board. . ." Transcript at 122, ll 21-25.

B. The Stringency, Infeasibility and Unequal Application of the New Storm Water Toxicity Standard Presents an Issue of State-Wide Significance that Should Be Addressed by the State Board

If the toxicity standard in the Order is not revised it will have significant long term impacts to not only the Navy, but other dischargers as well if applied equally across the region. If it was applied consistently, hundreds if not thousands of industries and municipal dischargers would be out of compliance due to the near impossibility of compliance. This fact is supported by years of laboratory data that show the Regional Board parking lot, a typical municipal parking lot, does not consistently meet the toxicity standard.

Potential broad applicability across the state, and the resultant impacts, is furthered by the fact that the major rationale used by the Regional Board to justify the imposition of the standard is that industrial stormwater is an "industrial process water" within the meaning of the 1974 Water Quality Control Policy for the Enclosed Bays and Estuaries of California. This 1974 policy has been cited by the Regional Board staff as the primary support for a toxicity standard. Yet this 1974 policy states that it does not apply to "land runoff..." The Regional Board's reliance on this policy is in direct conflict with a June

12, 2002 letter from the State Board to the Navy which states, "You are correct that the Policy's provisions concerning industrial process waters do not apply to stormwater discharges..." The Regional Board's position in direct conflict with the State Board's position represents a matter worthy of State Board review. Further, this is an issue of state-wide concern in that all industrial storm water throughout the state could be at risk if this standard was consistently applied and this also triggers State Board review. The following industrial discharges; NASSCO, BAE, and Continental Maritime shipyards in San Diego, have been presented by the Regional Board as support for the conclusion that the Navy can "comply" with the acute toxicity standard. This is an erroneous conclusion, where in reality these dischargers have in fact only avoided the standard by capturing all storm water and diverting it to the City of San Diego sewer system. This "compliance" option, zero discharge, is not feasible or available to the Navy, and is certainly not feasible on a region-wide basis due to the vast capacity and infrastructure issues if this standard were applied equally across all San Diego Bay dischargers. The targeting of waterfront facilities with this standard when upstream urban and industrial sources contribute greater pollutant loading to San Diego Bay is evidence of the unequal application of the storm water toxicity standard. The fact that the Shipyards were forced into this avoidance measure (zero discharge) by the infeasibility of the toxicity standard should indicate that across-the-board application to waterfront facilities is improper. Further, and perhaps most importantly, the Regional Board has not demonstrated that the stringent standard is necessary or feasible. As noted above, the San Diego Regional Board's executive officer stated that the toxicity issue could not be resolved at the Regional Board level and identified a petition to the State Board as the proper avenue for resolution. *See*Transcript Page 122

1. The New Toxicity Standard Is Overly Protective, Improperly Applied, Ignores Area-Wide Pollutant Sources, Fails To Take Economic Feasibility Into Account, And Is Infeasible To Consistently Meet Without Collection And Diversion Of Storm Water Which is Not a Realistic Option for the Navy

The State Board should revise the Order's storm water toxicity requirements or, at a minimum, order the Regional Board to demonstrate how the standard is scientifically based, technologically and economically feasible, only applicable to waterfront activities, and necessary to protect beneficial uses in

San Diego Bay. The toxicity standard currently in the Order is inappropriately applied, excessively conservative, ignores toxic affects of area source pollutants, and given its inherent infeasibility to meet could result in upwards of $300M in compliance costs to construct infrastructure to capture and divert storm water discharges. In addition it is not based in sound science or tied to any real-world baseline, unlike the toxicity standard developed by the Navy developed in response to a prior Order from the Regional Board.

A. The Toxicity Standard is Overly Conservative, Not Technically Supported and Improperly Applies WET Test Methods

The toxicity standard in the Order is overly conservative and not technically supported. The standard is applied at the end of the discharge pipe, with no allowance for a mixing zone. The standard is applied to "first flush" samples that must be collected during the first hour of a storm event and are not representative of the storm water discharge. In order for a sample to "pass," the survival rate of organisms used in the toxicity testing must not be significantly different than the survival rate in control samples. The proposed standard requires compliance at the end of the pipe 100% of the time for discharges that are affected by a wide range of factors. It is technically undisputed that storm water discharges are highly variable. Because storm water pollutant concentrations and flow rates are variable, the corresponding toxicity results will also vary. This standard does not take into account the variability of storm water discharges and applies Whole Effluent Toxicity test methods that were originally designed for process discharges that have consistent flow volumes and pollutant concentrations. The requirement to pass toxicity 100% of the time is overly conservative and from a practical standpoint requires dischargers to eliminate all storm water runoff or in other words implement a zero discharge program and as previously stated would be analogous to implement an air quality zero discharge standard on vehicle tail pipe emissions. The underlying assumption for Whole Effluent Toxicity (WET) testing is that the toxicity measurement is representative of the exposure conditions expected in the receiving environment. The Navy's four-year study (Katz et al., 2006) showed that less than 1% of receiving water samples

measured directly outside outfalls exhibited toxicity and that exposure conditions (spatial extent and duration) in the receiving environment were clearly much less than those represented by first flush samples collected at the end-of-pipe.

B. The Toxicity Standard is Flawed Because It Ignores Area-Wide Pollutant Sources Over Which the Navy Has Little or No Control

The proposed standard ignores the impacts of area sources of pollutants that are typical in all urban environments and contribute to toxicity in storm water runoff. The primary contaminants causing toxicity in storm water discharges are found in all urban areas largely as a result of atmospheric and direct deposition from automobile sources such as brake pads and tire wear. Numerous scientific studies identify the role of automotive sources and other industrial plant generation of these contaminants. For example, the TMDL study for Chollas Creek and the March 23, 2009 City of San Diego Aerial Deposition Phase II Study found that sources such as automobiles and industrial plant generation provide a majority of the copper in the Chollas Creek watershed. The 2006 Air Toxics Hot Spots program report, produced by Air Pollution Control District (and submitted to the Regional Board in the Navy's comment submission), estimates that 99% of zinc and 97% of copper comes from mobile area and natural emission sources.

The issue regarding area source pollutants is not just a Navy concern. It has also been recognized by the legislature. The City of San Diego is sponsoring SB 346, a Senator Kehoe bill, that would require automobile brakes be designed to eliminate pollutants such as copper and zinc. With regard to that Bill the Senate Environmental Quality Committee noted that "[t]he ubiquity of copper in the urban environment, and technical difficulty and impracticality of treating storm water to remove it, means compliance with copper TMDLs will not be feasible without source reduction of copper. Costs could go into the billions of dollars to remediate if source reduction measures are not taken." Without any industrial activity these area sources are more than enough to cause toxicity in storm water runoff if measured at the end of the pipe. In addition, the most recent scientific data show that storm water from all sources, not just Navy outfalls, is a minor source of copper and zinc to San Diego Bay. The most

recent mass loading data (Chadwick et al., 2004) show that storm water from all sources accounts for only 7% of the copper loading to the bay.

Area-source contaminants have been shown to routinely cause toxicity in parking lot runoff (Greenstein et al., 2003). The Regional Board's own parking lot, which is typical of parking lots across the county, consistently fails the end of pipe toxicity standard. This demonstrates that even a typical parking lot can not pass the end of pipe toxicity standard and speaks to the feasibility of compliance. Storm water monitoring results from the Regional Board office complex parking lot were presented at the permit hearing and disregarded by the Board. Similar tests and results have been found by the Southern California Coastal Water Research Project on a Long Beach City College parking lot.

C. The Regional Board Has Not Demonstrated that the Standard is Technologically or Economically Feasible

Aside from conclusory statements, the record is devoid of any analysis showing that it is feasible for the Navy to comply with the new toxicity standard. The Navy maintains it is not feasible, and this is confirmed by the lengths to which the Shipyards have gone to divert storm water to the sanitary sewer in order to avoid application of the standard to discharges. Unlike the Navy's study referenced above, the Regional Board has not offered scientific based evidence demonstrating that storm water runoff from Navy installations is having an adverse impact on San Diego Bay; nor has the Regional Board provided scientific based findings that, given the amount of contaminants from area sources, and their small particle size, that it is possible/feasible for end-of-pipe compliance with the storm water toxicity requirements. Nor has the Regional Board made any finding that it would be possible for the Navy to comply with (or avoid) the standard in the same manner as the shipyards by capturing all storm water and discharging it to the City of San Diego sewer system. As part and parcel of informed environmental public policy, the Regional Board is bound to make a feasibility determination analyzing whether or not the City of San Diego sewer system is capable of accepting the volume of storm water from the Navy facility, and if so under what conditions. The Board staff have represented to the Board that the standard

is feasible for the Navy because the shipyards comply and that the Navy could divert storm water from "high risk areas" and install "grassy swales" to achieve the toxicity standard. This totally misrepresents the feasibility of meeting the toxicity standard and ignores the fact the Navy has already isolated high risk industrial activities and installed grassy swales, but have still failed the end of pipe storm water toxicity standard. Therefore, the Regional Board's decision was based on erroneous and incomplete information and merits technical and legal review by the State Board. The Regional Board has an obligation to perform an independent analysis as to the feasibility of the standard as it applies to the Navy facilities. Such an analysis would have revealed that the shipyards' avoidance method of compliance is NOT available to the Navy. The City of San Diego has informed the Navy in writing that they could not accept the full volume of storm water from Navy facilities.

i. The Shipyards are Avoiding the Toxicity Standard Because Compliance Is Not Feasible. However, Collection, Storage and Discharge to the Sanitary Sewer is Not a Technologically or Economically Feasible Option for the Navy

To comply with the toxicity standards the Shipyard facilities now collect and discharge all of their storm water to the City of San Diego sanitary sewer system, a method that the Navy could not duplicate. Navy installations are much larger facilities and the City could not accept the higher volume of storm water into their sewer system. Compliance with the acute toxicity standard, if achievable at all, would require that the Navy install infrastructure to collect, and treat/redirect industrial storm water runoff from the installation at enormous cost (estimated at over $300 million dollars in 2005). The Navy has already implemented many of the suggestions Regional Board Staff put forward such as isolating high risk areas for diversion to sanitary sewer or building grassy swales, but the difficulty is that regardless of whether an area is a high risk area or not, storm water discharges do not consistently meet this standard any more than the shipyards, boatyards, or the Regional Board's own parking lot. Storm water discharges are too variable to consistently meet a strict end of pipe toxicity limit. The only way the Shipyards can comply with the toxicity standard is to avoid it by discharging all industrial storm water to the sanitary sewer.

The proposed toxicity standard is simply not feasible. The Navy has continued to investigate and employ a number of BMPs to reduce the release of toxic contaminants from its activities. Despite these efforts, however, there has been no evidence to date that BMPs or treatment technologies can consistently pass the current or new toxicity requirements in the order. The only demonstrated consistent manner to satisfy the requirement is to divert the storm water flow to the City of San Diego sanitary sewer system. For affected Navy installations it is unlikely there is sufficient land to build the required infrastructure without significant disruption of critical missions.

It is also very unlikely, due to capacity constraints, that the City of San Diego could accommodate storm water runoff from large naval installations as they have for the smaller shipyard and boatyard facilities. Therefore, any findings of feasibility that the Regional Board may have made for the shipyard permits are not applicable to the Navy permits and should be supplemented with clear findings that the proposed conditions are technologically and economically feasible. The Navy requests that the Regional Board be directed to take these factors into consideration because it has failed to do so up to this point. In fact, the Regional Board's Executive Officer stated during the hearing that "cost is not an option" with respect to the Navy's permit. *See* Transcript at pp 121, line 24. This is at odds with the language and intent of the Porter-Cologne Act, Section 13241 which states that the RWQCB "shall take into consideration" factors including "economic considerations."

Finally, the Regional Board failed to explain the necessity and justification for a new standard that is much stricter and likely impossible to consistently meet. As demonstrated by the Navy's 4 year toxicity study, storm water discharges only cause toxicity in San Diego Bay on exceedingly rare occasions. The Navy has provided substantial scientific evidence to support the fact that bay water beneficial uses are currently protected, that toxicity measured at the end-of-pipe is not a meaningful metric to evaluate potential impacts to bay waters, and that conducting WET tests on end-of-pipe samples does not appropriately take into account natural exposure conditions in bay waters. The current toxicity test applied to end-of-pipe characterizes most storm water, including everyday urban runoff, as toxic. This

results from the emerging consensus discussed above that toxic constituents in storm water like copper and zinc are ubiquitous. Such overstatement of toxicity makes its use alone as a measure of compliance inappropriate and inequitably singles out Navy storm water for toxicity while ignoring similar toxicity from urban discharges and sources, including those impacting Navy sites from aerial deposition beyond installation boundaries.

The toxicity standard in the previous permit was overly protective of beneficial uses in the Bay, yet the Regional Board imposed an even more stringent standard without addressing the Navy's objections and without making sufficient findings regarding the need or scientific basis for the new standard. As such ". . . the permit violates a basic principle of California law that 'the agency which renders the challenged decision must set forth findings to bridge the analytic gap between raw evidence and the ultimate decision or order.'" In the Matter of the Petition of: Los Vergenes Municipal Water District, State Board Order No. WQ 2001-03 (February 15, 2001) at pp 4 *citing* Toganpa Assn. For a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 515 (1974). "In other words, findings must explain the reasoning of the agency. They must explain how the law and fact justify the decision or order." Id. The Regional Board failed to bridge the analytic gap in this instance and the new toxicity standard should not stand.

2. The Regional Board Improperly Rejected the Findings of the Navy's Comprehensive Toxicity Study

During the 2002 permit hearings members of the Board had reservations about the current NPDES permit toxicity requirement. They therefore directed the Navy to conduct a storm water toxicity study. "During the 4-year period... the U.S. Navy shall conduct a study of the toxicity in storm water discharges and shall recommend a scientifically valid survival rate for acute exposure..." The purpose of the study was to provide data to support an alternative toxicity standard that is protective of beneficial uses in the Bay and scientifically defensible. The Navy designed and conducted a study as directed by the Regional Board, spending approximately $1 million dollars and collecting samples over the course of four

years. The study included, among other things, 333 toxicity tests, a wide range of chemistry measurements, 17 plume mapping surveys, and 10 Toxicity Identification Evaluations. The study methodology was peer reviewed by many notable water quality experts, including EPA Region IX, Southern California Coastal Water Research Program, Wright State University, Applied Marine Sciences, Port of San Diego, and the City of San Diego. Comments from peer reviewers were favorable. Dr. Burton from Wright State University commented that "this 4 year study is the most extensive and advanced onsite storm water runoff study that I am aware of." Dr. Denton of EPA Region IX was also supportive, stating "I compliment the Navy...Overall, the Navy has done an extensive job of collecting and analyzing storm water for toxicity assessments..."

The study developed a robust dataset of storm water and receiving water toxicity data to support a scientifically-based acute toxicity threshold for industrial storm water discharges from Navy facilities that are protective of the receiving water. The study shows that: 1) storm water discharges from Navy industrial facilities rarely cause toxicity in bay waters (Over 99% of the 202 receiving water samples did not show toxicity); 2) toxicity measured in end-of-pipe storm water samples is not predictive of toxic impacts in bay waters (toxicity almost never found in bay water regardless of end-of-pipe toxicity); and 3) Receiving water measurements properly predict impacts to San Diego Bay. It is clear that current Best Management Practices (BMPs) and compliance efforts by the Navy are already meeting the goals of the order to maintain beneficial uses without the need for a more stringent toxicity standard.

The study showed that toxicity was almost never found in bay waters regardless of the toxicity level measured in end-of-pipe storm water samples. This is consistent with the EPA's Technical Support Document (EPA's Technical Support Document for Water Quality-based Toxics Control, EPA, 1991) which was presented to the Board and states that *"there is a less likely chance for receiving water impacts to be observed in saltwater systems as predicted by toxicity tests"*. EPA 1991, page 9. It is apparent from the study results that failing an end-of-pipe storm water sample toxicity test is not meaningful with regards to identifying potential bay impacts.

The study also demonstrated that storm water plumes from industrial outfalls into San Diego Bay are very short-lived, have a limited spatial extent and are very low in magnitude. The volume of storm water discharged from Navy facilities is sufficiently small that it is observed only in the immediate vicinity of the discharge and is rapidly (~ 12 hours) assimilated. The low exposure conditions posed by the natural mixing of storm water plumes results in lack of toxic impacts. The use of whole effluent toxicity (WET) testing was intended to evaluate toxicity for large continuous discharge sources, and then, only after mixing with the receiving water was taken into account. This is consistent with EPA's TSD stating on page 11: "The results, when linked together, clearly show that if toxicity is present after considering dilution, impact will also be present" or "Impact from toxics would only be suspected where effluent concentrations after dilution are at or above the toxicity effect concentration". The use of Whole Effluent Toxicity (WET) testing is therefore only appropriate if it is used as intended; that is, that it be conducted on receiving water samples or on end-of-pipe samples adjusted for the magnitude and duration of the discharge. The current Order misapplies WET testing and fails to account for variability in the discharge and wholly ignores impacts in the receiving water, which is the appropriate location for measuring toxicity.

Based on the extensive data collected during the study the Navy proposed an alternative to the Order's overly stringent toxicity standard that is both scientifically based and protective of beneficial uses. The Regional Board abused its discretion by disregarding the findings of the toxicity study and adopted the permit with a toxicity standard that is overly protective, inappropriately applied, technologically and economically infeasible, and fails to take the inherent variability of storm water (and contributions from area sources) into account.

C. The Regional Board Improperly Applied the Thermal Plan Limitations for New Discharges to Steam Condensate Discharges That Have Been In Existence Since The 1940's and Do Not Impact Beneficial Uses

The Order as adopted incorrectly treats steam condensate discharges from NBC piers as "new sources" that did not exist when the California Thermal Plan was adopted in 1971. As such, the

discharges are subject to a strict thermal limitation that does not apply to discharges that existed prior to 1971. The appropriate standard for these existing discharges is to ensure they do not impact beneficial uses, which they do not. The Order applies the incorrect standard for these discharges and the Regional Board's mistake should be corrected.

1. The Regional Board Applied the Wrong Standard and Ignored Evidence that the Steam Condensate Discharges Existed Prior to Adoption of the California Thermal Plan

The order dictates an effluent limitation for temperature applicable to steam condensate discharges. Although this limitation can be found in the California Thermal Plan, it is the requirement for new discharges (no greater than 20 degrees F above receiving water) that were not in existence at the time the Thermal Plan was adopted. Steam condensate discharges have been in existence at Naval Base Coronado since the 1940s, well before the Thermal Plan was adopted. Steam condensate is an "existing discharge" under the thermal plan and the appropriate standard for existing discharges is "protection of beneficial uses" rather than imposition of a strict thermal limitation.

The California Thermal Plan defines existing discharges as "Any discharge (a) which is presently taking place, or (b) for which waste discharge requirements have been established and construction commenced prior to adoption of this plan, or (c) any material change in an existing discharge for which construction has commenced prior to the adoption of this plan." Steam condensate discharges at NBC are "existing discharges" that have occurred since prior to 1971, the year the California Thermal Plan was originally adopted, and were included as an authorized discharge in Order No.R9- 2003-0008 (issued on November 13, 2003). Page F-32 of the order incorrectly states that steam condensate discharges at NBC commenced after the Thermal Plan was adopted. The Navy stated in its comments and produced evidence at the permit hearing that the steam condensate discharges were existing sources and that the steam system at NBC was installed in 1945. *See* Transcript, pp 81, ll 12-14. Regional Board technical staff also agreed in a Response to Comments that if the discharge existed prior to 1971 it would be

considered an "existing discharge." The Regional Board improperly disregarded this evidence and the technical staff's recommendation and adopted the permit containing an inapplicable standard.

2. Steam Condensate Discharges do not Impact Beneficial Uses

Steam condensate discharges from NBC are in compliance with the standard applied to existing sources. The California Thermal Plan requires existing discharges into enclosed bays " . . . comply with limitations necessary to assure protection of beneficial uses." Because steam condensate discharges are exceptionally low volume and dispersed over a wide area they will not adversely affect beneficial uses. The total volume of steam condensate discharges to San Diego Bay from NBC has been estimated at between 100 and 375 gallons per day from 33 discharge points or on average up to 11 gallons per day from each discharge location. The estimated discharge rate from the steam lines is 1 (one) ounce per minute. These low volume discharges (literally drips) are dispersed over a wide area and would not result in a measurable change in receiving water temperature.

A temperature modeling study performed by the Navy in 2008 at Naval Weapons Station Earle, N.J. confirmed that discharges of this nature only have a negligible affect on the receiving water temperature. The study modeled steam condensate discharges nearly identical to those occurring at NBC and used conservative assumptions to ensure the results reflected the worst case scenario to predict changes in the receiving water. The study concluded that low volume steam condensate discharges such as those at NBC do not affect temperature in the receiving water in any meaningful way. A copy of the study, Temperature Modeling for Steam Condensate Discharge at Naval Weapons Station Earle, NJ, Technical Memorandum 2008 (SPAWAR Systems Center San Diego Environmental Services Branch) was provided to the Regional Board as part of the Navy's comment submission.

The cost to install any type of system to either eliminate the discharges or reduce their temperature is not justified because the discharges have negligible affect on the receiving water temperature and will not adversely affect beneficial uses. Estimates for installing condensate return systems at two Navy facilities in the San Diego Metro area are approximately $125 million dollars. The

Navy requested that the Regional Board remove the temperature limitation from the order and suggested that a requirement be added to the Monitoring and Reporting Program (MRP) to measure the receiving water temperature to verify there are no significant changes in the ambient water temperature. The Regional Board did not act on these comments. As such we respectfully request that the State Board take action to correct this error.

D. The Regional Board Improperly Imposed Effluent Limits for TCDD Equivalents that are Much More Stringent than Required by the State Implementation Plan

The Order is more stringent than the State Implementation Plan and includes effluent limits for all 18 TCDD equivalents, not just 2,3,7,8-TCDD as required by the SIP.. The SIP on pages 28 and 29 (presented to the Regional Board in the Navy's Comment submission) only requires 2,3,7,8-tetrachlorodibenzo-p-dioxon (2,3,7,8-TCDD) be evaluated to determine if Water Quality Based Effluent Limitations (WQBELs) are required. The SIP does not require effluent limitations for other TCDD congeners, yet Table F-6 on page F-43 of the fact sheet incorrectly lists the 2,3,7,8-TCDD California Toxics Rule (CTR) criteria as the criteria for all TCDD equivalents. This resulted in a final WQBEL that is overly conservative for TCDD equivalents and not based on the actual toxicity of the pollutant. 2,3,7,8-TCDD is a specific dioxin that has water quality criteria in the Federal California Toxics Rule and must be evaluated for an effluent limit. The SIP requires monitoring for these other TCDD equivalents, but with the stated purpose to develop future multi-media control strategies, not to develop limits in NPDES permits. This Order has included effluent limits at extremely low limits for TCDD equivalents in the parts per quadrillion. At these levels there is significant laboratory uncertainty that makes using them as permit limits problematic. In southern California the significant sources of TCDD equivalents are from the burning of biological materials (forest fires) and combustion of petroleum products (diesel exhaust). The SIP requires monitoring for other TCDD congeners with the stated purpose of assessing the presence and amounts of congeners discharged so that future multi-media control strategies can be developed. It is recognized that TCDD levels are impacted by Area-Wide Sources that are often not under the control the

discharger. At the hearing, in response to direct and specific questions by the Board members, the Regional Board technical staff were unable to explain why a more stringent standard was applied in the Navy's permit and the Board Chairman requested the Navy technical expert explain the applicable requirements to the Board. *See* Transcript, pp 100-108. The Board ended the discussion on TCDD matters with the statement that they were inclined to "set this aside, and I would suggest, Mr. Chairman, that we're probably going to need some more efforts to clarify this for the- for the Board." No subsequent clarification was offered prior to the Board voting to adopt the permit as written with respect to TCDD Equivalents. Adopting the permit with this very important technical issue outstanding was improper and a clear abuse of Regional Board discretion.

The TCDD Equivalent limits in the Permit are not supported by the testimony at the hearing or the findings. "Consequently, the permit violates a basic principle of California law that 'the agency which renders the challenged decision must set forth findings to bridge the analytic gap between raw evidence and the ultimate decision or order.'" In the Matter of the Petition of: Los Vergenes Municipal Water District, State Board Order No. WQ 2001-03 (February 15, 2001) at pp 4 *citing* Toganpa Assn. For a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 515 (1974). "In other words, findings must explain the reasoning of the agency. They must explain how the law and fact justify the decision or order." Id. The Board has failed to explain the reason or necessity for the more stringent standard in this case and it should be reversed.

E. The Navy Requests that the State Board approve a "Case by Case" exception for Marine Mammal Enclosure Discharges at NBC

The Order includes monitoring requirements and effluent limitations based on the State Implementation Plan for Marine Mammal Enclosure Cleaning Discharges. The SIP allows exceptions for discharges if they do not impact beneficial uses and support the public interest. The Navy applied to the SDRWQCB in April, 2009 for a Case by Case Exception from SIP provisions because this discharge has negligible impacts on receiving water or beneficial uses and is in support of public interest. Specifically,

the discharge is heated pressure washing of marine mammal enclosures (dolphins, sea lions) to remove bird guano and keep the enclosures clean and sanitary which is essential to the health of the animals. Granting a case by case exemption is in the public interest, as the marine mammals are an essential component of the Navy's port security and national security missions. At the permit hearing the Regional Board's executive Officer stated that he did not see a problem with the request and the Regional Board was supportive of the case by case exception. Transcript at pp 121, line 10. The Navy respectfully requests that the State Board grant an exception for this discharge.

IV. CONCLUSION

For the reasons stated above, and in the Petition for Review, the State Board should issue a stay of the Order's contested provisions pending the outcome of this proceeding and modify the Order issued by the Regional Board as requested in the Petition. In the alternative, the matter should be remanded to the Regional Board with orders to revise the Steam Condensate Discharge Limits to reflect existing sources, change the TCDD Equivalent limits to those specified in the State Implementation Plan, and demonstrate how the toxicity standard is scientifically based, technologically and economically feasible, applicable only to waterfront facilities, and necessary to protect beneficial uses in San Diego Bay. The Navy also requests that the Board approve a Case-by-Case exception for Marine Mammal Enclosure cleaning discharges.

Respectfully Submitted on behalf of the U.S. Navy this 9th Day of July, 2009.

L. R. HERING
Rear Admiral, U.S. Navy

BEFORE THE

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

In the Matter of : **California Regional Water Quality Control Board, San Diego Region's Order NO. R9-2009-0081**	**DECLARATION OF BRIAN GORDON IN SUPPORT OF PETITION AND MOTION FOR STAY** **(Cal. Water Code § 13320; 23Cal. Code Regs. §2050, 2053)**

I, Brian Gordon, certify under penalty of perjury under the laws of the State of California that the following is true and correct to the best of my knowledge. I make this Declaration of my own personal knowledge.

1. I am employed by Naval Facilities Engineering Command Southwest (NAVFACSW) in San Diego California, as the Water Program Manager. My duties include policy development, technical oversight, and resourcing of Navy Clean Water Act and Safe Drinking Water Act programs for all Navy installations located in California, Nevada, Arizona, Utah, Colorado, and New Mexico. I have had these responsibilities for over 10 years and have worked in the environmental field since 1987. If am familiar with Order NO. R9-2009-0081 as well as previous NPDES permits for Naval Base Coronado.

2. The U.S. Navy will suffer substantial harm if the Board does not stay the challenged effluent limitations. As an initial matter, the Navy will be unable to comply with the limitations and will be in violation of its permit. Permit violations subject the Navy to enforcement action from the Regional Board and citizen suits. The threat of citizen suits is not illusory, as the Navy is currently defending against a suit brought by San Diego Coast Keeper alleging that the Navy has violated its NPDES permit at Naval Base San Diego. Further, the Navy has no means by which to achieve compliance in the short-term. The $300 million dollar cost estimate to attempt compliance with the toxicity standard would require massive infrastructure changes over many years without any guarantee that the standard would be met. The $125 million dollar estimate to eliminate steam condensate discharges would take many years to fund and

implement, all for a de minimis discharge that has no impact on beneficial uses in San Diego Bay and that the Regional Board is regulating under the wrong standard. Allocation of these funds is subject to Congressional approval that is not within the Department of the Navy's control.

3. It is highly unlikely that any measures short of total capture and diversion to the sanitary sewer would be sufficient to ensure compliance with the new toxicity standard and TCDD equivalent limitations. This is not currently an option for Navy storm water discharges due to infrastructure and capacity issues and the costs to divert non-storm water discharges subject to the TCDD equivalent limitations would be significant. If the State Board does not stay the challenged provisions of the order while this Petition is pending the Navy will incur significant additional monitoring costs under the permit, particularly section V(A)(5) of Attachment E (Page E-19). Attachment E describes the Navy's Monitoring and Reporting Requirements, and Section V (A)(5) requires accelerated toxicity testing when the result of any toxicity test comes back as "Fail." Because the new standard is so incredibly stringent, the Navy will likely be forced into the accelerated testing schedule for each successive monitoring event. In addition to the increased sampling requirements a result of "Fail" under most circumstances trigger requirements to perform Toxicity Identification Evaluations (TIE) and Toxicity Reduction Evaluations (TRE), both of which required additional sampling and laboratory work in addition to that required by the accelerated toxicity testing. With more than 100 outfalls encompassed by the current Order, the expense associated with failures under the new toxicity standard at even a few discharge points would be significant. Costs for accelerated testing at a majority of the outfalls would be crippling to the Navy's water quality program. Significant funds and personnel would be diverted from activities that actually improve water quality to testing for the sake of testing.

4. Further, the provisions of the Order could impact to the Navy's national defense mission affecting the country's most strategic Pacific Basin port. A key component of ship homeporting is the ability to do routine maintenance, maintenance critical for ships to meet mission requirements. The inability to meet proposed permit standards either due to cost or San Diego city sewer limitations could create significant scheduling limitations on maintenance that is critical to this homeporting infrastructure. At the Regional Board hearing that I attended, Rear Admiral Len Hering testified that, "the permit conditions will have a prolonged and long-term impact on our ability to continue operations here in San Diego Bay." If the

challenged provisions of the order are not stayed while this Petition is pending Naval and National Security operations could be adversely impacted.

5. The Public and other interested persons will not suffer substantial harm if the challenged provisions of the order are stayed. The Navy's comprehensive toxicity study demonstrates that Navy storm water discharges very rarely cause toxicity in San Diego Bay, and a stay of the toxicity standard will not compromise protection of beneficial uses. The public and other interested parties will not suffer harm, let alone substantial harm, if the new toxicity standard is stayed. The same is true for the challenged steam condensate discharge limits and TCDD equivalent effluent limitations. Neither discharge causes toxicity in San Diego Bay or impairs beneficial uses. The Navy's study on steam condensate discharges at Naval Weapons Station Earle (submitted to the Regional Board) demonstrated that discharges of this nature have only negligible effects on receiving water, and the State Implementation Plan's treatment of TCDD equivalents makes it clear that effluent limitations such as those imposed by the Regional Board are unnecessary.

6. There are substantial questions of law and fact relating to the challenged provisions of the Regional Board's Order. The Regional Board has abused its regulatory discretion resulting in Regional Board action that is improper and inappropriate and merits State Board review. The infeasible and unjustified toxicity standard, inappropriate steam condensate discharge standard, and overly stringent and unsupportable TCDD equivalent effluent limitations are all important issues that cannot be resolved at the Regional Board level. In fact, the Regional Board Executive Officer testified at the permit hearing that "The Navy has options to pursue these additional matters of toxicity in the petition process, and I'm reluctant to say this, but on occasion I do, sometimes issues cannot be resolved by this Board. . ." Transcript at 122, ll 21-25.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on the 9th Day of July, 2009, at San Diego, California.

By: Brian S. Gordon

BRIAN GORDON

BEFORE THE REGIONAL WATER QUALITY CONTROL BOARD

SAN DIEGO REGION

STATE OF CALIFORNIA

DR. RICHARD WRIGHT, CHAIR

In the Matter of the)
Regional Board Hearing)
_____)

TRANSCRIPT OF PROCEEDINGS

San Diego, California

Wednesday, June 10, 2009

Reported By:

KIMBERLY ANTON
CSR NO. 12881

Job No.:
B1998WQSD

BEFORE THE REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION
STATE OF CALIFORNIA
DR. RICHARD WRIGHT, CHAIR

In the Matter of the)
Regional Board Hearing)
_____)

TRANSCRIPT OF PROCEEDINGS, taken at 9174 Sky Park Court, San Diego, California, commencing at 9:02 a.m., on Wednesday, June 10, 2009, reported by KIMBERLY ANTON, CSR No. 12881, a Certified Shorthand Reporter in and for the State of California.

APPEARANCES:

Chair, Richard Wright
Vice Chair, David King
Board Member, Eric Anderson
Board Member, Wayne Rayfield
Board Member, Kris Weber
Board Member, Grant Destache
Board Member, George Loveland
Board Member, Gary Thompson
Executive Officer, John H. Robertus
Staff Counsel, Catherine Hagan

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San Diego, California, Wednesday, June 10, 2009
9:02 a.m.

MR. WRIGHT: Okay. Thank you very much again.
This is the time for public forum, but I don't see any speaker slips.
MR. ROBERTUS: Mr. Chair, would you take roll, please, before you go on?
MR. WRIGHT: Oh, I'm sorry. We already took the roll.
MR. ROBERTUS: Yeah.
MR. WRIGHT: Is there something else?
This is the public forum, again, but I don't have any speaker slips, so why don't we take care of the minutes of the board meeting of May 13th.
Moving onto Item 6. I have a -- a brief statement to read, so bear with me.
This is the time and place for the Regional Board to consider adoption of Order Number R9-2009-0001, an NPDES Permit and Waste Discharge Requirement for the City of San Diego, E.W. Blom Point Loma Metropolitan Wastewater Treatment Plant, for its discharge to the Pacific Ocean via the Point Loma Ocean Outfall.
This Board jointly conducted a public hearing on this matter with U.S. EPA on January 21, 2009.

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The public comment period for the tentative permit/order and U.S. EPA's tentative decision document went beyond January 21, it closed on January 28th, 2009. All the written and oral comments received prior to 5:00 p.m. on January 28th are part of the record in this matter, and responses to comments have been prepared for comments that were timely received.

The tentative permit before the Board today contains some revisions based upon comments received during the public comment period. The Board will accept comments limited to those revisions.

As a reminder, however, the Board will not accept comments that are not specific to recent revisions to the permit and which should -- and which should have been offered during the public comment period, such as comments that oppose or support the tentative decision by the U.S. EPA to grant the city of San Diego a variance from secondary treatment standards.

And with that, I would ask all speakers on this matter, when you come to the podium, please indicate that you have -- I don't know that you need to -- just indicate that -- that you have -- that you are affirming the testimony that's on the card that you signed.

And, also, if you would, give your card -- if you have a business card, give that to the recorder so that she

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can more efficiently get your personal -- or your business information from you.

Okay. With that, let's go to the Staff presentation. Mr. Robertus.

MR. ROBERTUS: The Staff are moving forward to the front table here, and Melissa Valdovinos will be giving the Staff presentation.

MR. WRIGHT: I assume the Staff presentation will be fairly brief since we have heard this at great length before.

MS. VALDOVINOS: It's probably about ten minutes.

MR. WRIGHT: Okay.

MS. VALDOVINOS: Good morning, Chairman Wright and members of the Board. For the record, my name is Melissa Valdovinos, Water Resource Control Engineer with the Core Regulatory Unit.

You have in your agenda packet for this item a copy of Tentative Order Number R9-2009-0001, which included state waste discharge requirements and incorporates federal requirements under NPDES Permit Number CA0107409 based on the variance from federal secondary treatment standards under Section 301(h) of the Clean Water Act.

If adopted, Order Number R9-2009-0001 would update waste discharge requirements and NPDES requirements for the City of San Diego's E.W. Blom Point Loma Metropolitan

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Wastewater Treatment Plant effluent discharge to the Pacific Ocean through the Point Loma Ocean Outfall.

At the Board meeting on January 21st, 2009, Ms. Robin Stuber from U.S. EPA and I made Staff presentations that covered background information on the plant and Clean Water Act, a discussion of findings and U.S. EPA's tentative decision document, and a summary of how State and federal requirements for protection of water quality are implemented in the tentative order to ensure that the discharge will continue to meet all relevant water quality criteria.

At this meeting, you also heard comments reflecting opposition, support, and conditional support of the 301(h) waiver. Written comments were accepted until January 28th, 2009, at 5:00 p.m. at which time the public hearing was officially closed.

U.S. EPA and the Regional Board jointly responded in writing to all oral comments from the January Board meeting and all written comments received within the public hearing time frame.

On May 28th, 2009, the responses to comments and errata sheet resulting from the comments were made available to the Discharger and interested parties. The Discharger submitted comments on these two documents on June 3rd, 2009. They were primarily requesting clarification of some of the

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draft permit language.

These comments resulted in a supplemental errata sheet, which was made available to the Discharger and interested parties on June 5th, 2009. These documents are all included your agenda packet.

The errata sheet and supplemental errata sheet are mostly associated with corrections to and clarifications of the tentative monitoring and reporting program.

If you have any specific comments or questions on these errata, I will be happy to address them following my presentation.

As indicated at the beginning of this item, the Discharger and interested parties are also welcome to present oral comments today if they specifically address the errata.

The joint responses to comments document covers comments from the Discharger and interested parties; however, the Board members also had comments that I would like to address at this point.

At the January Board meeting, Mr. Thompson and Mr. Rayfield prompted discussions on how long the waiver might be renewed for in consideration of upgrades outside of conventional brick and mortar approaches.

Although the Regional Board consideration of NPDES permits is directly based on whether the discharge meets