

**Item No. 08
Doc. No. 15**

August 5, 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.") These comments are in response to the Regional Board staff's most recent draft of the proposed CMSD permit, the "Underline/Strikeout of Revised Tentative Order No. R9-2008-0049."

Coastkeeper is a locally-based non-profit organization dedicated to the protection and restoration of the region's bays, beaches, watersheds and ocean.

Thank you for your consideration of our previous comments, dated June 18, 2008, regarding the applicability of the CTR and NTR in the proposed permit. Although the response to comments initially provided by the Regional Board staff¹ contained language that was still an unlawful application of the law, we are pleased to see the improvements in the most recent "Underline/Strikeout" draft of the proposed permit which will come before the Regional Board on August 13, 2008.²

Background

CMSD's initial tentative permit stated: "The CTR and NTR criteria implemented are only applicable to non-storm water discharges."³ San Diego Coastkeeper is concerned with this language because it creates an exemption from the well-recognized requirement that storm water discharges comply with the California Toxics Rule (CTR).⁴ Under the law, the CTR does apply to storm water discharges and so any exemption from compliance with the CTR would be a violation of the law.⁵

¹ Regional Board staff "Response to Comments," Supporting Document No. 9, at 2. June 25, 2008 San Diego Regional Board Meeting Agenda.

² Underline/Strikeout of Revised Tentative Order No. R9-2008-0049. Available Online at: http://www.swrcb.ca.gov/sandiego/board_info/agendas/2008/aug/item_8/2008-07-13_Item_08-Doc_02.pdf

³ R9-2008-0049, Fact Sheet at F-23.

⁴ Application of the CTR to storm water is the standard in 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).

⁵ 40 CFR 131.38

The Regional Board then responded to Coastkeeper, and Mr. Cory Briggs' comments, agreeing that the language exempting storm water from the CTR and NTR was a misstatement. However, the Regional Board's proposed change to the language in the tentative permit was still in violation of the law. In its response to comments, the Regional Board staff stated that the text in the proposed permit should be revised to state:

"The SIP procedures for the implementation of CTR and NTR criteria are not applicable to storm water discharges. However, the toxicity objectives contained in the Basin Plan and the Bays and Estuary Plan are applicable to the discharge of storm water from the Facility to the San Diego Bay."⁶

This new language also failed to address whether the proposed permit will apply the CTR to storm water discharges.

The current draft of the permit, the "Underline/Strikeout of Revised Tentative Order No. R9-2008-0049," is a substantial improvement over previous drafts due to its deletion of language exempting application of the CTR and NTR to storm water discharges which effectively created an unauthorized exemption of the law.⁷ These unlawful statements were then properly replaced with language such as "These rules [the CTR and NTR] include water quality criteria for priority pollutants and are applicable to this discharge."⁸

The CTR Applies to Storm Water Discharges

As stated in our previous comment letter, the CTR and NTR are applicable to storm water as required by law.⁹ In *Divers' Environmental Conservation Organization v. State Water Resources Control Bd.*, in which the Regional Board was a party to the action, the California Court of Appeals held that the CTR applied to storm water discharges.¹⁰ Furthermore, in *Divers'* the Regional Board itself recognized the application of the CTR to storm water discharges.¹¹ Lastly, exempting CMSD's storm water discharges from compliance with the CTR would violate the Clean Water Act's (CWA) anti-backsliding provisions.¹² Without any circumstances calling for an exception under the law, the deletion of the CTR is unlawful backsliding under the CWA.¹³

6 San Diego Regional Board Responses to Comments, Tentative Order R9-2008-0049 at 2. Available online at: http://www.swrcb.ca.gov/sandiego/board_info/agendas/2008/jun_25/item08/2008-06-25%20Item%2008%20-%20Doc%2009.pdf.

7 Underline/Strikeout of Revised Tentative Order No. R9-2008-0049 at 9, F-23.

8 Underline/Strikeout of Revised Tentative Order No. R9-2008-0049 at 9. *See also* 13, 15, F-23.

9 40 CFR 131.38

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

11 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).)

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

12 40 CFR 122.44(l); *See also* 33 USCS § 1342(o)(2), 33 USCS §1313(d)(4)

13 For more discussion regarding the applicable law, please see previous comment letter submitted by Coastkeeper dated June 18, 2008.

Application of the CTR is Mandatory Because of the Reasonable Potential to Exceed Water Quality Objectives

The CTR is applicable to storm water not only by law, but is also must be applied following the facts present in the proposed permit. The fact sheet admits:

“[N]ot enough data is available to conclude that reasonable potential to exceed water quality criteria/objectives has been eliminated. Due to the lack of monitoring data, the types of industrial activities conducted on-site, the scale of these industrial activities, and the previous indication that reasonable potential for the Facility to exceed the WQBELs for toxicity exists, reasonable potential exists to exceed water quality objectives for acute toxicity.”¹⁴

The permit then states:

“Section 122.44(d)(1)(i) mandates that permits include effluent limitations for all pollutants that are or may be discharged at levels that have a reasonable potential to cause or contribute to an exceedance of a water quality standard, including numeric and narrative objectives within a standard. Where reasonable potential has been established for a pollutant, but there is no numeric criterion or objective for the pollutant, water quality based effluent limitations (WQBELs) must be established using: (1) USEPA criteria guidance under CWA 304(a), supplemented wherever necessary by other relevant information; (2) an indicator parameter for the pollutant of concern; or (3) a calculated numeric water quality criterion, such as proposed state criterion or policy interpreting the state’s narrative criterion, supplemented with other relevant information as provided in section 122.44(d)(1)(vi).”¹⁵

Therefore, because there still remains a reasonable potential to exceed water quality objectives for toxicity due to storm water discharges, it follows that the CTR must be applied to storm water discharges.

Conclusion

Coastkeeper is very concerned with establishing the precedent that storm water discharges are in effect being exempted from NPDES permit regulation. For the reasons previously stated, Coastkeeper supports the changes made in the most current draft of the proposed CMSD NPDES permit applying CTR to storm water discharges.

Thank you for consideration of our comments.

Sincerely,



Gabriel Solmer
Legal Director

Mary Kate Oehrlein
Legal Intern

14 Order No. R9-2008-0049, Fact Sheet at F-24.

15 Order No. R9-2008-0049 at 8. (Emphasis added).