



SAN DIEGO UNIFIED PORT DISTRICT

OFFICE OF THE GENERAL COUNSEL

November 19, 2014

VIA EMAIL

Laurie.Walsh@waterboards.ca.gov

Ms. Laurie Walsh
San Diego Regional Water Quality Control Board
2375 Northside Drive, Suite 100
San Diego, CA 92108

Re: Comments - Tentative Order No. R9-2015-0001, Place ID: 658018LWalsh

Dear Ms. Walsh:

The San Diego Unified Port District ("Port District") respectfully submits the following comments on Tentative Order R9-2015-0001, *An Order Amending Order No. R9-2013-001, NPDES No. CAS010266 National Pollutant Discharge Elimination System (NPDES) Permit and Waste Discharge Requirements for Discharges from the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds within the San Diego Region* ("Tentative Order").

The Port District appreciates the time, energy, and thoughtfulness devoted by the San Diego Regional Water Quality Control Board ("Regional Board") to regulate MS4 discharges in a manner that protects human and ecological health while also balancing the substantial economic and practicable feasibility constraints faced by fellow public agencies, such as the Port District. The Port District continues to work with the other San Diego County MS4 copermittees to implement the regional MS4 permit and looks forward to working with the Regional Board to accomplish our many shared goals for San Diego Bay.

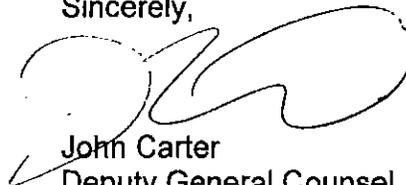
The Tentative Order amends but repeats verbatim provisions of the MS4 permit previously issued by the Regional Board, Order No. R9-2013-001, regarding which the Port District respectfully submitted comments and a currently pending petition to the California State Water Resources Control Board ("State Board"). The Port District's comments on Order No. R9-2013-001 apply with equal force to the Tentative Order. Accordingly, the Port District repeats and incorporates by reference those previously submitted comments with regard to the Tentative Order, which are set forth in letters

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dated September 14, 2012, and January 11, 2013, and in the transcript from the hearing that took place before the Regional Board on April 10 and 11, and on May 8, 2013. The Port District also incorporates by reference its position on these provisions as set forth in its petition to the State Board, submitted on June 7, 2013 (Petition No. A-2254(o)). Copies of the Port District's previously submitted comment letters are enclosed for your convenience.

Please do not hesitate to contact me should you have any questions.

Sincerely,



John Carter
Deputy General Counsel

cc: Thomas A. Russell, General Counsel
John Bolduc, Acting President/CEO
Randa Coniglio, Executive Vice President
Jason Giffen, Director, ELUM

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September 14, 2012

VIA EMAIL

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wchiu@waterboards.ca.gov

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

Re: Comments on the Administrative Draft of Permit Requirements for
Discharges from the Municipal Separate Storm Sewer System in the
San Diego Region (Tentative Order No. R9-2012-0011)

Dear Ms. Walsh and Mr. Chiu:

The San Diego Unified Port District (Port) submits the following comments supplementing other comments by the Port to the Administrative Draft of Permit Requirements for Discharges from the Municipal Separate Storm Sewer System (MS4) in the San Diego Region (the Permit). We note at the outset that the Port supports the objectives of the Permit. We wish simply to address one point regarding the current draft Permit. The Permit should clarify that each Copermitttee is responsible only for discharges from that portion of the MS4 which it owns and operates, not for discharges from all MS4 facilities within that Copermitttee's jurisdictional boundaries.

The Clean Water Act upon which the MS4 permit is grounded defines "copermitttee" as "a permittee to an NPDES permit that is only responsible for permit conditions relating to the discharge *for which it is operator.*" (40 Code of Federal Regulations §122.6(b)(1) [emphasis added].) The Regional Board's recent September 7, 2012, letter addressing its authority states that "[t]he federal regulations make it clear that Copermitttees need only comply with permit conditions relating to discharges from the MS4s *for which they are operators.*" (Emphasis added, citing 40 CFR Part 122.26(a)(3)(vi).) The Port is unaware of any legal authority that equates operation with jurisdictional location. Nor is such an interpretation consistent with the

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common and plain meaning of the word "operate." "Operate" strongly connotes the performance of a function or exertion of physical control or power over the object being operated.

This is a potentially significant distinction for the Port. The Port's jurisdiction overlaps with the jurisdiction of a number of Copermittees. Due to this fact, a significant amount of the MS4 facilities within the Port's geographic jurisdiction are not operated by the Port, but are instead owned and/or operated by others under easements or other forms of ownership and operation. Accordingly, the Permit should include language affirming the intent of the CWA on this point.

This distinction is also not a hypothetical concern, as the Regional Board has previously construed the Port's responsibility for MS4 facilities more broadly than the plain language of the CWA allows. The Port would propose the following clarifying language, which could be placed in the cover for the Permit, just ahead of Table 2 and just following the sentence added by the Copermittees in their proposed redline version of the Permit referencing 40 CFR §122.21(a)(vi):

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

We emphasize that the Port strongly supports the objectives of the Permit. We welcome the opportunity to respond to any questions the Regional Board may have with respect to our comments. Please contact the undersigned or Bill Brown at (760) 633-4485 if you have any questions or would like any clarification of the Port's position.

Very truly yours,


Scott E. Patterson

SEP/jd

cc: William D. McMinn, Esq.



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January 11, 2013

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

Submitted via email: wchiu@waterboards.ca.gov

Subject: Comment – Tentative Order No. R9-2013-0001, Regional MS4 Permit,
Place ID: 786088Wchiu

Dear Mr. Chiu,

The San Diego Unified Port District (Port) respectfully submits this comment letter regarding Tentative Order R9-2013-0001 National Pollutant Discharge Elimination System (NPDES) Permit and Waste Discharge Requirements for Discharges from the Municipal Separate Storm Sewer Systems (MS4s) in the San Diego Region (Tentative Order).

The Port has been actively involved in the development process of the Tentative Order and we support the Regional Board's Water Quality Improvement Plan (WQIP) concept in the Tentative Order with its proposed flexibility to focus resources on the priority problems in the watershed. However, the Tentative Order also contains prescriptive requirements that are in addition to the WQIP and would be very costly and at times infeasible to implement. With constrained budgets and staff resources, these additional costs may unintentionally limit the ability to conduct other water quality efforts having greater environmental benefits for the Bay.

The Port has worked alongside the other San Diego County Municipal Copermittees (Copermittees) to collectively submit a red-line strikeout document recommending changes to the permit language. With the exception of the proposed WQIP-based compliance option, the Port fully supports the recommendations provided in the Copermittee red-line strike-out. This document will be submitted through the County of San Diego. The changes help to clarify permit compliance points and provide a more efficient monitoring program to support the end goal of improving water quality. We strongly encourage you to consider the Copermittee's proposal and the Port's comments listed below.

1. Jurisdictional Accountability

The Port is committed to our role as an environmental steward of San Diego Bay. That commitment is reflected in a number of programs both regulatory driven and beyond compliance, that are focused on protecting and rehabilitating the Bay's resources. The

Port's Stormwater Program is an important part of this effort. At the same time we recognize that discharges from upstream jurisdictions impact our efforts to protect bay water quality. San Diego Bay is the receiving water body for a large watershed in which the Port is located at the extreme end. We are aware that most discharges from the MS4 to San Diego Bay are from storm drain easements under the authority of other jurisdictions. With this in mind, we support jurisdictional accountability throughout the watershed and we encourage the Regional Board to incorporate these concepts throughout the Permit.

2. WQIP-based Compliance and Modifications to Provision A

The Regional Board staff has presented the WQIP as an iterative process that allows for adaptive management so that compliance with water quality standards is achieved over time. It is the Port's opinion that the WQIP process, as currently proposed in the Tentative Order, adequately allows for compliance based upon WQIP implementation. However, what is missing is the linkage between the Discharge Prohibitions, Effluent Limitations, and Receiving Water Limitations in Provision A and the iterative process set forth in the WQIPs.

Modifications to Provision A are required to ensure implementation of that iterative process. Without a modification, jurisdictions are potentially open to third-party lawsuits and their resources may be directed to addressing a one-time exceedance. The Port requests that the Permit establishes a clear linkage between compliance with Provision A to compliance with the WQIP and the other Provisions of the Permit.

3. WQIP Development Timeline

The Tentative Order proposes an aggressive schedule for WQIP development and JURMP program updates. The timeline for WQIP development (9 months) does not allow for adequate time between due dates for required deliverables. Concerns with the timeline are as follows:

- o Formal agreements such as a Memorandum of Understanding and/or Cost Share agreements will be required within the watershed groups. Although the preliminary work may begin before permit adoption, the process cannot be completed until the Permit is adopted and the requirements are known. These agreements are integral to upholding jurisdictional accountability within the watershed groups. This process will take an estimated three months.
- o The water quality priorities and goals are due within the first six months, followed by a two month public comment period. While this first deliverable deadline may be feasible, potential modifications to the priorities and goals may be necessary as a result of the public comments received. Should modifications to the priorities and goals be required, there will be little time to develop the strategies and schedules.

- o Time is needed to address comments from the public or Regional Board throughout the process and to obtain management and jurisdictional governing body approvals. Governing body approvals take an average of three months.

The Port requests that the timeframe for permit deliverables is extended as outlined in the Copermittee's revised WQIP development schedule in the red-line strike-out submittal.

4. Illegal Discharges: Air Conditioning Condensation

The Tentative Order requires air conditioning condensation to be directed to landscaped areas or other pervious surfaces where feasible. Substantial structural modifications may be required to meet this requirement and discharges of this type may not be a priority pollutant source that is identified in the WQIP. The Port requests that the requirement to direct air conditioning condensation to landscaping be encouraged and not required.

5. Retention Requirement for Priority Development Projects

As proposed in the Tentative Order, Priority Development Projects are to implement BMPs to retain the volume of runoff equivalent to the design capture volume or the estimated volume that would be retained if the site was fully undeveloped. Due to the Port's location at the headwaters of San Diego Bay, a high groundwater table and existing soils with low infiltration rates, retention is not technically feasible on Port tidelands. The Port is at the bottom of the watershed so consequently retained runoff must be stored for a longer period of time after the peak of a storm. Large underground storage tanks to store the runoff would be infeasible because most tanks would have significant design constraints due to the high groundwater table, flat topography, and high receiving water elevation, making gravity flow drainage systems nearly impossible. Above ground storage tanks would be infeasible because most of Port tidelands are built-out and there is limited room for these facilities. Also, above ground storage tanks pose a vector hazard and a visual nuisance.

Similarly, the proposed alternative compliance options such as an offsite mitigation option or increasing the treatment area onsite also is not feasible for the Port. The land within the Port is largely built-out and area to use for additional treatment is extremely limited. Meeting this requirement would come at a cost to proposed projects that would make them infeasible. Furthermore, mitigation outside of the Port's jurisdiction is also not an option because the Port would not have the authority to enforce the implementation and maintenance of BMPs outside of its jurisdiction. The Port requests that the retention requirement be removed from the permit.

6. Predevelopment Design Reference Used for Hydromodification Controls

The Tentative Order requires the use of "pre-development (naturally occurring)" as a runoff reference condition for hydromodification controls. Establishing the

pre-development condition of a site requires a reference start date, which is not outlined in the draft, and also requires accepted and defensible references to the **pre-development** soils, vegetation and topography which are also not identified in the permit. This requirement will also create additional and unnecessary costs to each jurisdiction and to the project without additional water quality benefits. A recommended alternative would be the use of a "**pre-project**" runoff reference. This reference point is already being used by the Copermittees in the current MS4 permit and has been used in other MS4 permits in the State. The Port requests that the **pre-development** design reference in the permit is replaced with **pre-project**.

7. Hydromodification Exemption

An exemption to hydromodification requirements that is in the current MS4 permit has been removed in the Tentative Order. The exemption applies to projects that discharge to conveyance channels that are stabilized (i.e. concrete lined) all the way to the receiving water. Hydromodification requirements are included in the permit to mitigate for potential erosion and channel degradation downstream of a development project. Projects that discharge to a stabilized conveyance channel do not present potential erosive impacts downstream or channel degradation therefore, the imposition of hydromodification requirements on such projects is unnecessary and will not provide water quality benefits. The Port requests that the hydromodification exemption for projects that discharge to stabilized conveyance systems be reinserted in the permit.

On behalf of the Port, I wanted to thank you for providing us the opportunity to engage with you and the other stakeholders through the public workshops, and the ability to submit comments on the Tentative Order. Please contact Allison Vosskuhler at (619) 686-6434 or avosskuhler@portofsandiego.org if you have any questions or would like additional clarification on the information provided.

Sincerely,



Randa Coniglio,
Executive Vice President, Operations
San Diego Unified Port District

cc: Paul Fanfera
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Allison Vosskuhler

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January 11, 2013

VIA EMAIL

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Wayne Chiu
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San Diego, CA 92123-4340

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

Dear Mr. Chiu:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

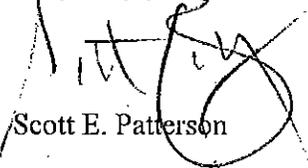
As a further necessary safeguard against improperly broad or joint and several liability for discharges, the Permit must include provisions that will allow the Regional Board and the

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

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

Very truly yours,



Scott E. Patterson

SEP/BPS

cc: William D. McMinn, Esq.

EXHIBIT 1

CASQA Proposal for Receiving Water Limitation Provision

D. RECEIVING WATER LIMITATIONS

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

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