

September 11, 2012

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

Submitted via email: [lwalsh@waterboards.ca.gov](mailto:lwalsh@waterboards.ca.gov) and [wchiu@waterboards.ca.gov](mailto:wchiu@waterboards.ca.gov)

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

Dear Ms. Walsh and Mr. Chiu,

The Port of San Diego (Port) respectfully submits this comment letter to supplement the San Diego County Municipal Copermittees (Copermittees) comments on the Administrative Draft of Permit Requirements for Discharges from the Municipal Separate Storm Sewer System (MS4) in the San Diego Region.

The Port greatly appreciates the efforts of the San Diego Regional Water Quality Control Board (Regional Board) to consider this new approach to permit reissuance by seeking early stakeholder input on an administrative draft of a new MS4 permit prior to issuing the technical draft for formal review. Moreover, we found the workshops to be extremely productive and your team to be open to receiving input and considering permit changes. We feel this process has provided an effective, efficient mechanism to engage stakeholders and receive varying perspectives in an open transparent manner. We fully believe that this process will result in an MS4 permit that Copermittees can support and implement, and which will ultimately achieve improvements in water quality.

The Port is committed to developing an effective and efficient permit. We recognized at the start of the review process that we wanted to fully utilize the opportunity to review the Administrative Draft and have open discussion with the Regional Board and other stakeholders through focus meetings. To that point, the Port devoted at least 500 staff hours over the past five months towards reviewing and developing feedback to the Administrative Draft both internally and with the other Copermittees. The Port also participated on the panel for two of the focus meetings. Through the process, the Port has gained an understanding of the Regional Board's intent of the Administrative Draft and the Board's limitations. We trust that you have heard our concerns and input, and that the ideas and comments the Copermittees have provided will be reflected in the permit. Furthermore, we were encouraged by the feedback received at the September 5, 2012 focus meeting whereby the Regional Board listed concepts of the



Administrative Draft that they planned to change. It is our understanding the list was not exhaustive.

The Port understands that the Copermittees will collectively, through the County of San Diego, submit a red-line strikeout document recommending substantial changes to the permit language. The changes help to clarify permit compliance points, provide a more efficient monitoring program to support the end goal of improving water quality, and are aligned with the Copermittee vision of incorporating adaptive management into the Permit. The Port fully supports the Copermittee recommendations as, in our opinion, the modifications clearly meet the overall objective of the Clean Water Act to restore and maintain the physical, chemical, and biological integrity of receiving waters and provide a well-designed approach that will improve water quality. We strongly encourage you to consider the proposal.

The Port also has general and specific comments on the Administrative Draft as outlined below:

- Modifications to the Receiving Water Limitations in Provision A are required to ensure the implementation of the iterative process. The Port supports revisions to the receiving water limitations language that aligns with the State Board's policy that compliance with water quality standards is "to be achieved over time, through an iterative approach requiring improved BMPs". It is our understanding that a workshop will be held at the state level to discuss the receiving water limitations language in MS4 permits. The Port strongly recommends that language developed as part of the statewide process be incorporated into the permit.
- Although the Regional Board has confirmed verbally that implementation of a Regional Board-approved Water Quality Improvement Plan (WQIP) constitutes compliance with the permit, the Administrative Draft does not reflect that idea. The Port requests that this compliance point be clearly stated.
- As proposed in the Administrative Draft, the monitoring program is very prescriptive and will not allow for efficient or best use of Copermittee resources or for adaptive management. The Copermittees are proposing an alternate monitoring program, and we understand from the discussions at the workshops that the Regional Board is open to considering the Copermittees' proposed program. While we strongly encourage you to incorporate the Copermittee proposed program in its entirety, we recognize that there may be some changes. As such, we want to emphasize the following points in regards to developing the permit's monitoring requirements:
  - Monitoring is only one part in implementing an effective program; it must be coordinated with the other programmatic implementation efforts to provide the most useful information. To be most effective, a monitoring and assessment program should be tailored to the needs of each



Watershed Management Area (WMA). As such, it will need to be part of the WQIPs and developed in alignment with the other programmatic elements.

- The Copermittees' proposed monitoring program shifts the focus of the monitoring efforts from receiving waters to MS4 outfalls. This places a greater reliance on outfall data, prioritizing sources and conducting special studies to determine how to best implement solutions that lead to water quality improvements. This paradigm shift is based on the fact that the Copermittees have a solid understanding of the large-scale receiving water problems and need to now focus on understanding sources so that pollutant load reductions can occur. The Port supports this approach, as we feel this provides the most reasonable means to identify programmatic adjustments that will improve water quality.
- The Port encourages the use of a question-driven monitoring approach. This approach is widely supported by local, state and federal regulatory agencies. It is based on a logical hierarchy in which overall management objectives help define clear management questions. Additional specific questions and assessment frameworks can help to develop appropriate monitoring designs so that meaningful data are collected. This ensures that data and resources are aligned to focus on high priority issues and solutions that can be effective.
- Jurisdictional accountability is best achieved by requiring Copermittees to participate in the WQIPs and conducting monitoring within their portion of the WMA to evaluate whether their programmatic activities are reducing pollutant loads; boundary monitoring does not accomplish this purpose. Jurisdictional boundary monitoring, similar to what is being proposed in the Administrative Draft, has been found to be relatively ineffective in estimating water quality impacts and loading from MS4 discharges. Several factors lead to this finding, 1) typically there is high variability of the constituent concentrations in receiving waters and discharges, 2) there are relatively small percentages of MS4 discharged pollutant loads in the receiving waters, 3) MS4 flows are highly variable and 4) discharges to the MS4 are highly variable. As such, the inability to detect significant differences would be unlikely to support any programmatic changes or guide improvements to water quality.
- A two-part monitoring approach to address transient and persistent non-stormwater discharges is recommended. Rather than implement an extensive MS4 outfall chemical field screening and analysis for all outfall discharges, the Copermittees propose a screening program to appropriately identify and prioritize persistent flows that impact receiving water quality. Coupled with this, a broad, visual-based monitoring program is being proposed to find and eliminate transient discharges. The Port



believes that an approach of this type is cost effective and may actually lead to the elimination of a greater number of transient discharges, while at the same time providing a better understanding of those persistent outfalls that are contributing to receiving water problems.

- While Copermittees may be able to identify sources outside of their MS4, the requirement to reduce/eliminate such discharges is outside the Copermittees control. Requirements to monitor non-stormwater discharges from sources outside of a Copermittee's jurisdictional authority should be removed.
- One element of the WQIP is the numeric targets. It was understood from the discussions at the focus meetings that those numeric targets are to be goals, but are not enforceable. The Port requests that this point is clearly specified in the permit language.
- As written, numeric action levels (NALs) and stormwater action levels (SALs) are triggers for immediate follow-up action. However, during the focus meetings, the Regional Board staff clarified that the NALs/SALs were intended to be used as a mechanism to measure progress and set priorities, and were not intended to be used for determining compliance. The Port requests that this point is clearly specified in the permit language.
- As proposed in the Administrative Draft, Priority Development Projects are to implement BMPs to retain the volume of runoff equivalent to the design capture volume. 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 offsite mitigation option discussed in the Administrative Draft also is not feasible within the Port's jurisdiction. Furthermore, mitigation outside of the Port's jurisdiction is also not feasible 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 is removed from the permit.

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Mr. Wayne Chiu  
San Diego Regional Water Quality Control Board  
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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 administrative draft. Please contact Allison Vosskuhler at (619) 686-6434 or [avosskuhler@portofsandiego.org](mailto: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  
Bill McMinn  
Karen Holman  
Allison Vosskuhler

DM#541697

## Walsh, Laurie@Waterboards

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**From:** Julie Day <JDay@brownandwinters.com>  
**Sent:** Friday, September 14, 2012 3:17 PM  
**To:** Walsh, Laurie@Waterboards; Chiu, Wayne@Waterboards  
**Cc:** bmcminn@portofsandiego.org; Bill Brown  
**Subject:** Comments on Administrative Draft of Permit Requirements for Discharges from Municipal Separate Storm Sewer System, San Diego Region (TO No. R9--2012-2011)  
**Attachments:** 2012-9-14\_comments to water board\_MS4.pdf

<<2012-9-14\_comments to water board\_MS4.pdf>> Dear Ms. Walsh and Mr. Chiu:

Attached are the San Diego Unified Port District's comments regarding the subject referenced above. Thank you.

Julie Day  
Legal Assistant  
BROWN & WINTERS  
120 Birmingham Drive, Suite 110  
Cardiff-by-the-Sea, CA 92007  
Phone: 760-633-4485, Ext. 112  
Fax: 760-633-4427  
[jday@brownandwinters.com](mailto:jday@brownandwinters.com)  
[www.brownandwinters.com](http://www.brownandwinters.com)

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2012-9-14\_comments to water board\_MS4

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# Brown & Winters

Attorneys at Law

120 Birmingham Drive, Suite 110  
Cardiff-by-the-Sea, CA 92007-1737  
Telephone: (760) 633-4485  
Fax: (760) 633-4427

Scott E. Patterson, Esq.  
Extension 104  
spatterson@brownandwinters.com

September 14, 2012

## VIA EMAIL

[lwalsh@waterboards.ca.gov](mailto:lwalsh@waterboards.ca.gov)

[wchiu@waterboards.ca.gov](mailto: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 Copermittee 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 Copermittee's jurisdictional boundaries.

The Clean Water Act upon which the MS4 permit is grounded defines "copermittee" 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 Copermittees 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.