

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

**ORDER WQ 2009-0013**

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In the Matter of the Petition of

**DEPARTMENT OF THE NAVY**

For Review of Waste Discharge Requirements (WDR) Order R9-2009-0081  
[NPDES No. CA0109085] for the United States Department of the Navy, Naval Base Coronado  
Issued by the  
California Regional Water Quality Control Board,  
San Diego Region

**SWRCB/OCC FILE A-2032  
ORDER ON STAY REQUEST**

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BY BOARD MEMBERS BAGGETT AND HOPPIN:

This matter is before State Water Resources Control Board (State Water Board) members Arthur G. Baggett, Jr. and Charles R. Hoppin, pursuant to the authority delegated in State Water Board Resolution No. 2002-0103. After careful review of the testimony and evidence presented at the stay hearing on October 13, 2009, the petitioner's request for a stay of Waste Discharge Requirements Order No. R9-2009-0081 [NPDES No. CA0109085] will be denied in part and granted in part for the reasons set forth herein.

**I. PROCEDURAL HISTORY**

On June 10, 2009, the San Diego Regional Water Quality Control Board (San Diego Water Board) issued Waste Discharge Requirements Order No. R9-2009-0081 (permit) to the U.S. Department of the Navy (Navy). The permit regulates the Navy's wastewater discharges from multiple discharge points at Naval Base Coronado to the Pacific Ocean, San Diego Bay, and the Tijuana River. The Navy filed a timely petition for review of the permit on July 9, 2009. In the petition, the Navy also requested a stay of the permit's effluent limitations for acute toxicity, steam condensate, and tetrachlorodibenzodioxin (TCDD) equivalents. On August 4, 2009, the State Water Resources Control Board (State Water Board) requested clarification of the substantial harm that is likely to occur to the Navy while the petition is reviewed on the merits. The Navy responded on August 18, 2009, and also rescinded its request for a stay of the TCDD equivalents.

On September 14, 2009, the State Water Board issued a "Notice of Public Hearing on Stay Request" to the designated parties—the Navy and the San Diego Water Board—as well as other interested persons. The notice indicated that a stay hearing would occur on October 13, 2009, and it would be limited to the Navy's request for a stay of the acute toxicity effluent limitation and associated monitoring requirements. The State Water Board did not receive requests from any other persons to be designated as parties. Accordingly, on October 13, 2009, the State Water Board held a public hearing to consider the Navy's request for a stay of the acute toxicity effluent limitation and associated monitoring requirements. State Water Board members Arthur G. Baggett, Jr. and Charles R. Hoppin presided as hearing officers. At the hearing, the Navy and the San Diego Water Board presented testimony and evidence as to why a stay should or should not be granted. Laura Hunter also appeared as an interested person on behalf of the Environmental Health Coalition to oppose the granting of a stay.

## II. BACKGROUND

U.S. Naval Base Coronado is located in San Diego, California, and comprises the following installations: Naval Air Station, North Island; Naval Amphibious Base, Coronado; Naval Outlying Landing Field, Imperial Beach; Naval Radio Receiving Facility; Naval Auxiliary Landing Field, San Clemente Island; Survival, Evasion, Resistance, and Escape Training School; La Posta Mountain Warfare Training Center; and Camp Morena. Of these eight installations, only four are regulated by the permit: the air station, amphibious base, radio receiving facility, and outlying landing field. The permit regulates 228 outfalls from these four installations, which discharge wastewater into the Pacific Ocean, San Diego Bay, and the Tijuana River. The point source discharges include steam condensate, diesel engine cooling water, utility vault and manhole dewatering, pier cleaning, reverse osmosis water purification unit product water, boat rinsing, swimmer rinsing, marine mammal enclosure cleaning, and industrial storm water.

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The permit sets forth a number of technology and water quality-based effluent limitations.<sup>1</sup> The effluent limitation for acute toxicity prohibits the Navy from discharging the first ¼ inch (first flush) of industrial storm water runoff from high risk areas,<sup>2</sup> except if testing demonstrates that the pollutants in the discharge achieve a rating of “pass” for any one test result. The “pass” or “fail” test is based on concurrent testing of an effluent sample, comprised of 100% effluent, and a laboratory control sample, which contains 0% effluent. If the organism survival rate in the effluent sample is not significantly different from the survival rate in the control sample, then the result is a “pass” and the discharge would be in compliance with the acute toxicity effluent limitation. In order to comply with this effluent limitation, the Navy must test its outfalls that discharge industrial storm water. If a “fail” is reported, the Navy must conduct an accelerated toxicity testing process. This process requires the Navy to conduct the same toxicity tests during the next four storm events. If an outfall fails to meet the acute toxicity effluent limitation, then a Toxicity Reduction Evaluation (TRE) will be required. In addition, Toxicity Identification Evaluations (TIE) are required at one third of the outfalls that fail to meet the acute toxicity effluent limitation.

During the 2008/2009 wet season, the Navy reported that industrial storm water samples collected from 39 of 99 outfalls at Naval Base Coronado would fail to meet the new permit’s acute toxicity effluent limitation. Based on these results, the Navy expects that during the 2009/2010 wet season, at least 50% of the samples collected from the outfalls will also receive a “fail” rating. Assuming this 50% failure rate and that accelerated monitoring will be required for the next four storm events, along with the required TREs and TIEs, the Navy estimates that it will cost \$630,978 to implement this monitoring program.

Accordingly, the Navy requested a stay of, among other permit requirements, the acute toxicity effluent limitation. The State Water Board recognizes the extraordinary nature of a stay remedy and places a heavy burden on the petitioner seeking a stay. (Order WQ 86-01 (*City of Colton*)). A stay may be granted only if the Navy alleges facts and produces proof of *all* of the following: (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., tit. 23, § 2053.) It is incumbent upon the Navy to meet all three prongs of the test before

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<sup>1</sup> Because the stay hearing was limited to discussion of the acute toxicity effluent limitation and associated monitoring requirements, this Order will also limit its discussion accordingly.

<sup>2</sup> High risk areas are defined as “areas where wastes or pollutants of significant quantities . . . are subject to precipitation, run-on, and/or runoff.” (Order No. R9-2008-0081, Attachment A, Page 3.)

a stay may be granted. (Order WQ 2002-0007 (*County of Los Angeles*)). In addition, the issue of whether a stay is appropriate is *not* whether the Navy might prevail on any of the merits of its claims, or whether the Navy will suffer harm over the term of the permit. Rather, the issue must be judged in the temporal sense—the Navy must prove that it will suffer substantial harm if a stay is not granted for the period of time pending resolution of the petition on the merits, which is currently May 17, 2010. (*Id.*) This Order will therefore discuss this three-prong test as it relates to the permit's acute toxicity effluent limitation and associated monitoring requirements; this Order will not decide issues that will later be addressed in reviewing the petition on the merits.

### III. CONTENTIONS AND FINDINGS

A. Contention: The Navy contends that it will suffer substantial harm if a stay is not granted.

Finding: Brian Gordon, Water Program Manager of Naval Facilities Engineering Command Southwest, testified that the Navy will suffer substantial harm for two principal reasons. First, because the Navy assumes that 50% of its outfalls will violate the acute toxicity effluent limitation, the Navy will immediately be subject to administrative enforcement by the San Diego Water Board and citizen lawsuits filed under the Clean Water Act. As proof this harm is not speculative, Mr. Gordon testified that the San Diego Water Board already initiated an enforcement action against Naval Base San Diego for alleged violations of its NPDES permit. The San Diego Water Board testified that not only is the threat of enforcement against Naval Base Coronado speculative, but also pursuant to State Water Board Order WQ 2006-0007 (*Boeing*), it is not a basis to justify a stay. Indeed, *Boeing* explained, “the possibility, or even probability, of enforcement actions does not justify a stay because it is very unlikely that these actions would be concluded during the time a stay would remain in place.” (WQ Order 2006-0007, p.10.) Moreover, “[i]t is Congress’ decision that citizens can enforce NPDES permits and it is not appropriate for the state to prevent the exercise of that right. The California Legislature has also deemed that enforcement of NPDES permits by Regional Water Boards is a high priority, even making penalties mandatory in some instances.” (*Id.*) The *Boeing* Order is controlling in this matter, and therefore the Navy’s argument concerning the threat of civil and administrative enforcement is unavailing for purposes of a stay. As a result, the Navy cannot satisfy the first prong of substantial harm regarding a stay of the acute toxicity effluent limitation. We still must consider, however, the Navy’s request for a stay of the associated monitoring requirements.

Mr. Gordon also testified that the Navy will suffer substantial harm if the accelerated monitoring and TRE/TIE requirements are not stayed because it will have to reallocate its budget in a manner that was not anticipated. In order to implement these requirements, the Navy will have to divert an estimated \$630,978 that was intended to fund its best management practices (BMP) program, which includes everything from eliminating non-storm water discharges to implementing a copper and zinc minimization plan. Mr. Gordon explained that the Navy receives a fixed amount of funding from Congress each year to implement its various permits and programs. Because the Navy did not budget for these additional monitoring requirements, and because it is very unlikely that the Navy will receive any additional funding during this fiscal year, the money originally allocated for the BMP program will instead be used to meet the accelerated monitoring and TRE/TIE requirements in the permit.<sup>3</sup>

Both the San Diego Water Board and Laura Hunter of the Environmental Health Coalition claimed that the Navy was well aware that its reissued permit for Naval Base Coronado would include additional toxicity monitoring requirements, and that Navy should be responsible for its failure to plan ahead. Although the Navy should have had the foresight to allocate its budget towards implementation of these requirements, we believe that the Navy will experience harm sufficient to warrant a stay. The permit was issued after the Navy's 2009-2010 budget was finalized, and the Navy's planned allocations for permit compliance and BMPs should not be compromised by expanded accelerated monitoring requirements established after the federal government set a budget for this facility.

In general, the State Water Board will not issue a stay where the only justification is the cost of compliance with a waste discharge requirement. (See, e.g., Order WQ 2002-0007 (*County of Los Angeles*)). Here, however, cost of compliance is not the only harm; actual programs that benefit the environment will suffer, and thus a stay of the accelerated monitoring and TRE/TIE requirements is appropriate. Further, the amount to be expended on enhanced and accelerated TRE/TIE requirements is substantial during the short period of time the State Water Board will be reviewing the petition and will likely reduce pollutant reduction efforts by nearly \$630,978. In light of the unique circumstances of the monitoring amount at issue in such a short period of time and its substantial impact on pollutant reduction programs at Naval Base Coronado, we find that the Navy has satisfied the first prong of the stay regulations.

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<sup>3</sup> It is our understanding that the Navy is limited in its ability redirect funding from, for example, its budget for national defense, in order to support the BMP environmental programs.

B. Contention: The Navy contends that interested persons and the public will not suffer substantial harm if a stay is granted.

Finding: The Navy testified that the Naval Base Coronado's discharges of industrial storm water do not cause toxicity in the receiving waters and therefore will not cause substantial harm to interested persons or the public. Charles Katz, author of a four-year, \$1 million, peer-reviewed toxicity study entitled "Storm Water Toxicity Evaluation Conducted at Naval Station San Diego, Naval Submarine Base San Diego, Naval Amphibious Base Coronado, and Naval Air Station North Island" (Toxicity Study) testified at the hearing. He cited his Toxicity Study, which concluded that over 99% of the 202 receiving water samples collected did not show any toxicity in San Diego Bay, and that any toxicity measured at the end-of-pipe is not predictive of toxic effects in the receiving waters. David Barker from the San Diego Water Board testified that toxicity is a significant concern. He stated that there is reasonable potential for acute toxicity to cause an excursion of the narrative water quality standard, and thus an effluent limitation is necessary to control whole effluent toxicity in the Navy's discharges. He also maintained that an acute toxicity effluent limitation will ensure the protection of beneficial uses in the receiving waters.

If the Navy's request to stay the accelerated monitoring and TRE/TIE requirements is granted, the potential harm to interested persons and the public is negligible. First, the acute toxicity effluent limitation will remain in place. Second, Brian Gordon testified that, even if a stay is granted, the Navy is still required to conduct baseline sampling during two storm events this rainy season, which requires an analysis of a wide range of pollutants, including acute toxicity. The San Diego Water Board asserts that collecting two storm event samples per outfall during the year will provide sufficient probability of detecting toxicity. Mr. Gordon also testified that the Navy will still be conducting receiving water monitoring, and it must develop and implement a copper and zinc minimization plan and monitor for copper and zinc, the primary pollutants known to cause toxicity in the discharges of industrial storm water. This sampling and monitoring program will help protect the beneficial uses of the receiving waters. And finally, because a stay only remains in effect while the State Water Board reviews the merits of the Navy's petition, the public will not suffer during this short time period.

C. Contention: The Navy contends that there are substantial questions of law or fact.

Finding: Although the Navy did not proffer concrete evidence to support this specific claim, it is clear from the testimony presented that there are substantial legal and factual questions concerning whether acute toxicity is a problem in San Diego Bay; the Navy

cites its Toxicity Study, which concluded that there is no acute toxicity problem in the receiving water, and the San Diego Water Board counters that reasonable potential exists for acute toxicity. In addition, substantial legal questions remain regarding whether the San Diego Water Board properly imposed the WET test methods and monitoring requirements for acute toxicity. These issues require substantive review on their merits and cannot be resolved in this Order. Accordingly, the third and final prong of this test is satisfied.

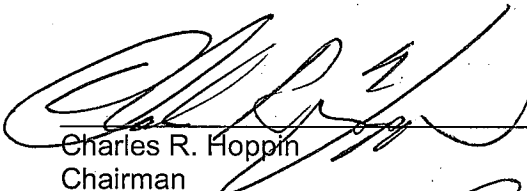
#### IV. SUMMARY AND CONCLUSION

With respect to the effluent limitation for acute toxicity, the Navy has not met its burden because the threat of civil and administrative enforcement does not justify a stay under the State Water Board's precedent. However, with respect to the accelerated monitoring requirements and TRE/TIE requirements, the Navy has met its burden of proving each of the three prongs necessary for granting a stay. The request for a stay is therefore denied in part and granted in part.

#### V. ORDER

IT IS HEREBY ORDERED that the request for a stay of Waste Discharge Requirements Order No. R9-2009-0081 Sections III.I, IV.A.5, and VII.H is DENIED, and the request for a stay of Section VI.C.2 and Attachment E Section V.A.5 is GRANTED.

Dated: 10/19/09

  
Charles R. Hoppin  
Chairman

Dated: 10/19/09

  
Arthur G. Baggett, Jr.  
Board Member