

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

ORDER: WQ 98 - 07

---

In the Matter of the Petitions of  
**NATIONAL STEEL AND SHIPBUILDING COMPANY**  
**AND**  
**CONTINENTAL MARITIME OF SAN DIEGO, INC.**  
for Review of Waste Discharge Requirements  
Orders 97-36 and 97-37 of the  
California Regional Water Quality Control Board,  
San Diego Region

*SWRCB/OCC Files A-1119 and A-1120*

---

BY THE BOARD:

On October 15, 1997, the Regional Water Quality Control Board, San Diego Region (Regional Water Board), adopted Waste Discharge Requirements Order 97-36, General NPDES Permit CAG039001 and Waste Discharge Requirements Order 97-37, General NPDES Permit CAG039002 (permits), for shipyard facilities in San Diego Bay. The permits regulate process and storm water discharges from ship construction, modification, repair and maintenance facilities, and activities. The permits constitute general national pollutant discharge elimination system (NPDES) permits pursuant to section 402 of the federal Clean Water Act (CWA).

On November 14, 1997, the State Water Resources Control Board (State Water Board) received petitions from two facilities subject to the permits, National Steel and

Shipbuilding Company and Continental Maritime of San Diego, Inc. (petitioners). The petitioners contested issuance of the permits and certain provisions thereof.<sup>1</sup>

The petitioners requested stays of the permits. Following the State Water Board's refusal to issue stays, court review was sought and a superior court commanded the State Water Board to set aside its dismissal of the stay requests and to reconsider the stay requests, and stayed the effectiveness of the permits in the interim. (*NASSCO et al. v. California State Water Resources Control Board et al.*, San Diego County Superior Court No. 718025.) Because this order considers the merits of the petitions, the court's order to reconsider the stay requests is now moot. Following issuance of this order, the permits shall be effective, as modified herein.

The petitioners also requested a hearing before the State Water Board. The comments that were excluded by the Regional Water Board, and were the basis for the hearing request have been entered into the record and considered in this order. The hearing request is hereby denied.

## I. BACKGROUND

The petitioners own and operate shipyards in San Diego Bay. The shipbuilding and repair industry is engaged in construction, conversion, alteration, repair, and maintenance of

---

<sup>1</sup> National Steel and Shipbuilding Company is subject to Order 97-36 and Continental Maritime is subject to Order 97-37. Both the permits and the petitions are virtually identical. For purposes of this review, the State Water Board has consolidated the petitions and is reviewing both in this order. The order is based on the record before the Regional Water Board when it adopted the permits. In addition, the petitioners have submitted declarations that include comments on the permits that were not entered in the Regional Water Board's records. Various parties and interested persons have submitted further comments and evidence regarding the petitions and responses thereto. Many of these entities including the petitioners, the Environmental Health Coalition (EHC), the United States Navy, the Regional Water Board, and the U.S. Environmental Protection Agency (U.S. EPA) submitted comments after the deadline for comments established by the State Water Board. All of these documents, with one exception, have been made a part of the record. (Water Code § 13320(b).) The exception is evidence submitted by EHC on June 1, 1998. This evidence consists of affidavits prepared for litigation in a separate matter. In light of the lateness of the submittal, and the fact that the matters asserted in the affidavits were covered in thorough fashion before the Regional Water Board, these affidavits will not be considered as a part of the record.

military and commercial ships and vessels. Their activities include formation and assembly of steel hulls and superstructures, application and repair of paint systems, installation and repair of mechanical, electrical and hydraulic systems, repair of damaged vessels, pipe fitting, boiler cleaning, and electroplating and metal finishing.

These activities can generate wastes including spent abrasives, paint, marine organisms, rust, bilge water, blast wastewater, oils, lubricants, grease, fuels, sludge, solvents, thinners, demolition waste, trash, asbestos, sewage, hydrocarbon or chlorinated solvents, electroplating and metal finishing wastes, acid wastes, caustic wastes, and aqueous wastes. Because the shipyards are located right on San Diego Bay, there is a potential for wastes to enter the Bay. Activities that can result in discharges to San Diego Bay include floating dry dock deballasting, submergence and emergence, graving dock floodwaters, gate leakage, hydrostatic relief flow, leaks from floodwaters and gates, and hydrostatic relief flows. Shipyard facilities sometimes directly discharge cooling water, fire protection system water, boiler and cogeneration feedwater, steam condensate water, saltbox water, integrity and hydrostatic testing water, and water from hosing down dry docks and hulls. Discharges may occur in a variety of ways including direct and indirect dischargers of wastewaters, and discharge of storm waters containing pollutants.

Prior to issuance of the general permits that are the subject of this order, the Regional Water Board had adopted individual permits for process wastewater discharges from each shipyard. The facilities were also subject to the statewide General Permit for Discharges of Storm Water Associated with Industrial Activities (Order 97-03-DWQ). The general permits issued by the Regional Water Board govern all discharges to San Diego Bay from the shipyards

including process wastewater and storm water. They therefore take the place of the earlier individual NPDES permits and the facilities are no longer subject to the statewide General Permit.<sup>2</sup>

The two permits issued by the Regional Water Board are virtually identical except that one applies to shipyards that are assigned a greater threat to water quality and complexity rating, and the other is for shipyards with a lower rating. Both permits require the use of best management practices (BMPs) to limit discharges of both process wastewater and storm water to San Diego Bay.

The Regional Water Board staff worked on these permits for at least two years and circulated several early drafts to the petitioners. The Regional Water Board staff and the petitioners met on several occasions, and the petitioners submitted dozens of comments throughout this time including their own versions of draft permits and comments on various issues of the proposed permits. The Regional Water Board held a workshop on April 9, 1997, at which the petitioners were allowed to comment extensively. The Regional Water Board held a public status meeting on May 21, 1997. On July 14, 1997, the Regional Water Board held a public hearing on the draft permits that had been circulated to the public. There was extensive comment from the petitioners, other dischargers, and the public. The Regional Water Board also allowed further written comments until August 20, 1997. Again the petitioners submitted extensive comments. On October 2, 1997, the Regional Water Board distributed final draft permits and prepared a response to comments. The Regional Water Board did not allow

---

<sup>2</sup> The statewide General Permit allows Regional Water Boards to adopt permits that apply in lieu of the statewide permit. These may be individual NPDES permits or general permits for specific industries or geographic areas.

comments on October 2, 1997 drafts and adopted them without further public comment on October 15, 1997.

## II. CONTENTIONS AND FINDINGS<sup>3</sup>

1. Contention: The petitioners contend that the Regional Water Board violated their due process rights by not allowing comments on the October 2, 1997 draft permits.

Finding: The petitioners and the Regional Water Board staff met numerous times from 1995 until the permits were adopted in October 1997. During that time, the petitioners reviewed and commented upon several draft permits and submitted their own versions of a permit. The Regional Water Board itself held a workshop, a status meeting, and a hearing. Extensive testimony was allowed on the draft permits at all of these meetings. At the hearing held August 13, 1997, the discussion centered on a July 14, 1997 draft permit. In addition to these public meetings, the petitioners were allowed to submit voluminous comments on the various draft permits including comments after the close of the hearing until August 20, 1997. Many other entities besides the petitioners also submitted comments including other dischargers, environmental groups, and resource agencies.

On October 2, 1997, the Regional Water Board staff distributed final draft permits. The staff also prepared an extensive document summarizing comments and responding to those comments, either by describing revisions to the permits, or by explaining why the permits were not revised as requested. The Regional Water Board adopted the draft permits at its October 15, 1997 meeting. At that meeting, the Regional Water Board did not allow further

---

<sup>3</sup> All other contentions raised in the petitions that are not discussed in this order are dismissed. (Cal. Code Regs., tit. 23, § 2052; *People v. Barry* (1987) 194 Cal.App.3d 158 [239 Cal.Rptr. 349].)

testimony. The petitioners claim that because they could not adequately comment on the October 2, 1997 draft permits, they were denied due process under the California and United States Constitutions.

The Regional Water Board complied with the federal procedural requirements for adopting NPDES permits (40 Code of Federal Regulations (C.F.R.) Part 124) and with Water Code section 13377. The Regional Water Board circulated the draft permits for at least 30 days, held a hearing on contested permits, made revisions to the draft permits in response to comments, and prepared a document containing response to comments. The revisions in the October 2, 1997 drafts, while extensive, were responsive to the various comments staff had received from the petitioners and other interested persons.

The petitioners argue that several permit conditions were changed significantly in the October 2, 1997 drafts. However, each of these terms was the subject of significant comment and discussion throughout the permit review period. For example, the petitioners themselves requested that the permits specifically authorize the discharge of ship launch grease. When the permits were revised to authorize such discharge, petitioners objected that an accompanying monitoring provision was added, ascertaining the new monitoring requirement to be a significant change for which they have a right to comment. The Regional Water Board appropriately required monitoring of an authorized discharge.

If the Regional Water Board had been unwilling to make revisions to the draft permits in response to comments, it would not have met the requirements of the federal regulations and of section 13377, which commands the Regional Water Boards to follow the federal regulations in adopting NPDES permits. Thus, the petitioners' argument is in effect an

attack on the constitutionality of section 13377. As we have stated in the past, the State Water Board will not review arguments that a statute which it implements is constitutionally infirm. (Cal. Const., art. III, § 3.5. See State Water Board Orders WQ 86-13, p. 4 and 85-10, p. 5.)

While petitioners may argue that the Regional Water Board could have simply allowed further comment on the October 2, 1997 drafts, and then adopted them on October 15, 1997, such a process would have then possibly necessitated further revisions to the drafts and, as required by the federal regulations, further responses to comments. The federal regulations clearly required no more than one public comment period and hearing and not the endless process the petitioners claim is required. The extensive process of negotiating privately with the petitioners and then allowing public comments at a workshop and a hearing, along with a lengthy public comment period, already resulted in delays in reissuance of permits that had expired five years before. It is clear from the record in this matter that the petitioners had more than ample opportunities to comment on the permit drafts and the major issues therein, and that they took full advantage of those opportunities.

The specific revisions to the October 2, 1997 drafts that the petitioners complain of include changing the toxicity limitation and testing to delete the dilution factor. The petitioners' August 20, 1997 comments included detailed criticisms of the toxicity limitation and monitoring. The petitioners asked for inclusion of a dilution allowance, and the final permits clarified that there would be no dilution credit allowed. This revision addressed a comment by the petitioners and is explained in the Regional Water Board's response to comments.

The petitioners had requested that the terms "high risk areas" and "industrial process water" be defined. The October 2, 1997 draft permits included definitions of these

terms, and the response to comments detailed the rationale for the definitions including the use of a definition of "industrial process water" derived from State Water Board Order No. WQ-88-4.. Again, these were not new issues in the October 2, 1997 drafts.

The petitioners claim that the October 2, 1997 draft permits newly required submission of complete individual NPDES permit applications each year. First, the issue of a permit application was discussed throughout the permit process. The Regional Water Board staff considered whether to issue individual permits or general permits, and the environmental groups argued for individual permits. Their greatest concern was having current information on the shipyards which must be included in the application for individual permits. The Regional Water Board resolved this issue by issuing general permits, but by requiring the petitioners to submit the information that would have been required in individual applications. This was not a new issue raised for the first time in the October 2, 1997 drafts. Second, the general permits do not require the petitioners to submit entirely new applications each year. The permits require only that each year the shipyards update the information. This requirement is reasonably related to the earlier discussions and comments.

In summary, the "new" requirements and provisions that the petitioners complain of had been issues that were discussed extensively by all parties and interested persons, and were all the result of comments that the Regional Water Board was required to consider and to respond to. The Regional Water Board was not required to hold a second hearing to discuss the comments and outcome of the draft produced as a result of the hearing.

The petitioners have cited several cases but none of these support their contention that the Regional Water Board denied them due process. The California Supreme Court found



that the State Bar denied due process when it did not explain to an applicant the reasons he was denied full reimbursement from a Bar-operated fund. (*Saleeby v. State Bar* (1985) 39 Cal.3d 547.) The Regional Water Board provided extensive responses to all of the petitioners' comments.<sup>4</sup>

In an Illinois case cited by the petitioners, the state issued an NPDES permit that included significant changes from the earlier draft permit. (*Village of Sauget v. Pollution Control Board* (1990) 207 Ill. App.3d 974.) The draft permit had been considered as uncontested during the public comment period, and any changes were due to comments from U.S. EPA submitted long after the close of the public comment period. The permittee never saw any comments from U.S. EPA until months after they were submitted, and there was never a hearing on the permit. The Regional Water Board, on the other hand, allowed extensive comments which were made available to all persons, and held a lengthy public hearing and a workshop. The revisions to the July drafts were based on the comments, and the Regional Water Board responded to all comments. The Illinois case presented the permittee with unanticipated major revisions to what was an uncontested draft permit. That case is not analogous to the adoption of these permits.

The petitioners also assert that the Regional Water Board did not comply with the procedural regulations in place at the time of the August 13, 1997 hearing. A review of the transcript reveals, however, that the petitioners were allowed to make lengthy presentations by numerous speakers, that they were afforded the opportunity to present questions for the staff to

---

<sup>4</sup> It is obvious that the State Bar's failure to provide any sort of a hearing cannot be compared with the petitioners' inability to speak at the October meeting, which followed a public workshop and hearing.

answer,<sup>5</sup> and that they made no objection to the hearing process at the meeting. The record fails to support any contention that the Regional Water Board did not follow the regulations.

2. Contention: The petitioners contend that the permits are not supported by adequate findings or evidence. Specifically, the petitioners assert that the Regional Water Board improperly inserted numeric effluent limitations in the permits.

Finding: The petitioners argue that the Basin Plan for the San Diego Region specifies that permits for shipyards cannot contain numeric limitations, that the permits violate this provision, and that they do not contain findings to support the inclusion of numeric limitations. The Basin Plan, however, does not prohibit the use of numeric limitations in permits for shipyards. Instead, it states that control of waste discharges is accomplished by BMPs, and that "numerical effluent limitations are not practical." (Basin Plan, at 4-51.) In fact, a prohibition against numeric effluent limitations at any facilities subject to NPDES permits would contravene U.S. EPA regulations, which require such limitations in some instances.<sup>6</sup> Moreover, the permit findings extensively discuss the threat to water quality posed by shipyards and form the basis for numeric effluent limitations.<sup>7</sup>

---

<sup>5</sup> In opening the hearing, the Chairman stated: "'At the conclusion of the dischargers' direct testimony, I will allow reasonable time for dischargers to ask questions pertaining to the staff presentation. All questions will be addressed to me as the Chairman of the Board.'" The petitioners chose not to ask any questions. In light of the great concerns petitioners voice in their petitions regarding the need to question staff, it is difficult to understand why they chose not to ask any questions at all. They raised no objection to the Chairman's statement that questions would be addressed to him, and we cannot see how that stricture would have affected their ability to pursue their questions.

<sup>6</sup> See, 40 C.F.R. § 122.44. The U.S. EPA in fact has commented that the Regional Water Board should have included numeric effluent limitations for copper and zinc, pursuant to this regulation. The petitioners mistakenly claim that the Regional Water Board complied with this recommendation and included numeric limitations for these constituents.

<sup>7</sup> In light of the information available to the Regional Water Board in adopting the permits and its actions therein, the Board should reconsider this Basin Plan language at its next triennial review.

The permits include numeric effluent limitations for oil and grease, settleable solids, turbidity, pH, and temperature. These limitations do not apply to storm water. The limitations are the same as those in the California Ocean Plan (1997). While the Ocean Plan is not applicable to enclosed bays and estuaries, such as San Diego Bay, the Water Quality Control Policy for the Enclosed Bays and Estuaries of California (1974; Bays and Estuaries Policy) is applicable.<sup>8</sup> The beneficial uses of bay waters are similar if not identical to those of the ocean. Bay waters are in hydrologic continuity to waters of the open ocean, but are generally subject to less dilution. It is appropriate to apply effluent limitations at least as stringent in San Diego Bay as in the ocean.

The numeric effluent limitations are also consistent with data presented in a U.S. EPA technical document, *Development Document for Proposed Effluent Limitations Guidelines and Standards for Shipbuilding and Repair*. The numeric limitations for these parameters are appropriate. The petitioners imply that the permits contain numeric effluent limitations for other parameters, including Receiving Water Limitations. These are not numeric effluent limitations, and the limitations are consistent with the State Water Board's prior decisions addressing receiving water limitations.<sup>9</sup>

The permits do include effluent limitations that provide that effluent shall not exceed a daily maximum chronic toxicity of 1 Toxic Unit Chronic. (TUC; Discharge

---

<sup>8</sup> The petitioners appear to confuse the Bays and Estuaries Policy, which is still in effect, with the Bays and Estuaries Plan, which was vacated. To the extent that the petitioners argue that the Regional Water Board included concepts from the vacated Plan, it is appropriate to use any technical documents in developing permit terms, while not relying on the Plan as including regulatory standards.

<sup>9</sup> See, e.g., State Water Board Orders 91-03 and 96-03.

Specifications B.7. and B.9.) This limitation would be appropriate for a treated industrial discharge, where volumes and types of effluent are relatively constant. But the discharges from the shipyard are intermittent and are controlled by BMPs rather than by treatment. Under these conditions, the use of a daily maximum is not an appropriate measure of chronic toxicity. Instead, the permit should require that a monthly median of chronic toxicity of process wastewater shall not exceed 1 TUC. Chronic toxicity for storm water is not a valid measurement of the impacts of storm water on receiving waters. The chronic toxicity limitation for storm water will be deleted.

The petitioners also contend that the requirement for chronic toxicity testing for intermittent discharges is inappropriate. Because of the intermittent nature of storm water discharges, and the fact that BMPs rather than treatment is employed, chronic toxicity testing of storm water discharges can be difficult and unreliable and can take longer than the storm event being measured. It is appropriate to measure only acute toxicity and not chronic toxicity for storm water discharges. As an alternative, the Regional Water Board could consider requiring further actions in the event that acute toxicity is identified. These could include a Toxicity Identification Evaluation, which would determine the cause of toxicity, and subsequent improvement of BMPs. While the chronic toxicity requirements and monitoring are not appropriate for storm water, the acute toxicity requirements and monitoring in the permits are appropriate.

The petitioners contend that the effluent limitations should have allowed for a mixing zone. The Regional Water Board could have considered a mixing zone, but because the discharges are intermittent and there are numerous potential discharge points, establishing a

mixing zone is impractical and technically questionable. Establishing a mixing zone involves considering the conditions in the receiving water, the conditions of the discharge and the characteristics of the point of discharge. These factors are all quite variable in the case of shipyards. It was appropriate for the Regional Water Board not to include a mixing zone.

The petitioners also contend that the fact sheet is inadequate and does not cite to specific evidence. The fact sheet is extensive and does contain adequate explanations to support the permits. The petitioners argue that the Regional Water Board was required to have site-specific evidence for all assumptions in the permit, such as the assumption that hydrostatic relief may contain pollutants. Such evidence is not a requirement for NPDES permit provisions which can be based on general knowledge of industrial sites, including available documents and best professional judgment. Moreover, in the case of general permits, the basis of the permit is the type of discharge or facility, and the permit is not based solely on particular entities that will be regulated.

Provision E.7. of the permits requires that the shipyards take necessary measures to prevent storm water runoff associated with industrial activity from commingling with other storm water runoff. The petitioners claim that this requirement is not based on substantial evidence. But as pointed out by the petitioners, this provision is related to the "first flush" requirement, which prohibits discharge of the first flush of storm water runoff from "high risk areas." (Prohibition A.9.) As is demonstrated in the findings and the Fact Sheet, the "first flush" of storm water from shipyards may contain significant pollutants. As a practical matter, compliance with Prohibition A.9 will require segregation of industrial storm water from other storm water. Moreover, the segregation requirement does not specify the manner of compliance.

(It only suggests the use of berms as an example.) This is a reasonable requirement in light of the threat to water quality posed by runoff from industrial activities at shipyards and the beneficial uses to be protected in San Diego Bay. While the “first flush” requirement applies to “high risk areas” and the segregation requirement applies more generally to areas associated with industrial activity, the dischargers can choose either to segregate two different waste streams or to apply the “first flush” requirements to all industrial storm waters.

Discharge Specification B.11 of the permits requires the petitioners to implement the “first flush” prohibition within 18 months of adoption of the permits. In order to allow the petitioners to demonstrate the need for an alternative “first flush” requirement, it is appropriate to allow the petitioners to conduct intensive monitoring of discharges over the next year. If the monitoring demonstrates that an alternative “first flush” requirement is appropriate, the Regional Water Board shall reopen the permits accordingly. Specifically, the Regional Water Board may reconsider the definition of “first flush of storm water runoff” in the permits. In order to allow for this process to occur, Discharge Specification B.11 is hereby revised to allow 24 months from the date of this Order for compliance with Prohibition A.9.

3. Contention: The petitioners contend the monitoring and reporting requirements are too broad and burdensome and violate the provisions of Water Code section 13267(b)(1).

Finding: The petitioners claim that the monitoring requirements are too expensive and, specifically, that the requirements for monitoring sediment are burdensome. Section 13267(b)(1) provides: “The burden, including costs, of [monitoring] reports shall bear a

reasonable relationship to the need for the report and the benefits to be obtained from the reports.”

The storm water monitoring and reporting requirements in the permits are consistent with the monitoring and reporting requirements in the State Water Board’s general industrial permit. The petitioners should have already been in compliance with the requirements and, therefore, they should not be encountering significant new costs. Moreover, in light of the size of shipyards, and the threat to water quality, the anticipated costs of compliance are reasonable.

Sediment testing was a requirement of the earlier shipyard permits, as amended in 1989. The testing requirements are reasonable.

4. Contention: The petitioners allege a variety of deficiencies in the permits, including that they do not clearly authorize specific discharges, exclude other discharges, and are generally too vague.

Finding: Given the voluminous record before the Regional Water Board, and the complexity of the regulated facilities, the Regional Water Board produced permits that are comprehensive, thorough, and responsive to comments from the petitioners and the public. While petitioners no doubt have real concerns over the cost of protecting San Diego Bay from pollutants associated with shipyard facilities, the time has come to move forward with regulation under the permits. The State Water Board finds that the permits are adequately clear and, in light of the complexity of the discharges, are as specific as possible.

#### IV. CONCLUSIONS

After review of the record and consideration of the contentions of the petitioners, and for the reasons discussed above, we conclude:

1. The Regional Water Quality Control Board complied with federal and state regulations in issuing the NPDES permits and accorded the petitioners due process of law.
2. The limitations in the permits are proper, except that the chronic toxicity limit for process wastewater should not be expressed as a daily maximum and there should be no chronic toxicity limit for storm water. The permits should not require chronic toxicity testing for storm water discharges.
3. The monitoring provisions are appropriate and proper.
4. The permits are not impermissibly vague.
5. The deadline for complying with the prohibitions against first flush discharges should be extended.

#### **V. ORDER**

IT IS ORDERED THAT Orders 97-36 and 97-37 are amended as follows:

1. Discharge Specification B.7 is amended to replace "daily maximum" with "monthly median".
2. Discharge Specification B.9 is deleted.
3. Discharge Specification B.11 is amended to replace "eighteen (18) months after the date of adoption of this Order" with "September 17, 2000."

///

///



4. Monitoring and Reporting Program No. 97-36 is amended to delete "Chronic Toxicity" requirements from Table 5, at page M-16.

IT IS FURTHER ORDERED THAT in all other respects, the petitions are denied.

CERTIFICATION

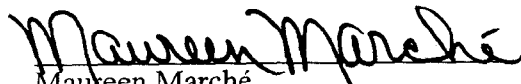
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on September 17, 1998.

AYE: John Caffrey  
James M. Stubchaer  
Marc Del Piero  
Mary Jane Forster  
John W. Brown

NO: None

ABSENT: None

ABSTAIN: None

  
Maureen Marché  
Administrative Assistant to the Board

