

SAN DIEGO UNIFIED PORT DISTRICT HEARING BRIEF

TENTATIVE CLEANUP AND ABATEMENT ORDER R9-2011-0001
AND RELATED DRAFT TECHNICAL REPORT

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I. *The Port Should Only be Secondarily Liable, Not Primarily Liable*

The Port's comments on the Tentative Cleanup and Abatement Order (TCAO) and related Draft Technical Report (DTR) discussed a number of reasons the San Diego Regional Water Quality Control Board (Regional Board) should limit any Port responsibility to secondary liability. The Port strongly contends that it is not a primarily liable under the law discussed below. The justification the Cleanup Team (CUT) provided for naming the Port a primarily responsible party clearly constitutes an abuse of discretion that cannot be sustained. Similarly, under the undisputed facts, it would be inequitable and unfair to name the Port as a primarily responsible party.

A. *The Port Has Been Cooperative and Supportive of the Regional Board*

The Port's history of cooperating with the Regional Board at numerous sites throughout the San Diego Bay and the Port's cooperation in the context of this particular TCAO process merit consideration and weigh heavily in favor of limiting the Port's responsibility to secondary liability. This cooperation includes 1) the Port's support of the cleanup approach in the TCAO and DTR¹; 2) the Port's support of the Regional Board's efforts in this process; 3) the Port's efforts to engage the dischargers and interested parties in discussions aimed at reaching a workable resolution; 4) the Port's efforts to locate various parties' insurance policies to help provide resources to implement the TCAO and DTR; and 5) the Port's provision of its experts to assist CUT in the site assessment. Additionally, the Port has been assisting CUT and the Regional Board to explore options for potential disposal or dewatering sites for the dredged sediment.

¹ The Port does believe that two other polygons should be added to best address the site concerns.

B. The Naming of the Port as a Primary Discharger in the Current TCAO and DTR is an Abuse of Discretion

As discussed in greater detail below, the current TCAO and DTR for the first time named the Port as a primarily responsible party. When the Port questioned CUT through administrative discovery and deposition questioning, the reason CUT provided for this change was that the Port had become non-cooperative. In particular, David Gibson and Craig Carlisle cited the Port's decision to withdraw from the mediation process as a basis for naming the Port primarily liable. (Exhibit "1" to Port's Comments [Gibson Deposition], at 33:9-22; Exhibit "6" to Port Comments [Carlisle Deposition], 110:20-23.) However, the Port's withdrawal from a voluntary mediation process that it initially proposed is an inappropriate basis for CUT naming the Port as a primarily responsible party, as a matter of law. While CUT may have some discretion, it is not permitted to abuse that discretion in an arbitrary and capricious fashion. Using a patently untenable justification for imposing liability – such as a party's refusal to continue participating in a mediation based upon valid concerns – is decidedly arbitrary and capricious particularly when it represents an abrupt change in a position on liability.

Tellingly, after the Port's comments to the TCAO and DTR rebutted CUT's explanation by demonstrating the Port's level of cooperation and support throughout the process, CUT again reversed field. Now CUT claims the Port's long history of cooperation is immaterial because the TCAO and DTR do not discuss the Port's alleged lack of cooperation. This disavowal of CUT's prior explanation both confirms and compounds the arbitrary nature of its approach. CUT is now essentially admitting that no facts changed between versions of the DTR to support its drastically different view of Port liability. It is unquestionably unfair for the Port to be placed in a position of secondary liability based on a thorough assessment of the facts and legal authorities, have this decision change without explanation, have a justification for the change in position offered in response to administrative discovery, and then have that impermissible justification – but not the associated change in position -- abandoned after forceful factual rebuttal of this unfounded charge. The Port is entitled to a far more transparent process.

1. *History of the DTR and Port Secondary Liability*

As noted, the current DTR for the first time assigns primary, rather than secondary, liability to the Port. Given the historic, factual and legal context, this sudden change is an abuse of discretion. There have been numerous prior iterations of the TCAO – the April 29, 2005 TCAO; the August 24, 2007 TCAO; the April 4, 2008 TCAO and the December 22, 2009 TCAO. (SAR 156322–156355 [4/29/05 TCAO]; SAR 375752–375779 [4/4/08 TCAO]; SAR 378622–378660 [12/29/09 TCAO].²) Each TCAO from August 2007 forward included an associated DTR. (SAR 375780–376460 [4/4/08 DTR]; SAR 378661–379286 [12/29/09 DTR].³) Each of these DTRs included an identical discussion and analysis of the legal and factual bases governing the Port’s liability. Each version of these DTRs reached the same conclusion – the Port should only be secondarily responsible and would only be named as a discharger “in the future if the Port’s tenants fail to comply with the Order.”⁴ (SAR 375819; SAR 379105.) The Regional Board expressly stated this exercise of its discretion was “consistent with previous State Water Board orders concerning the naming of non-operating public agencies in cleanup and abatement orders.” (SAR 375816; SAR 379107.)

As importantly, each version of the DTR included a lengthy analysis of the facts supporting its decision, each of which directly correlate to factors cited in State Regional Water Quality Control Board (State Board) orders regarding secondary liability:

- The absence of “evidence in the record that the Port ... initiated or contributed to the actual discharge of waste” (*See, Petition of Prudential Insurance Company*, Order WQ 87-6, p. 3 [noting petitioner “did not in any way initiate or contribute to the actual discharge of waste”]; *Petition of Wenwest*, Order WQ 92-13, p. 6 [party had “nothing to do with the activity” that resulted in discharges]; *Petition of ALCOA*,

² The August 24, 2007 TCAO does not appear to be in the record.

³ Again, the August 24, 2007 DTR does not appear to be in the record.

⁴ For this reason, the draft TCAOs prior to December 2009 did not even reference Port liability. In the December 2009 draft, the TCAO included for the first time a section simply summarizing the consistent analysis and conclusions in all of the prior DTRs that the Port should only be secondarily liable and would only be named as a discharger in the future should the tenants fail to comply with the order.

Order WQ 93-9, p. 12 fn. 8 [discussing secondary liability authority and noting application to non-discharging landowners];

- The absence of evidence in the record that the Port's tenants had "insufficient financial resources" to clean up the site (*See, Petition of Wenwest*, at p. 9 [concluding non-discharging landowners "should be required to perform the cleanup only in the event of default by [the primarily liable dischargers]" when dischargers are "capable of ... undertak[ing] the cleanup"]);
- The fact "[t]he major [site] investigation to determine the extent of pollution at the [site] were satisfactorily completed" by the primarily responsible parties (*See, Petition of Prudential Insurance Company*, at p. 3 [noting site investigation and cleanup "proceeding well"]; *Petition of Wenwest*, at p. 9 [concluding non-discharging landowners "should be required to perform the cleanup only in the event of default by [the primarily liable dischargers]" when dischargers are "willing to undertake the cleanup"]);
- The fact the Port is a "responsible public agency that is well equipped under its lease agreements to coordinate or require compliance of its tenants with the cleanup and abatement orders issued by the Regional Board" (*See, Petition of United States Department of Agriculture, Forest Service, Order WQ 87-5*, p. 5 [decreeing that because the Forest Service was a "responsible public agency which is well equipped to require compliance of the [discharger]," "it would be unwise to seek enforcement of the waste discharge requirements against the Forest Service ***until it becomes clear that [the discharger] will not comply***" [emphasis added]); and
- The fact that naming the Port as a primarily responsible party "may create an additional adversarial situation and hinder cooperation with the Regional Board in a cleanup that is already highly contested by other dischargers (*See, Petition of United States Department of Agriculture, Forest Service, Order WQ 87-5*, p. 4 [noting as valid consideration that naming a non-discharging

public entity landowner “may regrettably create an adversarial situation and hinder cooperation”])

(SAR 375819; SAR 379108.)

Based on these factors, all prior DTRs unanimously concluded that “[t]here is no need name the Port ... in the Cleanup and Abatement Order as a ‘discharger’ with primary responsibility for compliance *until it becomes clear* that the Port’s tenants *have failed to comply with the order.*” (SAR 375819; SAR 379105 [emphasis added].) The DTRs added that the Port would only be named as a discharger “in the future if the Port’s tenants *fail to comply with the Order.*” (*Id.* [emphasis added].)

2. *The Current DTR and CUT Explanation for Port Primary Liability are Contrary to the Law and Facts*

Despite this repeated affirmation of the proper secondary liability analysis and the repeated affirmation that the facts support secondary liability for the Port, the current DTR suddenly reached a different conclusion. The current DTR continues to acknowledge that “there is no evidence in the record that the Port ... initiated or contributed to the actual discharge of waste.” (DTR §11.2, at p. 11-4.) However, it now states that the Port should be named as a primary discharger “to the extent the Port’s tenants, past and present, have insufficient financial resources to cleanup” the site “and/or fail to comply with the order.” (DTR §11.2, at p. 11-4.) The DTR states that in the event the Port’s tenants have the resources and comply with the order, the Port can then in the future seek a designation of secondary liability. (DTR §11.2, at pp. 11-4 to 11-5.)

In its response to the Port’s comments, CUT adds the following explanation as well⁵:

⁵ This explanation was not provided in the administrative discovery responses when the Port asked CUT to explain its new position. Rather, CUT claimed the explanation was that the Port had been non-cooperative and that CUT had misunderstood or misapplied the relevant law.

Because some former Port District Tenants may not have sufficient financial resources to account for their fair shares of cleanup costs, and because the cleanup is not progressing and a number of named dischargers are contesting the TCAO, the Port District should remain a primarily – not a secondarily – responsible party.

(CUT Response to Comments, at p. 11-30.)

This proposed explanation is legally and factually untenable as a basis for Port primary liability. To begin, CUT cites no new legal authority or facts that support a different outcome from the DTR’s prior analysis of the same law and facts. Furthermore, CUT’s analysis of the dischargers’ resources is misplaced in this forum as it would require the Regional Board have to allocate shares of responsibility among the dischargers. Because there are numerous solvent and financially able responsible parties who are both capable of complying with any order and will comply with any order, the Port cannot properly be assigned primary liability.

a) Unanimous State Board Authority Requires a Non-Discharging Landowner be Secondarily Liable Until Discharger Noncompliance, not Primarily Liable Until Discharger Compliance

The current DTR’s analysis of the Port’s primary liability is directly contrary to the State Board orders discussing secondary liability. The repeated, unanimous and unmistakably clear admonition of the State Board is that non-discharging landowners⁶ should be secondarily liable and responsible for compliance only *after* the dischargers fail or default on their compliance:

- Non-discharging landowners “should be required to perform the cleanup *only in the event of default by [dischargers]*” (*Petition of Wenwest*, p. 9 [emphasis added]);
- Order placed “primary cleanup and abatement responsibility on [discharger’s] shoulders and specifically requires [non-discharging landowners] to assume the

⁶ The Port is a trustee rather than a landowner. However, the same rationale would apply in both contexts. The term “non-discharging landowner” in the balance of the brief should be understood to include non-discharging trustees.

burden *only upon [discharger's] failure to perform*" (*Petition of Schmidl*, Order WQ 89-1, p. 4 [emphasis added]);

- Regional Board instructed to "only look to the [non-discharging landowner] regarding enforcement should [discharger] fail to comply" (*Petition of Forest Service*, p. 5: [emphasis added]⁷);
- Regional Board ordered to modify order to provide that non-discharging landowner required to comply with order only upon "determination and actual notice to [the non-discharging landowner] that [the dischargers] *ha[ve] failed to comply*" (*Petition of Prudential Insurance Company*, p. 5 [emphasis added]);
- Non-discharging landowner responsible for cleanup "only if the other named dischargers did not timely complete these tasks" (*Petition of Spitzer*, p. 6.)

No State Board order has authorized the approach taken by the current DTR -- delaying secondary liability for a non-discharging landowner to a later date after discharger compliance is demonstrated. In fact, CUT's approach would render secondary liability illusory since proof of compliance could only be achieved at the completion of the cleanup at which point redesignating the Port's liability would be meaningless. Thus, the correct procedure mandated by the State Board is the one adopted by the prior DTRs – the Port should be designated secondarily liable now and become primarily liable only in the event of noncompliance.

b) The Port is Not Required to Prove that the Dischargers Can and Will Comply with the Order

CUT erroneously contends in its response to the Port's comments that the Port is only entitled to secondary liability "if, but only if, its current and former tenants have the financial resources to undertake the cleanup *and* those tenants are cooperating with and implementing the applicable cleanup order." (CUT Response to Comments, at p. 11-31 [emphasis in original][citing *Petition of Wenwest* and *Petition of Spitzer*].) However, as noted above, these

⁷ While *Petition of Forest Service* involved waste discharge requirements rather than a cleanup and abatement order, the secondary liability analysis is the same in both contexts. (*Petition of Schmidl*, p. 4 [citing *Petition of Forest Service* as instructive on secondary liability analysis].)

cases do not impose this type of burden on a non-discharging landowner like the Port. Rather, those cases, and numerous other cases, demonstrate that a non-discharging landowner is entitled to secondary liability until the dischargers are non-compliant.

(1) *There is no Evidence that the Dischargers Lack the Financial Ability to Comply with the Proposed Order*

Contrary to CUT's approach, no State Board order analyzing secondary liability requires a non-discharging landowner to produce detailed factual evidence of the dischargers' financial assets. Only *Petition of Wenwest* even references this factor, which is limited to a comment that the dischargers in that case were "capable" of undertaking the cleanup. (*Petition of Wenwest*, p. 9.) On this point, the named dischargers are capable of performing any cleanup required by the order. The dischargers include NASSCO, BAE Systems and SDG&E, financially robust parties with significant resources. The other dischargers have potential insurance assets available to assist in any remediation. No State Board order regarding secondary liability requires a more detailed showing on this point.

Additionally, CUT cannot cite the state of the dischargers' resources as a basis for Port primary liability given the numerous consistent and directly contrary findings in prior DTRs. These findings stated unequivocally that there was no evidence that the dischargers could not perform the required remediation, which is consistent with the proper secondary liability analysis in the State Board authority discussed above. CUT cites no new evidence on this point and nothing relative to the dischargers' resources has changed in the interim. CUT cannot now reach a different finding on this point and claim that this inexplicable change in position is anything other than arbitrary and capricious.

Rather than make the untenable statement that the discharger group lacks the resources to perform the cleanup, CUT cites the possibility of "potential gaps" in the dischargers financial resources and claims that some prior tenants that may be dischargers may not have the financial resources "to satisfy their respective fair shares of responsibility." (CUT Response to Comments at p. 11-31 [citing *Petition of Aluminum Company of America*, pp. 16-18.].) CUT goes on to contend that there is "considerable controversy over, which, if any, discharger named in the

TCAO is responsible for discharges from the current BAE Systems leasehold from 1962 through 1979.” (*Id.*)

Contrary to CUT’s contention, neither the TCAO nor the DTR contains any allocation of “fair shares of responsibility” among the dischargers for any specific discharges. Indeed, the TCAO and DTR nowhere refer to any discharger’s “fair share” of liability. Likewise, no State Board order contemplates or authorizes a regional board to impose liability on the basis of “fair shares.” Instead, State Board authority is unanimously to the contrary – dischargers are jointly and severally liable to the regional board for the entire cleanup. (*Petition of Union Oil Company of California*, Order WQ 90-2; *Petition of Ultramar, Inc.*, Order WQ 09-001-UST, p. 7 fn. 12.) If the named dischargers are concerned about fair shares of liability, this issue must be taken up among those parties in a court of law. (*See, Petition of Ultramar, Inc.*, p. 7, fn. 12.) The concept of “fair shares” of liability is out of place in the administrative context as a basis for imposing primary liability upon a party that would otherwise be entitled to secondary liability. Ignoring this long-standing State Board authority, CUT cites *Petition of Aluminum Company of America* for the proposition that a landowner becomes primarily responsible for “orphaned liability” resulting from a non-existent prior operator. Yet, *Petition of Aluminum Company of America* does not refer to “orphaned liability,” much less establish that such liability can be the basis for imposing primary liability on a non-discharging landowner.⁸

CUT’s reliance on possible “orphan shares” as a justification for Port primary liability also falters because “orphan shares” are the share of liability that would be allocated to a party who is “defunct, bankrupt, uninsured.” (*United States v. Kramer* (D NJ 1997) 953 F.Supp. 592, 595.) Here, CUT’s suggestion that Star & Crescent is an orphan share is rebutted by the evidence in the record that all of the Star & Crescent entities should have insurance assets. Even if an orphan share existed, this share would not automatically fall upon the landlord as CUT suggests. Rather, orphan shares must be allocated in an appropriate equitable fashion among the responsible parties. (*Pinal Creek Group v. Newmont Mining Group* (9th Cir. 1997) 118 F.3d

⁸ In fact, CUT’s citation for this proposition references pages 16-18 of *Petition of Aluminum Company of America*, whereas that order is only fourteen pages long.

1298, 1303.) Because the law is that a non-discharging landowner should be primarily responsible only where the primarily liable dischargers fail to comply with the order, any orphan share liability should be handled in the same manner – the primary dischargers would remain responsible for the entire cleanup and the Port would remain secondarily liability until the dischargers’ default or noncompliance.

(2) *The Dischargers are not in Noncompliance or Default with Respect to any Enforceable Cleanup Obligations*

CUT also now contends that secondary liability is inappropriate because “no cleanup is taking place.” (CUT Response to Comments, at p. 11-32.) However, every prior iteration of the DTR emphasized that “[t]he major [site] investigation to determine the extent of pollution” at the site had been “satisfactorily completed” by the dischargers. Additionally, the extensive State Board authorities cited above conditioned a non-discharging landowners’ primary liability on the dischargers’ “default,” “failure to comply” or “failure to perform.” Here, the cleanup has not yet commenced because there is no enforceable order, not because of the dischargers’ default or non-compliance.

Further, the named dischargers have been appropriately involved and engaged in the administrative process and that none have ever asserted that they would flout or ignore a final enforceable cleanup order. To this end, David Gibson has testified under oath that the process is “proceeding cooperatively.” (Exhibit “5” to Port Comments [Gibson Deposition], at pp. 489:20-490:14.) Given these facts, and given the extensive State Board authority discussed above, the only permissible conclusion is that the Port should be in a position of secondary liability until there is actual non-compliance with an enforceable order by all dischargers.⁹

⁹ The Port notes that the point of the primary/secondary liability is to have the non-discharging landowner available to step immediately into a breach created by dischargers’ non-compliance and perform the cleanup. Naming the Port as a primarily responsible discharger under the pretext that the dischargers have not yet performed the cleanup would not serve this purpose for the simple reason that there are not yet any cleanup obligations for the Port to perform.

II. The Port Should Not be Liable For MS4 Facility Discharges

The TCAO and DTR also impose liability upon the Port for purported discharges from the Port's municipal separate storm sewer system (MS4) at outfalls SW9 and SW4. The Port's MS4 facilities are operated subject to a National Pollutant Discharge Elimination System (NPDES) permit. Liability for MS4 facility discharges under a NPDES permit requires testing at the point of discharge. (*National Resources Defense Council v. County of Los Angeles Flood Control District* (9th Cir. 2011) 636 F.3d 1235 (*NRDC*)). Furthermore, the Port has complied with its MS4 permit. In fact, the Port does not own the MS4 facilities that lead to SW9 or SW4 and therefore is not liable for discharges from those facilities. The Port is not liable under the NPDES permit for discharges from other permittees' MS4 facilities and it would be unfair and inequitable to apply the permit in the manner advocated by CUT.

A. There has Been no Testing at the MS4 Discharge Points as Required by *NRDC*

As the Port discussed in its original comments, *NRDC* establishes the legal standard for liability premised on a violation of an NPDES permit for MS4 facilities. In short, such liability requires specific testing at the discharge point demonstrating that the MS4 facility discharged the contaminants of concern. In this particular context, an "assumption" that the MS4 facility discharged contaminants in violation of the NPDES permit is inadequate, even if the assumption is "highly likely." (*NRDC*, 636 F.3d at 1253.)

CUT claims that *NRDC* "specifically addresses the evidentiary threshold required for finding that an NPDES permittee exceeded the parameters of its permit" which, according to CUT "requires some quantification of the discharged constituent since some level of discharge is permitted." (CUT Response to Comments at p. 11-34.) CUT then argues that that the Port is not being held liable for an NPDES violation but for "caus[ing] or contribut[ing] to the condition of pollution or nuisance at the Site" through MS4 facility discharges. (CUT Response to Comments, at p. 11-34.) CUT's proposed distinction from *NRDC* is simply wrong.

In *NRDC*, the Ninth Circuit discussed at length the basis for the alleged permit violation. In this regard, the Ninth Circuit explicitly noted that the NPDES permittees were required under the permit to ensure that MS4 discharges “shall neither cause nor contribute to the exceedance of water quality standards and objectives *nor create conditions of nuisance in the receiving waters.*” (*NRDC, supra*, 636 F.3d at 1241. [emphasis added].) Later, the Ninth Circuit again noted:

[T]he Permit prohibits MS4 discharges into receiving waters that exceed the Water Quality Standards established in the Basin Plan and elsewhere. Specifically, Section 2.1 provides: “[D]ischarges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objective are prohibited.” *Section 2.2. of the Permit reads: “Discharges from the MS4 of storm water, or non-storm water, for which a Permittee is responsible for, shall not cause or contribute to a condition of nuisance.”*

(*NRDC, supra*, 636 F.3d at 1244 [emphasis added].)

In short, the purported NPDES permit violation was based on the same standard as that which CUT now claims distinguishes that case from the present – the prohibition on discharges that create or contribute to a nuisance. Regardless, the proposed distinction offered by CUT is unsound. If this approach were sound, the NPDES permits would be rendered a nullity since any amount of vague circumstantial evidence could support the theory that some amount of contaminants may have been discharged from a MS4 facility. If CUT wishes to impose liability upon the Port for permitted MS4 facility discharges, CUT must produce the type of evidence required to establish a violation of that permit. *NRDC* does not allow a lesser standard of evidence.

B. The Port is in Compliance with its MS4 Permit Obligations

Imposing liability upon the Port for MS4 facility discharges is also improper because the Port has complied with its MS4 permit obligations. The Port inspects its MS4 facilities as required and sweeps the area associated with its MS4 permits as required. The Port has prepared the JURMP document required by the MS4 permit and operates in MS4 facilities in compliance with that document. The Port’s compliance program is being implemented to the “maximum

extent practicable” and in many cases has proactively implemented compliance at a higher level. (See, Collacott Declaration in Support of Port Comments, pp. 4-5, paras. 8(g)-(h), 9.) For this reason, holding the Port liable on the basis of alleged discharges from the Port’s MS4 facilities is improper.

C. The Port is Not Responsible Under its NPDES Permit for Discharges from MS4 Facilities the Port Neither Owns nor Operates

The current draft of the TCAO and DTR, which was the first draft to discuss Port liability for MS4 discharges, clearly assumed that the Port owned and operated the MS4 facilities that discharge to SW4 and SW9. (DTR at 11-8, §11.4 [referring to Port liability for pollutants allegedly discharged “through *its* SW4 ... and SW9 ... conduit pipes” (emphasis added)].) CUT has since acknowledged that these conduit pipes are owned and operated by the City.

Faced with this erroneous assumption, CUT has changed its position and is now advancing the argument that the Port accepted liability for all MS4 discharges to the San Diego Bay by virtue of its role as a copermitttee under the NPDES permit and the Port’s general jurisdiction over the tidelands area. However, the scope of Port liability for MS4 facility discharges is a function of the NPDES permit. The NPDES permit contains no language imposing the broad liability CUT now proposes and CUT cites no actual language to this effect. In fact, the language of the NPDES permit coincides with CUT’s original approach – parties are liable under the NPDES permit for discharges from MS4 facilities that the copermitttee owns or operates.

There is no broader third category of liability in the NPDES permit for MS4 facilities that the copermitttee does not own or operate but that are within the party’s general geographic jurisdiction. The Port’s interpretation of the NPDES permit is supported by the federal regulations that authorize such permits. The Clean Water Act 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).) Absent any

language suggesting that the parties intended co-permittee to have a much broader meaning, CUT's argument is legally unsound.

D. The Regional Board Should Not Name the Port as a Primary Discharger Based on MS4 Discharges

As noted above, there is no evidence supporting Port liability for MS4 facility discharges. However, even if a technical legal basis for liability existed, the Regional Board should exercise any discretion it may have to not name the Port as a discharger on this basis. The explanation for Port MS4 liability in the TCAO and DTR was that the Port owned and operated the MS4 facilities at the points of discharge. This factual basis was incorrect. CUT's new argument that the Port should still be liable for these facilities under terms of the permit that CUT has never cited has no discernible support in the permit language or any law. Any contention that the Port's liability can be based on other MS4 facilities that it does own or operate is also unfair given the absence of any testing of discharges from these facilities and the Port's demonstrated compliance with its MS4 permit obligations. Under CUT's approach the Port has been inexplicably singled out when other copermittees such as City of Lemon Grove and City of La Mesa have facilities that connect to the MS4 facilities that discharge to SW4 as well.

As discussed at the outset of the brief, the Port has a history of working with the Regional Board throughout the Bay generally and on this matter specifically. There is no evidence that the Port itself has contributed to the purported discharges at SW4 and SW9, and the MS4 facilities that discharge to these locations are under the ownership and operation of a party that is already involved, the City of San Diego. The approach now being advocated by CUT is at best an unnecessarily stringent and aggressive application of the Regional Board's authority in a manner that is unfair and unprecedented. For these reasons, the Port requests that the Regional Board not impose liability upon the Port for the MS4 discharges to SW4 and SW9.

III. Conclusion

The Port recognizes that the Shipyard Sediment Site must be addressed and largely agrees with remedial footprint proposed by the TCAO and DTR. The Port has been cooperative and involved in this process and will continue to be cooperative and involved. However, the Port should not be primarily liable as it did not discharge contaminants of concern and the dischargers are both willing and able to implement any cleanup required by the TCAO and DTR.