



City of San Clemente Engineering

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Via Email: sandiego@waterboards.ca.gov

David Gibson, Executive Officer
San Diego Regional Water Quality Control Board
2375 Northside Drive, Suite 100
San Diego, CA 92108-2700
Attn: Christina Arias

Re: Comment - Tentative Order No. R9-2016-0205

Dear Mr. Gibson:

The City of San Clemente has reviewed Tentative Order No. R9-2016-0205, a draft of the *Order Directing the Owners and Operators of Phase I Municipal Separate Storm Sewer Systems Draining the Watersheds within the San Diego Region to Submit Technical and Monitoring Reports Pertaining to the Control of Trash in Discharges from Phase I MS4s to Ocean Waters, Inland Surface Waters, Enclosed Bays, and Estuaries in the San Diego Region* ("Draft Order"). As an entity subject to the Draft Order, which is intended to fulfill the requirements of the Amendment to the Water Quality Control Plan for Ocean Waters ("Ocean Plan") and for Inland Surface Waters, Enclosed Bays, and Estuaries ("ISWEBE Plan") of California (collectively the "Trash Amendments"), the City appreciates the opportunity to provide comments.

For the reasons set forth in this letter, the City requests that the San Diego Regional Water Quality Control Board ("Regional Board") not issue the Draft Order until a source of funding and State guidelines are provided and remove requirements that exceed the scope and intent of the Trash Amendments.

1. The Draft Order Is Premature

The State's guidelines on Track 2 are not yet available. This leaves uncertainty regarding issues, especially interjurisdictional matters, such as how a downstream MS4 monitors and evaluates compliance under Track 2 when upstream MS4s continue to discharge trash into a common MS4.

Without guidance from the State, it is difficult to make an informed choice between Track 1 and Track 2. Similarly, if the City wishes to switch tracks, there is no information regarding how or whether this can be accomplished. The City requests that the Regional Board issue the Draft Order after the State guidance is available, so that the City can make a properly informed selection.

2. The Draft Order Exceeds the Mandates in the Trash Amendments

The City is concerned that the Draft Order imposes requirements on the City that are not required in the Trash Amendments and requests that these requirements and related findings be removed from the Draft Order. The Trash Amendments require the Regional Board to modify, re-issue, or adopt an MS4 permit to add requirements implementing the Trash Amendments for dischargers permitted pursuant to Clean Water Act Section 402(p) or to:

Issue an order pursuant to Water Code section 13267 or 13383 requiring the MS4 permittee to submit, within three (3) months from receipt of the order, written notice to the PERMITTING AUTHORITY stating whether such MS4 permittee will comply with the prohibition of discharge under Chapter IV.A.3.a.1 (Track 1) or Chapter IV.A.3.a.2 (Track 2). ... Within eighteen (18) months of the receipt of the Water Code section 13267 or 13383 order, MS4 permittees that have elected to comply with Track 2 shall submit an implementation plan to the PERMITTING AUTHORITY that describes: (i) the combination of controls selected by the MS4 permittee and the rationale for the selection, (ii) how the combination of controls is designed to achieve FULL CAPTURE SYSTEM EQUIVALENCY, and (iii) how FULL CAPTURE SYSTEM EQUIVALENCY will be demonstrated. The implementation plan is subject to approval by the PERMITTING AUTHORITY.¹

The Trash Amendments thus only require a Water Code section 13267 or 13383 order to direct MS4 Permittees to select between Track 1 and Track 2, and if selecting Track 2, to submit an implementation plan. Requirements in the Draft Order to coordinate with Caltrans and to address transient encampments exceed the direction in the Trash Amendments. For these reasons, the City requests removal of Findings 9.c and 9.d and Provisions A.3 and A.4 from the Draft Order.

a. Remove Requirements to Coordinate with Caltrans (Draft Order Finding 9.c and Section A.3)

The Draft Order requires the City to describe how it “will coordinate ... efforts to install, operate, and maintain full capture systems, multi-benefit projects, and other controls with

¹ Ocean Plan Chapter III.L.4.a(1)A, B and ISWEBE Plan Chapter IV.A.5.a(1)A, B.

Requirements”).² As noted above, the Trash Amendments only require an investigative order to address the selection of Track 1 or 2; they do not require the Regional Board to address the City’s role in coordinating with Caltrans. Requiring the City to describe how it will coordinate with Caltrans exceeds the direction in the Trash Amendments.

The City is concerned that including the Caltrans Requirements in the Draft Order is also unnecessarily duplicative. First, the MS4 Permit already requires the City to coordinate with Caltrans in controlling the contribution of pollutants.³ Including additional requirements in the Draft Order appears to be duplicative of the City’s obligations under the MS4 Permit’s WQIP provisions. Second, requiring a description of how the City will coordinate with Caltrans shifts Caltrans’ responsibility to the City. Under the Trash Amendments, Caltrans is required to develop an implementation plan identifying significant trash generating areas, describing trash controls, and describing how it will demonstrate full capture system equivalency.⁴ The City’s obligation under the Trash Amendments is to cooperate in Caltrans’ efforts. Caltrans is in the best position to identify what cooperative efforts are needed from the City. The Draft Order shifts the obligation to identify cooperative efforts to the City.

The City has and intends to continue cooperating with Caltrans to control the contribution of pollutants to the City’s MS4. Because the Draft Order duplicates provisions already in the MS4 Permit and shifts Caltrans’ responsibilities on the City, the City requests that the Caltrans Requirements be removed from the Draft Order.

b. Remove Requirements to Address Transient Encampments (Draft Order Finding 9.d and Section A.4)

The City is concerned that the Transient Encampment Requirements (defined below) exceed the scope and intent of the Trash Amendments in three ways and make the Draft Order an inappropriate mechanism to impose such requirements. First, the City’s land use authority does not extend to transient encampments. Second, implementing Track 1 and/or Track 2 will not control the trash issues described in the Draft Order. Third, significant constitutional and statutory restraints limit the City’s ability to address trash from these programs. For these reasons, the City requests that the Transient Encampments Requirements be removed from the Draft Order and that the Regional Board consider alternative regulatory mechanisms targeted to specific areas known to generate the greatest amounts of trash.

i. Land Use Authority Does Not Address Transient Encampments

The Trash Amendments are written in terms of the City’s “regulatory authority over land uses”⁵ and authorize the Regional Board to make a determination that a specific land use

² Draft Order, Finding 9.c and Section A.3.

³ San Diego Regional Water Quality Control Board Order No. R9-2013-0001, Provisions B.3.b.(1)(c); E.1.a.(5).

⁴ Ocean Plan Chapter III.L.4.b(1) and ISWEBE Plan Chapter IV.A.5.b(1).

⁵ Ocean Plan Chapter III.L.2.a and ISWEBE Plan Chapter IV.A.3.a.

or location generates a substantial amount of trash.⁶ If the Regional Board makes this determination, it may require the MS4 to comply with Track 1 or Track 2 with respect to such land uses or locations.⁷

The Draft Order identifies “transient encampments in the San Diego River watershed” as generating substantial trash in amounts that adversely affect beneficial uses or cause nuisance in the San Diego River.⁸ It then requires certain MS4 permittees to develop “plans to address trash runoff from the relevant areas of land affected by transient encampments through Track 1 or Track 2 controls” (“Transient Encampment Requirements”).⁹

The “San Diego River watershed” and “transient encampments” are not priority land uses as defined in the Trash Amendments. Priority land uses are high density residential, industrial, commercial, mixes of these uses, and public transportation stations.¹⁰ The San Diego River watershed is also not a specific land use or location; instead, it is a vast geographical designation covering multiple local agency jurisdictions. Similarly, transient encampments are not specific land uses or locations; they are generally illegal activities that occur on a wide range of land use designations.

The City is concerned that including requirements to address transient encampments represents a dramatic divergence from the land use-based structure of the Trash Amendments, and, as a result, distracts from the intended focus on and prioritization of specific land-use based controls.

ii. Track 1 and 2 Land Use Controls Will Not Effectively Control Trash From Transient Encampments

The intent of the Trash Amendments is “to allow MS4s to allocate trash-control resources to the developed areas that generate the highest sources of trash.”¹¹ The City is concerned, however, that Tracks 1 and 2, as required by the Draft Order and future MS4 Permit, will be largely ineffective at addressing a complex social issue spanning multiple land uses and locations because these controls are not designed to capture trash from transient encampments.

The Draft Order relies on information received in regard to Item 5 on the Regional Board’s May 14, 2014 agenda (“Transient Encampment Information”), for the determination that transient encampments in the San Diego River watershed generate substantial trash. The Executive Officer’s report for that item states, in part:

Transient encampments within the San Diego River present the largest challenge for trash abatement for both the municipal storm

⁶ Ocean Plan Chapter III.L.2.d and ISWEBE Plan Chapter IV.A.2.d (emphasis added).

⁷ *Ibid.*

⁸ Draft Order, Finding 9.d.

⁹ Draft Order, Finding 9.d; Section A.4.

¹⁰ Ocean Plan Appendix I and ISWEBE Plan Appendix A.

¹¹ Staff Report for Trash Amendments, p. 13.

water Copermittees and Caltrans. Specific and lengthy procedures must be followed to assist and disperse identified transient populations and post notices of abatement and intent to cleanup sites prior to initiation of trash removal at these sites.¹²

Transient encampments within the river – i.e., encampments that discharge directly to a receiving water – are not discharges from an MS4. A Draft Order or MS4 permit regulating discharges from an MS4 should not regulate transient encampments within a receiving water because these encampments do not cause or contribute to discharges to or from an MS4.

As noted above, even though the Draft Order relies on the Transient Encampment Information, it directs certain MS4 permittees to address transient encampments within the entire San Diego River watershed using Track 1 or 2. In addition to the problems with this approach noted above, the City is concerned that such overreach will be ineffective. It is possible that transient encampments may be located within priority land use areas that discharge to an MS4. In these cases, trash from the encampments will be addressed, together with all other sources of trash from priority land uses, through implementation of the Trash Amendments based on priority land uses. To the extent transient encampments may be located in areas other than priority land uses that discharge to an MS4, the Trash Amendments explicitly prioritize control of trash through the use of land use designations and specific locations. As noted above, transient encampments are not land use designations or specific locations. It is contrary to the intent of the Trash Amendments to direct MS4 permittees to address trash by means other than land use designations or specific locations.

It is also possible that transient encampments may be located within an MS4 that discharges to the San Diego River. There are two issues associated with regulating discharges of trash from transient encampments located within an MS4. As noted above, a transient encampment within an MS4 is not a land use designation or specific location. It is contrary to the express intent of the Trash Amendments to require controls unrelated to an MS4's land use authority. Further, even if an MS4 implements Track 1 or 2 with respect to such discharges, the Trash Amendments expect that full capture systems will be installed where installation is not cost-prohibitive,¹³ but full capture systems are generally not designed or intended to address such trash discharges. This is because the currently certified devices are designed to be installed primarily in catch basins and pipes.¹⁴ Transient encampments within MS4s are often found in close proximity to the river, after the places where full

¹² Emphasis added. The 2013, 2014, and 2015 State of the River reports, cited in the Draft Order, also note that “trash/debris [and] homeless encampments” were observed at all monitoring sites. See, San Diego River Park Foundation, State of the River Report, Water Quality Monitoring Supplemental Report, Table E.3 (2013-2015). Each monitoring site is located within a reach or tributary of the San Diego River, suggesting that the observed encampments were located within the San Diego River. *Id.* at Table E.1.

¹³ Ocean Plan Chapter III.L.2.a.(2) and ISWEBE Plan Chapter IV.A.3.a.(2)

¹⁴ Certified full capture devices include those certified by the Los Angeles Regional Water Quality Control Board prior to April 7, 2015 and those listed in Appendix I of the Bay Area-wide Trash Capture Demonstration Project, Final Project Report (May 8, 2014). Ocean Plan Appendix I and ISWEBE Plan Appendix A.

capture devices are installed. As a result, Track 1 and Track 2 are poorly designed to address trash generated by transient encampments.

iii. Statutory and Constitutional Provisions Limit City's Ability to Address Trash from Transient Encampments

Finally, to the extent that transient encampments are located within a non-priority land use area in the San Diego River watershed, including within the MS4 and within the riverbed, MS4 permittees may need to undertake activities other than Track 1 or Track 2 to address the trash. MS4 permittees face significant constitutional and statutory restraints on their ability to address trash from these encampments. As the Executive Officer's Report for Item 5 on the Regional Board's May 14, 2014 meeting notes, "[s]pecific and lengthy procedures must be followed to assist and disperse identified transient populations and post notices of abatement and intent to cleanup sites prior to initiation of trash removal[.]" For example, under the Fourth and Fourteenth Amendments, unattended property cannot be searched, seized, destroyed or discarded without reasonable notice and opportunity for the person to reclaim the property.¹⁵ In many cases, local government control over activities associated with transient encampments may be limited under the Eighth Amendment when there is inadequate shelter space in the area.¹⁶

Because the San Diego River watershed and transient encampments are not specific land uses or locations, the Draft Order exceeds the scope and intent of the Trash Amendments by requiring control of trash generated from transient encampments in the San Diego River Watershed Management Area. In addition, the Transient Encampment Information identified encampments within the river as presenting the largest challenge for trash abatement, but neither Track 1 nor Track 2 will address trash from encampments within the River because these encampments do not discharge to an MS4. Finally, actions beyond Track 1 and 2 that may be necessary to control trash from transient encampments are circumscribed by constitutional limitations. The complex problem of transient encampments is not an appropriate subject for the Draft Order or a subsequent MS4 permit. For these reasons, the City requests that Finding 9.d and Section A.4 be removed from the Draft Order. It is appropriate for the Regional Board to conduct further studies into the issue of trash from transient encampments, identify specific locations known to generate the greatest amounts of trash, and possibly issue a separate order targeted to controls at those areas.

3. Provide a Source of Funding for the State Mandates in the Draft Order

The Investigative Order and implementation of the Trash Amendments through a renewed MS4 Permit constitute unfunded state mandates. Section 6 of Article XIII B of the California Constitution requires the State to provide a subvention of funds to local agencies any time the Legislature or a state agency requires the local agency to implement a new program or provide a higher level of service under an existing program.

¹⁵ U.S. Const. Amends. IV and XIV; see also *Lavan v. City of Los Angeles* (9th Cir. 2012) 693 F.3d 1022, 1032; *Joyce v. City and County of San Francisco* (N.D. Cal. 1994) 846 F.Supp. 843, 863.

¹⁶ See, e.g., *Jones v. City of Los Angeles* (9th Cir. 2006) 444 F.3d 1118, *vacated after settlement* by 505 F.3d 1006.

The purpose of Section 6 “is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are ‘ill equipped’ to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose.”¹⁷ The section “was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues.”¹⁸

Government Code section 17556 identifies seven exceptions to the subvention requirement of Section 6, including statutes or executive orders that impose a requirement mandated by a federal law or regulation, which results in costs mandated by the federal government.¹⁹ When considering this exception, California’s Supreme Court determined that requirements which are “animated” by flexible federal laws and regulations do not constitute federal requirements unless, perhaps, the requirements constitute “the only means by which the [flexible] standard could be implemented[.]”²⁰ To demonstrate the applicability of this exemption, “the party claiming the applicability of an exception bears the burden of demonstrating that it applies.”²¹

The Draft Order constitutes a new program or higher level of service by requiring the City to submit a notice stating: (1) whether the City will implement Track 1 or Track 2; (2) how the City will coordinate with Caltrans to install, operate, and maintain full capture systems, multi-benefit projects, and other controls; and (3) for the cities of San Diego, Santee, El Cajon, La Mesa and the County of San Diego, how trash generated from transient encampments will be addressed. When incorporated into a future MS4 Permit, implementation of the Trash Amendments will also constitute a new program. The activities mandated by the Draft Order and implementation of the Trash Amendments through a future MS4 Permit are referred to in this letter as “Programs.”

The Programs are State mandates. According to the Draft Order, the Programs are required pursuant to state laws, policies and regulations: California’s Porter-Cologne Water Quality Control Act, including sections 13267 and 13383 of the California Water Code, State and Regional Water Quality Control Plans, and State Water Board policies and regulations.²² The Draft Order also alleges it conforms to and implements “applicable state and federal regulations” and “relevant standards, criteria, and advisories adopted by other state and federal agencies.” No federal regulations, standards, criteria, or advisories are identified as mandating the new programs, however. There is no evidence in the Draft Order that the Programs constitute “the only means” by that the unnamed federal regulations, standards criteria, or advisories could be implemented.²³ Consistent with the Supreme Court’s decision, the Programs are state mandates.

¹⁷ *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81; *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487.

¹⁸ *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *Redevelopment Agency v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 984-985.

¹⁹ Gov. Code, § 17556, subd. (c).

²⁰ *Dep’t of Finance v. Comm’n on State Mandates* (2016) 1 Cal.5th 749, 768.

²¹ *Id.* at p. 769, citing *Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 23.

²² Draft Order, Finding 1.

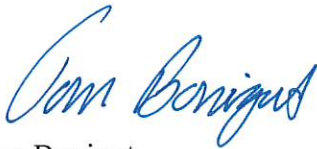
²³ *Dep’t of Finance v. Comm’n on State Mandates* (2016) 1 Cal.5th 749, 768.

The City does not have a source of funding to dedicate to the Programs and requests that the Regional Board not issue the Draft Order until a source of funding is provided or provide funding to implement the Programs.

Conclusion

The City takes the region's water quality seriously and appreciates the opportunity to provide comments on the Draft Order. Because the Trash Amendments establish a system that prioritizes trash controls through land use regulations, the City respectfully requests that the Regional Board consider the City's request to provide a means to fund implementation of the chosen Track, delay issuance of the Draft Order until after the State's guidelines and funding are available, and remove the Caltrans Requirements and Transient Encampment Requirements from the Draft Order.

Sincerely,



Tom Bonigut
Deputy Public Works Director