



December 14, 2016

By E-Mail to: sandiego@waterboards.ca.gov

Attn: Christina Arias

Christina Arias, PE

Water Resource Control Engineer

California Regional Water Quality Control Board, San Diego Region

Subject: Comment - Tentative Order No. R9-2016-0205 (786088 C.Arias)

Dear Ms. Arias:

The County of Orange, as Principal Permittee of the Orange County Stormwater Program, and the Orange County Flood Control District (collectively, County) appreciate the opportunity to provide comments on *Tentative Order No. R9-2016-0205, Investigative Order Directing the Owners and Operators of the Phase I Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds within the San Diego Region to Submit Technical and Monitoring Reports Pertaining to the Control of Trash From Phase I MS4s to Ocean Waters, Inland Surface Waters, Enclosed Bays and Estuaries in the San Diego Region*, issued on November 10, 2016 (hereafter, "TIO"). To the extent they are consistent, these comments support those submitted by the California Stormwater Quality Association (CASQA) as well as the City of San Diego and County of San Diego, and were prepared in consultation with our co-permittees. The cities of Aliso Viejo, Dana Point, Laguna Hills, Laguna Niguel, Lake Forest, Mission Viejo and Rancho Santa Margarita have directed that they be recognized as concurring entities..

The San Diego Regional Water Quality Control Board (Regional Board) released the TIO in response to Amendments to the Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California (ISWEBE Plan) and the Water Quality Control Plan for Ocean Waters of California (Ocean Plan) adopted by the State Water Resources Control Board on April 7, 2015, in Resolution No. 2015-0019 (hereinafter, "Trash Amendments").

The County and Cities provide the following comments to the TIO:

1. Finding 3 of the TIO indicates that the Regional Board is required to "modify, re-issue, or adopt an applicable MS4 permit, or issue an order pursuant to Water Code section 13267 or 13383 to implement the Trash Amendments. (Emphasis added). This finding suggests that the Trash Amendments may be implemented pursuant to an investigative order issued under Water Code 13267. This is contrary to the Trash Amendments, and beyond the scope of a section 13267 order. Sections IV.A.1.a and III.L.1.A of the Trash Amendments provide, in pertinent part, that the Trash Amendments shall be implemented through a prohibition of discharge and through NPDES permits issued pursuant to section 402(p) of the Federal Clean Water Act. Furthermore, sections IV.A.3 and III.L.2 of the Trash Amendments specifically set forth the specific provisions to be

included in NPDES permits, including the requirement to comply with the discharge prohibition by either Track 1 or Track 2, as well as coordination efforts with Caltrans.

While the Trash Amendments allow for the Regional Board to issue a 13267 order in the interim period prior to modification, re-issuance or adoption of NPDES permits that are subject to the Trash Amendments (see Section IV.A.5, for example), the orders included in the TIO go far beyond what the Trash Amendments call for in a 13267 order.

2. TIO Order A.2.f requires that the implementation plan should include a compliance time schedule based on the shortest practicable time to achieve compliance with the trash discharge prohibition. The Amendments state, however, that their implementation is to be through a prohibition of discharge and through NPDES permits. Further, under sections IV.A.5.a.(1).B and III.L.2.a.(2), the information to be required in response to a 13267 order does include the proposal of a compliance time schedule on the part of permittees. Based upon this language, compliance schedule provisions should be incorporated into the implementing permit and not implemented through a 13267/13383 order. This will ensure proper legal protection for the permittees while they implement the Trash Amendments.
 - It is requested that Regional Board staff strike TIO Order A.2.F. Alternatively, the deletion of “based on the shortest practicable time” is requested. Footnote 3 should also be revised for consistency with the Trash Amendments.
3. TIO Order A.3 requires permittees to submit a description of how they will coordinate their efforts to install, operate and maintain full capture systems, multi-benefit projects and other controls with Caltrans. Again, this order goes beyond the scope of a 13267 order, and beyond what sections IV.A.5.a.(1).B and III.L.2.a.(2) of the Trash Amendments call for in 13267 orders issued by the Regional Board.
 - It is requested that Regional Board staff strike TIO order A.3.
 - For the same reasons, it is requested that Regional Board staff strike TIO Order A.2.d.
4. In adopting the Trash Amendments, the State Board was clear that the amendments were to be implemented and not interpreted by the Regional Boards. The TIO is not entirely consistent with the Trash Amendments. To ensure that the Amendments are implemented as intended by the State Board, the following changes are requested:
 - Finding 7 Finding 7 does not properly reflect the text of the Trash Amendments with respect to the discretion of a permittee opting to implement Track 2. Specifically, the Trash Amendments allow that Track 2 permittees “may determine the locations or land uses within its jurisdiction to implement any combination of controls.” This specific language is missing from Finding 7. It is requested that Finding 7 be modified to include the above-specified language and that Finding 7 overall accurately reflect the language of Trash Amendments section IV.A.3 and III.L.2.
 - Finding 8 presents the definition for Full Capture System Equivalency. However, the definition omits some of the language from the Trash Amendments that provides

- flexibility to the MS4 Permittees. Add the omitted language from the Trash Amendments to the Tentative Investigative Order.
- Finding 9.a should clarify that the priority land uses only apply under a Track 1 approach.
 - Finding 9.b should include all language from the Trash Amendments.
 - Finding 11 needs to provide more clarity regarding the reporting requirements under Track 1 vs. Track 2. Language from the Trash Amendments should be added.
 - Finding 14 should include clarifying language to specify which requirements apply to Track 1, Track 2, or both.
 - Directive A.2.e incorrectly links Priority Land Uses and Equivalent Alternative Land Uses with a Track 2 approach. Suggest deletion of A.2.e.
5. The Tentative Investigative Order requires the incorporation of the requirements of the Statewide Trash Amendments into the WQIPs. The Statewide Trash Amendments were not, however, written to be part of a watershed-based management approach. Indeed, mandating that trash be a focus of the WQIP may be construed as antithetical to the watershed management approach which emphasizes local prioritization of issues. It should be noted, for example, that trash was not identified as a high priority condition in South Orange County Watershed Management Area. Moreover, for Track 1, incorporation of the Amendments into the WQIP provision unnecessarily complicates what was intended to be a very simple scheme of control device implementation. The Tentative Investigative Order therefore needs to allow jurisdictions the flexibility to determine the best option for incorporating the Trash Amendments, either through the WQIPs or the Jurisdictional Runoff Management Plan (JRMP) or a combination of both.
- It is requested that Regional Board staff delete Finding 13 and revise Finding 12 to enable agencies to include their approach for compliance with the Trash Amendments, whether Track 1 or Track 2, within the Water Quality Improvement Plans or their respective JRMPs, or in a combination of the Water Quality Improvement Plans and JRMPs. TIO Order A.2.d should also be deleted.
6. As recognized by the State Water Resources Control Board and other Regional Boards throughout California, transient encampments have been identified as a non-point source of trash. Public works departments can address some of the consequences of homelessness but not the root causes. While the Regional Water Board's keen interest in tackling the trash and debris associated with transient encampments within flood control infrastructure is recognized, this interest needs to be addressed using an alternative non-point source regulatory construct that includes all responsible parties and is not tied to compliance with the municipal stormwater Permit.

TIO Finding 9.d. seeks to designate "transient encampments" in the San Diego Watershed as "specific land use or locations determined to generate substantial amounts of trash," and requires permittees in the San Diego River Watershed Management Area to develop plans to address trash runoff from the relevant areas of land affected by transient encampments.

Sections III.L.2.d and IV.A.3.d of the Trash Amendments provides that a permitting authority may determine that specific land uses or locations generate substantial amounts of trash, and that in the event this determination is made, the permitting authority may require the MS4 to comply with IV.A.3.a.1 (Track 1) or IV.A.3.a.2 (Track 2). However, the San Diego Watershed is a large geographic area, and is not a specific location, such as a park, stadium, school, campus, or road, all examples provided in the Trash Amendments. Further, "transient encampments," if this term is meant to exclude specific grounds designated as recreational campground, is not an otherwise sanctioned "land use." The requirement to address trash generated within the entirety of the San Diego Watershed as a result of "transient encampments," is thus overbroad and ambiguous, and fails to identify the "specific land uses or locations" for purposes of Sections III.L.2.d and IV.A.3.d of the Trash Amendments. Further, the requirement to address "how trash generated from transient encampments will be addressed" raises a myriad of other issues, including feasibility, and, importantly, constitutional concerns, especially under the Fourth and Fifth Amendments.

- o In light of the above considerations, it is requested that Regional Board staff strike the second paragraph of Finding 9.d, and also strike Order A.4, in favor of considering alternative regulatory mechanisms outside of the Trash Amendments, which have the capability of addressing the issue.

In addition to the above comments, as various letters submitted by cities subject to the TIO have set forth, the TIO represents a state agency order directed to local government and requiring those local governments to expend funds to implement a new program or higher level of service, i.e., the requirements set forth in the TIO. As such, the TIO is a state mandate for which funding has not been provided, and thus is subject to the provisions of Calif. Const. article XIII B, section 6.

Thank you for your attention to our comments. Please contact Richard Boon at (714) 955-0670, with any questions.

Very truly yours

Chris Crompton, Manager
Water Quality Compliance

Cc: (Electronic copies only)

South Orange County Permittees
Orange County Technical Advisory Committee
Andrew Kleis, Deputy Director, City of San Diego
Todd Snyder, Manager, Watershed Protection Program, County of San Diego
Stuart McKibben, Riverside County Flood Control and Water Conservation District
Marc Rodabaugh, San Bernardino County Flood Control District