

DEPARTMENT OF TRANSPORTATION

LEGAL DIVISION

4050 TAYLOR STREET – MS 130

SAN DIEGO, CA 92110-2737

PHONE (619) 688-2531

FAX (619) 688-6905

www.dot.ca.gov



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June 20, 2018

Via Email & U.S. Mail

Roger Mitchell
California Regional Water Quality Control Board
San Diego Region
2375 Northside Drive, Suite 100
San Diego, California 92108
sandiego@waterboards.ca.gov

Re: Tentative Investigation Order No. R9-2018-0021
Reference No. #656543:RMitchell

Dear Mr. Mitchell:

The California Department of Transportation (Caltrans) appreciates the opportunity to comment on the Tentative Investigation Order (I.O.) No. R9-2018-0021. Caltrans identified the following areas in the Tentative I.O. which require clarification or modification to improve Caltrans's ability to meet the objectives of the I.O.:

- (1) Caltrans's use of its enforcement authority to prevent illicit discharges;
- (2) Sources of human fecal material in the San Diego River Watershed;
- (3) Named dischargers; and
- (4) The semiannual progress reports.

These four areas are addressed below.

1. Caltrans's use of its enforcement authority to prevent illicit discharges

The Tentative I.O. correctly notes that Caltrans's National Pollutant Discharge Elimination System (NPDES) permit and Waste Discharge Requirements (WDRs) require discharges of pollutants from Caltrans's municipal separate storm sewer systems (MS4s) to be reduced to the maximum extent practicable (MEP). (Finding 45; Order No. 2012-0011-DWQ, page 7, Finding 7, Performance Standards.) The Tentative I.O. also notes that Caltrans must "effectively prohibit non-storm water discharges into its storm water conveyance system." (Finding 45.)

In Finding 46, the Tentative I.O. discusses illicit discharges from homeless encampments. In particular, Finding 46 states:

Assuming that individuals living in the San Diego River are not regularly using restroom facilities, they are likely defecating outdoors, resulting in the discharge of human fecal material to the watershed tributary to the San Diego River or directly

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into the San Diego River. This is an illicit discharge that must be eliminated per . . .
. Provision B.1 of Order No. 2012-0011-DWQ [Caltrans's NPDES Permit]. . . .
Caltrans must use [its] land use and enforcement authority to prevent and eliminate
illicit discharges to the MS4, including discharges from homeless encampments.

First, and in response, homelessness is a complex social-economic issue involving competing policies, resources, rights, stakeholders, and opinions. While Caltrans has taken extensive efforts to abate illegal encampments on its rights of way, as detailed below, the California Regional Water Quality Control Board, San Diego Region's (Board) findings oversimplify a delicate and multifaceted issue. (*See e.g., Orange County Catholic Worker et al. v. Orange County et al.*, No. 8:18-cv-0155-DOC-JDE (C.D. Cal., Complaint Filed Jan. 29, 2018).) The Board's statement suggests that Caltrans has total control over the activities of the unhomed who transit through its rights of way. As illustrated in numerous lawsuits across the State of California, this is far from the case.

Second, the Tentative I.O. makes nearly no mention of the numerous pollution prevention and source control policies and activities Caltrans has engaged in to deal with unhomed persons on its rights of way. For instance, Caltrans regularly—meaning weekly—inspects and patrols its rights of way to ensure the safety of drivers and the public in general. Caltrans routinely engages in trash and debris cleanup activities and sweeping. Caltrans also erected fences in the San Diego River Watershed to secure its rights of way. (*Cf.* Finding 16 where the Board limits Caltrans's cleanup efforts to the Hepatitis A outbreak.)

Caltrans's efforts do not stop here. Caltrans regularly removes homeless encampments from its rights of way. In fact, Caltrans contracts with hazardous waste removal companies to clean its rights of way after homeless encampments have been removed. Such cleanup includes removing any human fecal material. Caltrans also routinely cooperates with the City of San Diego, the San Diego River Park Foundation, and other local and environmental agencies to remove homeless encampments outside of its rights of way. Additionally, since at least 2015, Caltrans developed maintenance policies for its crews to abate illegal encampments on its rights of way. (*See e.g., Caltrans's Maintenance Manual, Vol. 1, Ch. 1, Pages 1-14 to 1-17.*¹)

Third, and finally, Caltrans efforts are in full compliance with Caltrans's Statewide Stormwater Management Plan (dated July 20, 2016), which the Board approved.² Section 10.3, Illegal

¹ Caltrans's Maintenance Manual is available at: available at
http://www.dot.ca.gov/hq/maint/manual/2015/3_Chpt-1_July_2015_rev_1-02.pdf.

² Caltrans's Statewide Stormwater Management Plan is available at:
https://www.waterboards.ca.gov/water_issues/programs/stormwater/docs/caltrans/swmp/swmp_approved.pdf

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Connection/Illicit Discharge and Illegal Dumping, describes Caltrans's procedures for handling illicit discharges, including: conducting routine inspection and maintenance, investigating, reporting, and taking corrective action (removing illicit discharge and/or providing progressive warnings). All of Caltrans's actions to handle illegal encampments on its rights of way comply with Caltrans's Statewide Stormwater Management Plan. And, the Plan does not require Caltrans to go beyond those measures already approved by the State Board.

Based on the foregoing and other activities included in its existing programs, Caltrans maintains that it has already used its "land use and enforcement authority" to the maximum extent practicable to abate discharges from homeless encampments onto its rights of way.

In sum, Caltrans disagrees with the Board's Finding; rather, Caltrans maintains such "discharges" are "effectively prohibited" by Caltrans consistent with Provision B.1 of Order No. 2012-011-DWQ.

- ***Findings should be added to include Caltrans's prevention, source control, structural and treatment efforts to remove or prevent the deposition of fecal material, trash and debris, and to ensure the safety of the public in its rights of way.***
- ***Finding 46 should be updated to reflect Caltrans's current efforts to use its land use and enforcement authority to prevent illegal discharges and that such efforts comply with Caltrans's obligations under its NPDES permit.***

2. Sources of human fecal material in the San Diego River Watershed

The Tentative I.O. identifies six possible sources for the discharge of human fecal material into the San Diego River Watershed, including sanitary sewer overflows from public-owned sewer collection systems, sewage spills from privately-owned lateral sewer lines, and exfiltration from publicly-owned sanitary sewer collection systems, privately-owned lateral sewer lines, and privately-owned on-site wastewater treatment systems. (Finding 14.) Caltrans does not own, operate, or discharge to any of these potential sources, nor does the Board allege that Caltrans does so. As such, Caltrans cannot control sampling analysis from any these potential sources. More importantly, Caltrans's minor role in the San Diego River Watershed—most of Caltrans's facilities in the Watershed are maintained by other parties by agreement and/or only represent a small portion of the Watershed—should not now obligate Caltrans to fund costly studies from these potential sources that do not tie into any Caltrans facility.

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Additionally, Caltrans has no legal authority to prevent discharges from such sources or to “determine if the management measures in use by the various dischargers in their respective programs are adequately addressing the REC-1, REC-2, and SHELL beneficial use impairments caused by the presence of human fecal material in the San Diego River, its tributaries, and the downstream beach coastal waters,” i.e., the Board’s stated need for this Tentative I.O. (Finding 62.)

- ***The Board should: (1) clarify that Caltrans is only required to develop a work plan and investigative study for discharges from its rights of way, and (2) remove Directive 1.d from the Tentative I.O.***

3. Named Dischargers

The Tentative I.O. omits maps showing real property ownership along the San Diego River Watershed. Such maps inform the Board on whether all relevant parties have been named in the Tentative I.O. Ownership maps also allow the dischargers and the Board to discuss right-of-way access issues, which will inevitably arise in completing any meaningful work plan. Moreover, failing to name all adjacent property owners unfairly imposes responsibilities onto neighboring landowners and limits the power of the “land use and enforcement authority” relating to potential illicit discharges- clearly an issue of concern for the Board. Finally, the failure to include relevant parties early on in the process undercuts the potential effectiveness of any work plan which might be developed.

- ***The Board should include ownership maps in the Tentative I.O. so that all relevant and necessary parties can be brought into this Order.***

4. Semiannual Progress Reports

The Tentative I.O. will require all dischargers to submit semiannual progress reports on the 15th of January and July of each year. (Directive 4.) Considering the limited number of wet weather events in southern California, semiannual reports would be redundant. Moreover, the Board’s July semiannual deadline coincides with year-end reporting at Caltrans. In particular, Caltrans must prepare the Caltrans Storm Water Management Program Annual Report and the Caltrans Storm Water Management Program District Work Plan for the State Board. As such, Caltrans requests that the Tentative I.O. require no more than annual progress reports, due in January of each year.

- ***Require only annual progress reports due in January of each year.***

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Again, thank you for the opportunity to provide comments on the Tentative I.O. We look forward to the Board's substantive responses to Caltrans's comments.

Sincerely,



AMY M. SERIEYS
Deputy Attorney

Cc: Mr. Carl Savage, Chief, Storm Water, Culvert Analysis & Visual Analysis, California Department of Transportation

Laurie Walsh, Senior Water Resources Control Engineer, California Regional Water Quality Control Board, San Diego Region