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June 20, 2018

Via Email to sandiego@waterboards.ca.gov

David Gibson
San Diego Water Resources Control Board
2375 Northside Drive, Suite 100
San Diego, CA 92108
Attn: Roger Mitchell

Re: Comment on Tentative Investigative Order R9-2018-0021

Dear Mr. Gibson:

San Diego Metropolitan Transit System ("MTS") appreciates the opportunity to submit these comments on the San Diego Regional Water Quality Control Board Tentative Order R9-2018-0021, *An Order Directing City of San Diego, City of Santee, City of El Cajon, City of La Mesa, the County of San Diego, the Padre Dam Municipal Utility District, Ramona Municipal Water District, San Diego State University, Metropolitan Transit System, and the California Department of Transportation to Submit Technical and Monitoring Reports to Identify and Quantify the Sources and Transport Pathways of Human Fecal Material to the San Diego River Watershed* ("Tentative Order")

MTS supports the goal of the Tentative Order to identify the sources and pathways of and reduce human fecal material in the San Diego River and its tributaries. MTS also supports the overall intent to establish a collaborative approach to addressing this important water quality issue.

The Tentative Order, however, requires MTS to undertake an investigation or study of potential sources and pathways of human fecal material to the San Diego River and its tributaries without any evidence that MTS contributes many of the sources identified. It is inappropriate to include MTS in the order when there is insufficient evidence to link MTS's activities to the problem which the order seeks to address. See *In the Matter of the Petition of Chevron Products Company*, Order WQO 2004-0005, SWRCB/OCC File A-1343 (May 20, 2004).

Further, the Tentative Order's focus on homeless encampments raises significant socio-economic issues that are not easily solved by the entities currently included in the Tentative Order. Important stakeholders, such as law enforcement, entities providing services to homeless populations, and the Regional Board, are not part of the Tentative Order.



For these reasons, we believe the better approach is to establish a memorandum of agreement between stakeholders, which is designed to establish structures for identifying key sources and pathways and collaborating on solutions. MTS respectfully asks the Regional Board not to issue the Tentative Order and instead to explore a collaborative agreement between stakeholders.

If the Regional Board decides to issue the Tentative Order over these objections, MTS requests revisions to the Tentative Order, which are set forth in this letter.¹

Comments

1. Remove direct deposition from homeless encampments as a potential source or pathway of human fecal material to the San Diego River

The Tentative Order requires MTS to undertake studies, in part, of the following sources and pathways of human fecal material in the San Diego River and its tributaries:

- Illegal connections to MS4s
- Illicit discharges to MS4s
- Direct deposition from homeless encampments

The requirement for MTS to investigate direct deposition relies, in large part, on the designation of the San Diego River as an MS4, and of homeless encampments as illegal connections and discharges to the MS4, as set forth in Finding 46. Finding 46 of the Tentative Order states, in part, that MTS is required to use its "land use and enforcement authority to prevent and eliminate illicit discharges to the MS4, including discharges from homeless encampments. This requirement pertains to the San Diego River because urban streams such as the San Diego River are considered both an MS4 and a receiving water per Finding 11 of Order No. R9-2013-0001." MTS requests that this Finding be deleted from the Tentative Order for the reasons set forth below, and that the requirement to conduct an investigative study of the direct deposition from individuals in homeless encampments likewise be deleted.

a. The Regional Board exceeds its authority by considering the San Diego River and its tributaries to be both waters of the United States and point sources.

It is improper to require MTS to study direct deposition from homeless encampments pursuant to Finding 46, which is based on a permit that does not cover MTS, because that Finding is contrary to the law.

First, MTS is a Phase II MS4 and is not subject to Order R9-2013-0001. A finding in Order R9-2013-0001 does not apply to MTS. Thus, Finding 46 in the Tentative Order, which is based on Order R9-2013-0001, does not support a conclusion that the San Diego River is part of MTS's MS4, or that direct discharges to the San Diego River are a violation of MTS's permit. It is, therefore, inaccurate and inappropriate to state that direct discharges to the river constitute a violation of MTS's MS4 permit.

¹ This request for revisions does not constitute concurrence in the issuance of the Tentative Order.

Second, it is contrary to the plain language and structure of the Clean Water Act to consider a navigable water to be an MS4. A person who dumps pollutants directly into the San Diego River is not discharging to MTS's MS4. In the same way, a person defecating in the river is not discharging to MTS's MS4. Finding 46 of the Tentative Order is based on a legally flawed determination, that is itself subject to a petition with the State Water Resources Control Board. See, e.g., State Water Resources Control Board, Water Quality Petition A-2254(h).

The federal definition of "municipal separate storm sewer system" does not include a water of the United States or its tributaries:

(8) Municipal separate storm sewer means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):

(i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States;

(ii) Designed or used for collecting or conveying storm water;

(iii) Which is not a combined sewer; and

(iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2.

40 C.F.R. § 122.26(b)(8).

Not only does the definition of "municipal separate storm sewer" not include waters of the United States or its tributaries, "waters of the United States" is separately defined and does not include "municipal separate storm sewer systems." 40 C.F.R. § 122.2. By considering a water of the United States (the San Diego River) to be an MS4, the Regional Board renders the term "waters of the United States" superfluous, contrary to basic rules of statutory interpretation. See *Hibbs v. Winn* (2004) 542 U.S. 88, 101 ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant ... ")

Further, the structure of the Clean Water Act does not permit the Regional Board to consider a water of the United States to be an MS4. The Clean Water Act is premised entirely on the discharge of a pollutant to a navigable water from a point source. 33 U.S.C. § 1311. A navigable water cannot discharge into itself, even where humans have modified the navigable water for purposes of conveying storm flows. See *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.* (2013) 568 U.S. 78 (holding that the flow of polluted water from one portion of a river, through a concrete channel or other engineered improvement in the river, to a lower portion of the same river, does not constitute a discharge of pollutants). The definition of

"discharge of a pollutant" under the Act "requires that the pollutant flow 'to navigable waters from any point source.' The most natural reading of this language is that the point source is distinct from navigable water." *Froebel v. Meyer*, 217 F.3d 928, 937 (7th Cir. 2000).

Finding 46 is based on a legally flawed premise. The Regional Board exceeds its authority by requiring MS4 permittees to address the direct deposition of human fecal material to the San Diego River and its tributaries based on this finding. Because direct deposition of human fecal material into the San Diego River and its tributaries does not constitute an illicit discharge *to the MS4*, it is wholly improper to consider such discharges to be a violation of MTS's MS4 permit or to direct MTS to investigate and remediate such direct deposition by virtue of its MS4 discharges to the San Diego River.

b. The Regional Board's targeting of homeless individuals runs contrary to significant constitutional and statutory provisions

Homelessness is a complex socio-economic issue whose causes and effects do not have a simple remedy. MTS's ability to enact a program that prevents individuals from establishing encampments in the San Diego River and its tributaries is limited by fundamental constitutional rights of movement, association, expression, and equal protection of the laws. See, e.g., *Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41; see also *State of Hawai'i v. Beltran* (2007) 116 Hawai'i 146. By targeting homeless persons on the basis of homelessness, the Tentative Order may also implicate the Regional Board in an unconstitutional selective use of its authority. See *Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 63. The Regional Board, however, has authority to issue an order directly to individuals discharging to the river, as *dischargers*, which MTS cannot do.

In addition, MTS's ability to investigate and study homeless encampments is limited by the scope of MTS's enabling legislation. MTS was established as a special district by the California Legislature in 1975 pursuant to Public Utilities Code § 120000 *et seq.* MTS is authorized to operate or to let contracts to operate public mass transit guideways within the Cities of Chula Vista, Coronado, El Cajon, Imperial Beach, La Mesa, Lemon Grove, National City, Poway, San Diego and Santee, as well as within all of the unincorporated areas of the County of San Diego not served by the North San Diego County Transit Development Board.

MTS's enabling legislation does not grant land use or police power to MTS in the same nature that cities possess. This means that MTS cannot act to conduct investigations or studies or take enforcement actions without assistance from other agencies that possess such power. On the ground, this means that MTS generally requires assistance from local law enforcement to arrest and remove homeless encampments. A police officer or sheriff deputy must be present to take an individual into custody for such violations or for felonies. MTS also requires cooperation and assistance from the City of San Diego Lifeguard Swift Water Rescue Team to access the islands in the San Diego River. A long-term solution will require participation and assistance from the applicable social service agencies to create and identify housing alternatives for the San Diego River homeless encampment population. Requiring MTS to undertake studies and activities outside of the scope of its authority is improper.

Importantly, individuals in homeless encampments on MTS's property are engaging in criminal activity. Their direct deposition of fecal material cannot be imputed to MTS as if MTS were directly discharging into the River. Because the Tentative Order requires MTS to undertake actions outside of MTS's scope of authority and to take actions that are subject to significant constitutional and statutory limitations, MTS believes the Tentative Order is

the wrong way to address the water quality effects from homeless encampments. We believe the better approach is for the Regional Board to issue an order directly to individuals discharging to the river and to establish a memorandum of agreement between stakeholders, designed to establish structures for identifying key sources and pathways and collaborating on solutions.

MTS respectfully asks the Regional Board not to issue the Tentative Order and instead to explore a collaborative agreement between stakeholders. If this Tentative Order issues over MTS's objection, MTS requests the following revisions:

Requested Revision 1.a. Delete Finding 46.

Requested Revision 1.b. Remove "direct deposition from homeless encampments" from Finding 14 and from paragraph 1 of the Order Directive 1.

2. There Is No Evidence Supporting The Requirement For MTS to Study Sewage Discharges

The Tentative Order requires MTS to undertake studies, in part, of the following sources and pathways of human fecal material in the San Diego River and its tributaries:

- Sewage spills from privately-owned lateral sewer lines
- Exfiltration from publicly-owned sanitary sewer collection systems
- Exfiltration from privately owned lateral sewer lines and privately owned OWTS
- Sanitary sewer overflows from publicly owned sewer collection systems
- Treated effluent from wastewater treatment plants

MTS does not own or operate a public sewer collection system or wastewater treatment plant. MTS does not have authority to regulate private property on which private laterals and private septic systems are located. Discharges from wastewater treatment plants, publicly owned sewage systems, and private property are not the responsibility or even within the authority of MTS. Thus, there is no evidentiary basis under *Chevron* for requiring MTS to investigate these potential sources and pathways.

MTS requests that the Tentative Order be revised to specify that each Discharger is only responsible for submitting an investigative study and monitoring of the sources of human fecal material within that Discharger's control

Requested Revision 2.a Revise the first paragraph of Order Directive 1 as follows:

Investigation to Identify Sources of Human Fecal Material Discharges in the San Diego River Watershed. No later than June 30, 2022, ~~the~~ each Dischargers must submit the results (Final Investigative Study Report) of an investigative study, or studies, to identify and quantify sources of human fecal material in wet weather discharges and in that Discharger's control to the San

Diego River and its tributaries.

3. MTS's MS4 permit does not require MTS to implement the Bacteria TMDL

The Tentative Order states that MTS is responsible for complying with the Bacteria TMDL. Finding 44. TMDLs are not self-implementing. The Bacteria TMDL is implemented, in part, through incorporation of its requirements into MS4 permits. Section F.5.i of the Phase II MS4 General Permit, requires MTS to comply with all applicable, approved TMDLs that assign a Waste Load Allocation to MTS and which have been identified in Attachment G of the Phase II MS4 General Permit. As of June 2018, Attachment G of the Phase II MS4 General Permit does not list MTS as an entity required to comply with any Waste Load Allocations in any of the TMDLs in the Regional Board's jurisdiction. Thus, MTS's MS4 permit does not include MTS as an entity required to comply with the Bacteria TMDL. To the extent the Tentative Order modifies the requirements of MTS's MS4 permit, it is improper for the Tentative Order to amend the permit.

Requested Revision 3. Revise Finding 44 as follows:

Provision C of Order No. 2013-0001-DWQ states that "[p]ermittees shall implement controls ... to reduce the discharge of pollutants from their MS4s to waters of the United States to the MEP." Provisions F.5.a.1.(ii)(a) and F.5.a.1.(ii)(b) require permittees to have adequate legal authority to 1) effectively prohibit non-stormwater discharges through the MS4 and 2) detect and eliminate illicit discharges and illegal connections to the MS4. ~~As owners and operators of small MS4s that are responsible for complying with the Bacteria TMDL WLAs, San Diego State University and Metropolitan Transit System must reduce bacteria loading to the San Diego River Watershed using their legal authority described above by the compliance schedule described in the Bacteria TMDL.~~

4. Align reporting requirements with existing reporting schedule

The Tentative Order requires Dischargers to submit progress reports twice each year, which describe actions taken during the previous six months, the results of all sampling, all scheduled activities, including a graphical depiction of the progress of the investigative study, any modifications to the work plan, and any delays encountered as well as efforts to mitigate delays.

Preparing semiannual reports on the Work Plan creates reporting obligations that must be added to MTS's established reporting schedule. MTS already prepares reports under multiple General Industrial Permits and its MS4 permit. A requirement to prepare these semiannual reports appears to disregard MTS's established reporting obligations and to prioritize reporting on the Work Plan over long-standing and long-anticipated programmatic elements, such as implementing the industrial and MS4 stormwater management programs. Because semiannual reporting on the Work Plan adds another "complex and resource-intensive" program without consideration of limited time and personnel resources already dedicated to water quality programs, MTS requests the following revision:

Requested Revision 4 Revise paragraph 4 of the Ordering Provisions to read as follows:

The Each Dischargers shall prepare and provide written semiannual progress reports as provided below:

(a) Semiannual progress reports must: (1) describe the actions taken toward achieving compliance with this Investigative Order during the previous six months; (2) include all results of sampling, tests, and all other verified or validated data received or generated by or on behalf of the Dischargers during the previous six months in the implementation of the actions required by this Investigative Order; (3) describe all activities including, data collection and other field activities which are scheduled for the next six months and provide other information relating to the progress of work, including, but not limited to, a graphical depiction of the progress of the investigative study; (4) identify any modifications to the Investigative Study Work Plan or other work plan(s) that the Dischargers proposed to the San Diego Water Board or that have been approved by San Diego Water Board during the previous six months; and (5) include information regarding all delays encountered or anticipated that may affect the future schedule for completion of the actions required, and a description of all efforts made to mitigate those delays or anticipated delays.

(b) All semiannual progress reports shall be submitted to the San Diego Water Board by the thirty-first (31st)(15th) day of October January and July of each year following the submission of the Work Plan effective date of this Investigative Order. Submission of these progress reports shall continue until submittal of the Final Investigative Study Report verifying completion of the investigative study or studies required under Directive 1 of this Investigative Order.

Thank you for considering these comments on the Tentative Order. Please contact me at (619) 557-4512 or karen.landiers@sdmts.com with any questions or concerns. You may also work with our Environmental Health & Safety Specialist, Sean-Ryan McCray, who may be contacted at (619) 238-0100 ext. 6422 or sean-ryan.mccray@sdmts.com.

Sincerely,



Karen Landers
General Counsel