



CITY OF SANTEE

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June 18, 2018

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

Via Email to sandiego@waterboards.ca.gov

Attn: Roger Mitchell

**Re: Comment on Tentative Investigative Order R9-2018-0021
Reference 656543: RMitchell**

Dear Mr. Gibson:

The City of Santee ("City") appreciates the opportunity to submit these comments on the San Diego Regional Water Quality Control Board Tentative Investigative Order R9-2018-0021, An Order Directing the City of San Diego, the City of Santee, the City of El Cajon, the City of La Mesa, the County of San Diego, the Padre Dam Municipal Utility 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 ("Order").

The Tentative Order requires the City to undertake an investigation of the following possible 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
- 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

The City supports the Regional Board's intent to establish a collaborative approach toward addressing an important water quality issue in the San Diego River watershed; however, we believe the Order is not the best approach.

The Order's focus on homeless encampments as a source of direct deposition of human fecal matter to the San Diego River and its tributaries raises significant socio-economic issues that are not easily solved by the entities currently included in the Order. Important stakeholders, such as law enforcement, entities providing services to homeless populations, and the Regional Board, are not part of the Order. For this reason, 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.

The City respectfully asks the Regional Board not to issue the Order and instead to explore a collaborative agreement between stakeholders.

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

REQUESTED REVISIONS

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

This City requests that Finding 46 be removed from the Order and that "direct deposition from homeless encampments" be removed from Finding 14 and from paragraph 1 of the Order Directive 1.

Finding 46 of the Order states that homeless individuals who defecate outdoors, resulting in a discharge of human fecal material to the watershed tributary to the San Diego River or directly into the San Diego River, constitutes "an illicit discharge that must be eliminated per Provision E.2.d of Order No. R9-2013-0001 ..." It further states that the City "must ... prevent and eliminate illicit discharges to ... the San Diego River [because it] is considered both an MS4 and a receiving water per Finding 11 of Order No. R9-2013-0001."

The City requests that this Finding be deleted from the 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.**

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

The Ordering Directives that focus on direct deposition of human fecal material are premised on the legally flawed finding that MS4 permittees are required to “prevent illicit discharges to ... the San Diego River [because it] is considered both an MS4 and a receiving water per Finding 11 of Order No. R9-2013-0001.” A person who dumps pollutants directly into the San Diego River is not discharging to the City’s MS4. In the same way, a person defecating in the river is not discharging to the City’s MS4.

As the Co-permittees have challenged in petitions to the State Water Resources Control Board, it is contrary to the plain language and structure of federal law to consider a navigable water to be an MS4. See 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). Designating a “water of the United States” to be an MS4 also runs afoul of the definition of MS4, because the City does not “own or operate” the San Diego River. In California, natural waterbodies are not owned by the municipality through which they flow. Such water bodies are generally administered by the State of California in the public trust for the right of the people to use such waters for certain purposes. *Marks v. Whitney* (1971) 6 Cal.3d 251, 259-260. The Legislature, acting within the confines of the common law public trust doctrine, is the ultimate administrator of the trust and may often be the final arbiter of permissible uses of trust lands.

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 the City’s MS4 permit or to direct MS4 permittees to investigate and remediate such direct deposition by virtue of their MS4 discharges to the San Diego River.

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

The Order directs the City to undertake a study of certain effects of homelessness on water quality in the San Diego River and its tributaries and to determine how the data will be used to prevent discharges of human fecal material from homeless encampments (Finding 46, Order Directives 1 and 2). The Order implies that the City has authority to prevent homeless individuals from living in the San Diego River watershed (Finding 46). This overly simplistic drafting ignores significant constitutional and statutory limitations on the City and Regional Board’s ability to target homeless individuals.

Homelessness is a complex socio-economic issue whose causes and effects do not have a simple remedy. *The City’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.

Even if the City was able to adopt a constitutionally sound program regulating access to the San Diego River and its tributaries, constitutional and statutory provisions restrict the City's authority to fully enforce such a program against large groups of homeless individuals, such as veterans and homeless persons under 25 years of age, and its ability to remove personal property from encampments. Penal Code §§ 1463.012 (prohibiting wage garnishment against certain homeless veterans); 1463.011 (same for persons under age 25); *Lavan v. City of Los Angeles* (9th Cir. 2012) 693 F.3d 1022 (due process protects seizure of homeless individual's personal property). Further, without adequate shelters available for homeless individuals to use, for example, enforcement of a facially constitutional ordinance may fail. See *Jones v. City of Los Angeles* (9th Cir. 2006) 444 F.3d 1118, vacated after settlement by 505 F.3d 1006. By targeting homeless persons, the 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.

For these reasons, if the Regional Board issues the Order, the City 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. Provide sufficient time to prepare and implement the work plan

The Order requires the dischargers to submit a Work Plan, no later than January 7, 2019, describing the proposed actions to be conducted in order to complete an investigative study or studies of the sources of human fecal material in wet weather discharges to the San Diego River (Order Directive 2). The Order recognizes that the investigative studies will be "complex and resource-intensive." The Order does not clearly state whether the Board expects each discharger to prepare a separate work plan, or if a single work plan, with all dischargers under one plan, is what is preferred.

If the intent was to have a single Work Plan, additional time will be required to complete such a request. Bringing eleven dischargers together to negotiate agreements (MOU), identify cost shares and funding sources, agree upon an approach, hire a consultant, and subsequently review and unanimously approve a Work Plan will take significantly more time than the six month timeline provided.

The City requests the following revisions to clarify the nature of the Work Plan (a work plan for each agency (discharger) vs. a single work plan for all agencies (dischargers) and to extend the implementation time frame. If a collaborative plan is desired, the City requests that, the deadline for the Work Plan be revised to correspond with the fiscal year and budgeting process:

Requested Revision 2.a. Explicitly state the type of Work Plan that is requested (individual agency vs. multi agency) and extend the timeline for implementing the

Work Plan. If the desired approach is a single work plan for all dischargers, revise paragraph 3 of the Ordering Provisions to read as follows:

No later than ~~January 7, 2019~~, one fiscal year after the effective date of this Order, the Dischargers must submit a single an Investigative Study Work Plan (with all dischargers under one plan) describing the proposed actions to be conducted to complete the investigative study described in Directive 1. The Dischargers must implement the Investigative Study Work Plan within ~~60~~ 90 days of submittal, unless otherwise directed by the San Diego Water Board. The Investigative Study Work Plan must include, but not be limited to, the following:

Requested Revision 2.b. Explicitly state the type of Work Plan that is requested (individual agency vs. multi agency) and extend the timeline for implementing the Work Plan. If the desired approach is for each discharger to develop their own, individual work plan, revise paragraph 3 of the Ordering Provisions to read as follows:

No later than **January 7, 2019**, ~~the~~ each Dischargers must submit an Investigative Study Work Plan describing the proposed actions to be conducted to complete the investigative study described in Directive 1. The Dischargers must implement the Investigative Study Work Plan within ~~60~~ 90 days of submittal, unless otherwise directed by the San Diego Water Board. The Investigative Study Work Plan must include, but not be limited to, the following:

3. There is no evidence supporting the requirement that the City investigate potential human fecal material sources and pathways that are outside its jurisdiction

It is inappropriate to include the City in the Tentative Order where there is insufficient evidence to link the City's activities to the problem that 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). The Order directs the City, as a "Discharger," to complete an investigative study or studies of: (a) sanitary sewer overflows from publicly-owned sewer collection systems; (b) sewage spills from privately-owned lateral sewer lines; (c) exfiltration from publicly-owned sanitary sewer collection systems, privately-owned lateral sewer lines, and privately-owned on-site wastewater treatment systems; and (d) treated effluent from wastewater treatment plants.

The City, however, does not own or operate a public sewer collection system or a wastewater treatment plant. The City has no jurisdiction or authority over the publicly owned sewer collection system or publicly wastewater treatment plant within the city limits. Further, the City does not regulate or have authority to access or regulate privately-owned lateral sewer lines or on-site wastewater treatment systems.

The Order also appears to assume that the City owns or controls all portions of the San Diego River and its tributaries that flow through the City's jurisdiction. Large portions of these natural waterbodies are owned and controlled by other entities and the City does not have any authority to enter or control these areas. The City does not have legal access to these areas for purposes of conducting monitoring.

The City cannot exercise authority over another public agency's jurisdiction, cannot regulate private property regulated by other public agencies, and cannot enter property owned by others without permission. For this reason, it is contrary to the *Chevron* court case decision for the Order to obligate the City to undertake studies or monitoring of these facilities and areas.

The City requests that the 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 3.a. Revise the first paragraph of Order Directive 1 as follows:

Investigation to Identify Sources of Human Fecal Material in Wet Weather Discharges in the San Diego River Watershed. No later than June 30, 2022, ~~the each~~ Dischargers must submit the results (Final 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.

Requested Revision 3.b. Add the following sentence to the end of Order Directive 2:

No monitoring is required in areas where a Discharger lacks legal access.

4. Reduce monitoring and reporting obligations

- a. Clarify that Discharges are not required to conduct monitoring unless there is a rain event that creates a discharge and are not required to conduct monitoring in areas where they lack legal access.**

The Order requires Dischargers to identify and quantify sources of human fecal material in wet weather discharges, to conduct sampling and chemical analyses and to provide written progress reports twice each year, which include all results of the sampling (Order Directive 1 and 2). The required monitoring program will thus be dependent on the occurrence of rain events during the applicable reporting periods. In San Diego County, there are large periods of time when there is insufficient rain to conduct sampling of wet weather discharges. The Order does not contain any provisions addressing how monitoring should occur where wet weather is insufficient to allow for monitoring. For this reason, the City requests that the Order be modified as follows:

Requested Revision 4.a. Add the following sentence to the end of Directive 2:

No sampling or chemical analysis is required during a reporting period unless there is at least one precipitation event that produces a discharge from the MS4 and is preceded by 48 hours without a precipitation event that produces a discharge. No monitoring is required in areas where a Discharger lacks legal access.

b. Align reporting requirements with existing reporting schedule

The Order requires Dischargers to submit progress reports each July 15 and January 15, 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 additional reporting obligations that must be added to City's established reporting schedule. The City already prepares reports on the Jurisdictional Runoff Management Plan ("JRMP"), the Water Quality Improvement Plan ("WQIP"), and the Trash Order provisions. A requirement to prepare these semiannual reports appears to disregard the City's established reporting obligations and to prioritize reporting on the Work Plan over long-standing and long-anticipated programmatic elements, such as implementing the JRMP and WQIP, implementing the requirements of the Trash Order, TMDL implementation, and participating in the bacteria reopener and MS4 permit reissuance process.

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, the City requests the following revision:

Requested Revision 4.b. Revise item 4 a. and b. of the Ordering Provisions to read as follows:

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

~~Semia~~Annual progress reports must: (1) describe the actions taken toward achieving compliance with this Investigative Order during the previous ~~six months~~ year; (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~~ year 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~~ year 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~~ year; 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.

All ~~semia~~Annual progress reports shall be submitted to the San Diego Water Board by the ~~(15th 31st)~~ day of ~~January and July~~ of October each year following the ~~effective date of this Investigative Order~~ submission of the Work Plan. 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.

5. Clarify the relationship between this Order and the Bacteria TMDL

The City is an entity subject to the requirements of the Bacteria TMDL, which addresses many of the same concerns that motivate the Order. If the Order is issued in some form, then the City requests clarification of the relationship between the two documents and asks that compliance with one be deemed compliance with the other.

Requested Revision 5. Clarify that compliance with the Order constitutes compliance with the Bacteria TMDL.

6. Provide funding for conducting the studies

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. The Order requires the City to implement a new program to investigate the sources and pathways of human fecal material in wet weather discharges to the San Diego River. Issued pursuant to Water Code sections 13267 and 13383, the Order constitutes a state mandate. The City does not have authority to levy service charges, fees, or assessments sufficient to pay for the mandated program.

Because the Order constitutes a state mandate, the City requests that the Regional Board comply with Section 17561 of the Government Code and undertake the following:

Requested Revision 6.a. Prepare and provide a bill appropriating the funds for the costs mandated by the Order, or alternatively, provide an appropriation for these costs in the Budget Bill for the next fiscal year.

Requested Revision 6.b. Revise the Order to cite that item of appropriation in the Budget Bill or that appropriation in any other bill that is intended to serve as the source from which the Controller may pay the claims of local agencies and school districts.

As previously stated in this letter, the City respectfully asks the Regional Board not to issue the Order and instead to explore a collaborative agreement between stakeholders.

Thank you for considering these comments on the Order. Please contact Cecilia Tipton, Storm Water Program Manager at 619-258-4100, x. 177 with any questions or concerns.

Sincerely,



Marlene Best
City Manager

Copy: City Council
Melanie Kush, Director of Development Services
Cecilia Tipton, Storm Water Program Manager