



August 5, 2014

Jeanine Townsend  
State Water Resources Control Board  
1001 I Street  
Sacramento, CA 95814



RE: Comments on Draft Amendments to Statewide Water Quality Control Plans for Trash

Dear Ms. Townsend,

The County of Orange and the Orange County Flood Control District (collectively, “County”) submit the following comments on the Draft Amendments to Statewide Water Quality Control Plans to Control Trash (“proposed Trash Amendments”)<sup>1</sup>. The County appreciates the opportunity to provide comments, but has the following concerns regarding the proposed Trash Amendments as currently drafted.<sup>2</sup>

- 1. The Record is Inadequate to Support Statewide Regulation.** The County shares the State Board’s concern for ensuring the State’s waterways are free from litter and debris. The proposed Trash Amendments will apply to all surface waters of the State. The Draft Staff Report, however, identifies 73 waterbodies that are listed for trash, which represents only 2 percent of the total waterbodies in California. Only four regions have trash listings, two of which have TMDLs for trash (Los Angeles and Colorado). In addition, most of the factual justification described in Appendix A justifying the proposed Trash Amendments comes largely from the coastal areas of Los Angeles and San Francisco. Furthermore, there has not been a demonstration that trash is likely to cause a discharge of waste to most waters of the State. Therefore, there is a lack of substantial evidence justifying application of the proposed Trash Amendments to every storm drain statewide, particularly with respect to inland areas.
- 2. State Water Board Authority Is Questionable.** The primary means to regulate trash has been through the federal 303(d) listing and TMDL processes. In the two regions subject to trash TMDLs, TMDLs have either been established by the Regional Board or EPA. The proposed regulatory basis for imposing the proposed Trash Amendments, however, is Water Code section 13170, whereby the State Board may adopt water quality control plans where they are applicable. Without substantial evidence to justify statewide trash controls, the State Board would be regulating waterways where the proposed Trash Amendments should not be applicable. Furthermore, the State Board would

<sup>1</sup> The following cities asked to be recognized as concurring entities: Brea, Fullerton, Garden Grove, Huntington Beach, Irvine, Lake Forest, San Juan Capistrano, Santa Ana, Seal Beach, Tustin, and Yorba Linda

<sup>2</sup> The County supports the comments of the City of Irvine, the Counties of San Diego and Riverside, and the California Stormwater Quality Association (CASQA).

essentially usurp the Constitutional land use authority of local governments as well as the expertise of the Regional Water Boards, which are in a better position to identify priority pollutants and regulate accordingly. State Board staff appears to utilize the compliance approach used in the LA Trash TMDL that was upheld in *City of Arcadia v. State Water Resources Control Bd.*,<sup>3</sup> but sidesteps the listing and TMDL process entirely. Lastly, while MS4s may transport trash into statewide waterways, the studies cited in Appendix A note that trash is largely a non-point source issue due to storm and wind events. To the extent that the State Board exercises proper authority to require the installation of catch basins to prevent non-point sources of trash, the State Board would act under authority of State Law, not federal law.

The County recommends the approach suggested by San Diego County that the State Board should establish the narrative water quality objective for trash and establish implementation procedures for the water quality objective that are triggered when the water quality objective has been exceeded and the NPDES permit holder has been demonstrated to be a source of trash causing the exceedance. This approach is consistent with the approach taken to regulate all other pollutants in the State, and allows an MS4 to prioritize trash control where its waterbody is specifically listed for trash.

To the extent the proposed Trash Amendments are lawfully adopted and narrowly tailored to those high priority areas, the County offers the following additional comments:

- 3. The Proposed Trash Amendments Would Impose New State Requirements on Local Entities without Identifying a Funding Source.** The costs for implementation of the proposed Trash Amendments are much higher than estimated by State Board staff. For example, if the City of Irvine were to implement Track 1, full capture devices would be required at 4,600 catch basins (out of 6,423 total). Utilizing the estimated cost from Appendix C: Economic Considerations for the Proposed Amendments to Statewide Water Quality Control Plans to Control Trash of \$1,142 per catch basin insert for installation and one year of operations and maintenance, the estimated total cost to implement Track 1 is \$5,253,200. This cost estimate results in a cost per capita of \$21.65, more than double the \$10.50 estimated cost per capita included in the proposed Trash Amendments in Table 13. Operations and maintenance costs would then continue for the life of the device. Furthermore, Permittees subject to the Los Angeles River TMDL have expressed substantial difficulty in reaching full compliance for the final 5% of the catch basins in their city without expending substantial amounts, ranging from \$10,000 to \$100,000 per catch basin, to completely retrofit the remaining catch basins. Moreover, if the State Board properly exercises its authority over MS4s, it is exercising State authority.<sup>4</sup> The County therefore supports the California Stormwater Quality Association (CASQA) recommendation that the State Board assist with the development of funding sources for Permittees to comply with the proposed Trash Amendments.
- 4. The Proposed Trash Amendments Do Not Contain Sufficient Compliance Options.** MS4 permittees would be considered in full compliance with the prohibition of trash discharge so long as the permittees were fully implementing Track 1 or Track 2. The proposed Trash Amendments, however,

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<sup>3</sup> 135 Cal. App. 4<sup>th</sup> 1392 (2006).

<sup>4</sup> *Tahoe-Sierra Preservation Council v. State Water Resources Control Bd.*, 210 Cal. App. 3d 1421, 1432 and 1435 (1989).

are silent on whether meeting the discharge prohibition requirements also means full compliance with receiving water limitations. This creates an ambiguity where a permittee could still be subject to a trash TMDL or could potentially be deemed as not complying with the receiving water limitations section of its permit. The proposed Trash Amendments should be clarified to define compliance accordingly.

5. **Revise Definition of a Full Capture System.** As was previously stated in the County's May 10, 2013 letter, the definition of "full capture systems" should be refined to specify that the point of compliance is the street level (drain inlet) for catch basin-based BMPs. Additionally, full capture system specifications should be consistent with existing MS4 Permit numeric sizing criteria for structural treatment BMPs. The proposed Los Angeles River Watershed Trash TMDL language provides one example calculation for establishing a flow-based system; however, other MS4 permit numeric sizing criteria should be included as an option. For example, existing MS4 Permit language for Orange County requires that BMPs be sized to treat either: 1) the maximum flow rate of runoff produced from a rainfall intensity of 0.2 inch of rainfall per hour, for each hour of a storm event; 2) the maximum flow rate of runoff produced by the 85<sup>th</sup> percentile hourly rainfall intensity, as determined from the local historical rainfall record, multiplied by a factor of two; or 3) the maximum flow rate of runoff, as determined from the local historical rainfall record, which achieves approximately the same reduction in pollutant loads and flows as achieved by mitigation of the 85<sup>th</sup> percentile hourly rainfall intensity multiplied by a factor of two.
6. **Revise the Definition of "Trash."** The definition of "trash" should be amended to include a size limit of 5mm, consistent with the definition of "full capture systems" that are the basis for compliance for Track 1. State Board staff's rationale for omitting the size limit from the definition is to ensure the prohibition pertains to pre-production plastics and "other materials." There are two problems with this justification: (1) The State Board assumes that pre-production plastics will be adequately and thoroughly addressed by industrial activities via the Industrial General Permit; and, (2) The State Board has not defined "other materials," thereby creating an additional source of trash of unknown composition or origin that must be controlled without an explanation as to which entity would be responsible. Without the inclusion of a size limit in the definition of "trash," MS4 operators could end up liable for pre-production plastics and "other materials" less than 5mm in size that are found within its storm drain system, even if in full compliance with either Track 1 or Track 2.
7. **Allow an Exemption and/or Time Extension for Catch Basins with Grant-Funded BMPs Installed Prior to Adoption of the Proposed Trash Amendments.** Several municipalities within the County have participated in grant-funded Measure M projects<sup>5</sup> through the Orange County Transportation Authority (OCTA) to install catch basin BMPs. Per Measure M rules, these BMPs *must* remain in place for at least 10 years or the participating municipalities would be required to repay the funding they received. These catch basin BMPs were not designed to meet the definition of a full capture system as outlined by the proposed Trash Amendments; therefore, the municipalities face either non-compliance with the Trash Amendment provisions or the loss of a significant amount of funds due to repayment of their Measure M grant(s). The County requests that either the affected catch basins be exempted from the requirements of the proposed Trash Amendments, or these

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<sup>5</sup> Measure M is a half cent sales tax for transportation improvements first approved by Orange County voters in 1990, and renewed by voters for a 30-year extension in 2006.

municipalities be granted an extension to comply with the proposed Trash Amendments at these catch basin locations.

- 8. Revise Determination of High Trash Generating Areas.** As currently drafted, the proposed Trash Amendments equate high trash generating areas to priority land use areas, which are defined as areas developed as high density residential, industrial, commercial, mixed urban, and public transportation stations. State Board staff estimate that this definition of priority land use areas will equate to 2.35% of the Santa Ana Regional Board land area and 1.68% of the San Diego Regional Board land area; however, this is a gross underestimation of the land area that would actually be categorized “priority land uses” in Orange County, per the current definition. For example, the City of Irvine has conducted a GIS analysis of the land use areas in their city and found that 71% of the City’s developed area would be considered priority land use areas under the proposed Trash Amendments. This figure is expected to be equal or greater for the majority of the other cities within Orange County, as Irvine ranks 28<sup>th</sup> in the County for population density, and many of the areas that would be considered priority land use areas are not high trash generating locations. The County recommends that each municipality be allowed to identify the high trash generating locations in their municipal area (a) or, if the priority land use designation is retained, that the definition for high density residential is revised to be consistent with state and local standards (b).
- a. Allow Municipality to Determine High Trash Generating Locations.** Given that the extent of the proposed Trash Amendments will be much greater than the State Board staff anticipated, the County requests that each municipality be allowed to determine which areas constitute high priority trash generating locations within its jurisdiction. The definition of priority land use areas included in the proposed Trash Amendments is based on a review of trash generation in Los Angeles County, and is not necessarily reflective of conditions in Orange County. Furthermore, MS4 Permittees in Orange County have collected data on catch basin maintenance for over ten years and could easily refer to this data to identify the greatest trash generating areas within their municipal area. This beneficial revision can be accomplished through amending the language on page E-9 regarding authorization of “equivalent alternative land use[s]” to include the following: “An MS4 may request its permitting authority to approve an exemption from treatment controls if that MS4 has areas within its jurisdiction that generate trash at rates that are significantly lower than estimated for the priority land use listed.”
- b. Amend the Definition of High Density Residential.** Although State Board staff cite the Governor’s Office of Planning and Research 2003 General Plan Guidelines as an “example of the dwelling unit standards used in local general plans” at 15-30 units per acre, high density residential is defined in the proposed Trash Amendments as “all land uses with at least ten (10) developed dwelling units/acre.” The most prevalent standard for high density residential in Orange County is nearly double that of the proposed Trash Amendments, at 18 units per acre<sup>6</sup>. The County recommends that the definition for high density residential be amended in one of the following three ways: (1) allow each municipality to use the definition of high density residential included in their General Plan; (2) revise the definition of high density residential in the proposed Trash Amendments so that it is consistent with the Governor’s Office of Planning and Research 2003 General Plan Guidelines at 15 units per acre; or (3) replace high density residential with multi-family residential in the definition of priority land use areas.

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<sup>6</sup> Based on a review of the following 10 representative cities within the County: Dana Point, Garden Grove, Huntington Beach, Irvine, La Palma, San Juan Capistrano, Santa Ana, Stanton, and Yorba Linda.

- 9. Support Watershed Planning Efforts.** Orange County Permittees in Region 9 – San Diego will be required in 2015 to identify the highest priority water quality conditions within each watershed and develop strategies to address those priority areas and pollutants. The County has already determined bacteria, nutrients, and toxicity to be the top pollutants of concern in both Region 8 and Region 9. Requiring trash capture within catch basins under Track 1 will create a system-wide repository of organic debris within the drainage that will likely function as a source of bacteria and nutrients in both dry and wet weather. The proposed Trash Amendments, as currently drafted, would effectively have trash supersede these top pollutants of concern and, indeed, likely confound efforts to address the highest priority water quality conditions as required by MS4 permits. The County strongly recommends that a mechanism be included in the proposed Trash Amendments to allow for watershed planning efforts to continue unimpeded, with trash being among the pollutants that are considered and prioritized as part of these efforts, but not necessarily the top priority if data does not support it as such. Allowing Permittees to identify which areas in their municipal area are truly high trash generating locations, as recommended in comment 8a, would be one way in which the proposed Trash Amendments could be supportive of watershed planning efforts.
- 10. Remove Requirement to Demonstrate Equivalency of Track 2 to Track 1.** It is unclear how the equivalency of Track 2 to Track 1 would be demonstrated, given that the level of trash removed through Track 1 would not be known if implementing Track 2. If the monitoring that is required for Track 2 is essentially infeasible, then there is only really a Track 1, which is problematic for Orange County (see prior comments). The County strongly recommends that this requirement be removed and that the proposed Trash Amendments be reframed to make Track 2 a truly equivalent option, particularly for municipalities required by permit to develop strategies to address priority areas and pollutants at a watershed scale.
- 11. Retain Time Extension Element and Apply Retroactively.** The County is supportive of the option to extend the compliance time by up to three years for implementing regulatory source controls and requests that the time extensions also be granted to those municipalities that have proactively implemented regulatory source controls such as the Cities of Huntington Beach and Laguna Beach, which have implemented bans on single-use plastic bags, and the City of Dana Point, which has implemented bans on both single-use plastic bags and Styrofoam.
- 12. Allow for Devices Other than Those Approved by the Los Angeles Water Board to be Considered Certified as Full Capture.** As presented, the proposed Trash Amendments would only allow for devices certified by the Los Angeles Water Board to be considered as full capture devices at the time of adoption. Thousands of devices currently installed and removing trash in the State would not be certified. The proposed Trash Amendments should provide a process for non-approved devices to be considered certified as full capture if also certified by the San Francisco Water Board and a significant transition period for non-conforming devices to be replaced beyond the 15 year compliance deadline.

We also support the recommendation of CASQA that the State Board create a list of certified devices prior to the adoption of the proposed Trash Amendments and establish a streamlined process to approve future devices.

Ms. Jeanine Townsend  
August 5, 2014  
Page 6

Thank you for the opportunity to provide comments. If you have any questions, please contact Christy Suppes at (714) 955-0673.

Very truly yours,



Chris Crompton, Manager  
Water Quality Compliance

Cc: Orange County Permittees  
Mary Anne Skorpanich, Director, Environmental Resources, County of Orange  
Ryan Baron, Counsel, County of Orange