

August 5, 2014

Jeanine Townsend, Clerk to the Board  
State Water Resources Control Board  
1001 I Street, 24th Floor  
Sacramento, CA 95814



**Subject: Comment Letter – Proposed Amendments to State-Wide Water Quality Control Plans to Control Trash and the forthcoming *Inland Surface Waters, Enclosed Bays, and Estuaries Plan***

Dear Ms. Townsend:

The San Diego Unified Port District (District) appreciates the opportunity to provide comments to the State Water Resources Control Board (State Water Board) on the Proposed Amendments to the State-Wide Water Quality Control Plans to Control Trash (Trash Amendments), dated June 10, 2014. As a Phase I Municipal Separate Storm Sewer Systems (MS4) permittee, the District would be subject to the proposed Trash Amendments once incorporated into the National Pollutant Discharge Elimination System (NPDES) stormwater discharge permits.

From a practitioner's standpoint, District staff supports the comments and recommendations submitted by the California Stormwater Quality Association (CASQA). District staff respectfully requests that the State Water Board consider the additional comments provided herein, as follows:

1. **Reducing trash is a concern, state-wide.** To that end, we continue to encourage a state-wide approach to addressing trash and are committed to supporting and encouraging that regulations be consistent at a state level. Reducing trash is a state-wide issue that requires consistency as new regulations are developed.

**A state-wide approach is necessary when considering regulatory source control measures such as bans on single-use consumer products.** Controlling trash is a societal problem that spans all jurisdictions. MS4s are not the only source of trash and stormwater programs will not be able to solve the trash problem alone. As the amendments are incorporated into the respective NPDES stormwater discharge permits, they may drive local solutions that may not be effective or the most appropriate approach for addressing an issue that is common throughout the state. Local solutions, such as localized bans, have limited effectiveness when products may be brought in from other locations where they are still legal. Therefore, compliance will be difficult without state

controls. **State-level direction on standardizing trash quantification is also needed.** Trash monitoring data is being used in a number of NPDES permits. However, there are currently no standards for measuring and counting trash, which leads to difficulty in interpreting trash data in general. The District recommends standardizing trash quantification at the state level to create consistency throughout the state. The District also agrees with CASQA's comment that the demonstration of effectiveness should not be limited to monitoring Best Management Practices (BMPs) performance. **Permittees should be allowed to propose the method by which they demonstrate performance in their plan,** such as through rigorous visual assessments.

2. **Jurisdictional Accountability.** The District is committed to its role as an environmental steward of San Diego Bay. That commitment is reflected in many District programs that are focused on protecting and rehabilitating the Bay's resources. At the same time, the District recognizes that discharges from upstream jurisdictions impact its efforts to protect the Bay's water quality. San Diego Bay is the receiving water body for a large watershed in which the District is a very small jurisdiction, located at the extreme end.

The District was established in 1962 by the state of California to effectively develop the harbors and port facilities for multiple-purpose use for the benefit of the people. Through the Port Act, the District was given the authority to manage the lands that overlay the city boundaries of the Cities of Chula Vista, Coronado, Imperial Beach, National City and San Diego. During the course of establishing the District, several parcels and/or utilities remained under the authority of the respective underlying city. This enabled the cities to maintain ownership of such areas; while indemnifying the District for claims or damages arising from their use. This is documented in easements, dedicated streets, and other deeded rights. As such, it can be the case that some of the streets and storm drains shown to be within the District jurisdictional boundary are actually owned, operated, and maintained by another agency.

The proposed Trash Amendments should not result in the imposition of liability on the District for discharges from portions of the MS4 that the District does not own or operate. Indeed, this would be impermissible under the Clean Water Act (CWA). The CWA defines "copermittee" as "a permittee to a NPDES permit that is only responsible for permit conditions relating to the discharge for which it is an *operator*." 40 C.F.R. § 122.26(b)(1)(emphasis added). "Co-permittees need only comply with permit conditions relating to discharges from the municipal separate storm sewers *for which they are operators*." 40 C.F.R. §122.26(a)(3)(vi) (emphasis added). The term "owner or operator" is also defined in the CWA to mean "any person who owns, leases, operates, controls, or supervises a source." 33 U.S.C. § 1316(a)(4). A "source" is "any building, structure, facility, or installation from which there is or may be the discharge of pollutants." *Id.* at §

1316(a)(3). For a copermittee to be liable as an owner or operator of an MS4, that co-permittee must own, lease, operate, control or supervise the MS4, or the source of a potential discharge of pollutants.

With this in mind, we support jurisdictional accountability throughout the watershed and we encourage the State Water Board and the applicable permitting authorities to incorporate these concepts throughout the proposed Trash Amendments and correlated permits. The District requests that the State Water Board include language in the Trash Amendments that makes it clear that a permittee is not liable for any discharges from MS4 facilities that the permittee does not own or operate.

- 3. Additional public outreach and an extension of the comment period are warranted.** Prior to the July 16, 2014 workshop, outreach efforts were primarily being made in Northern California, through focused stakeholder outreach meetings. Given that many agencies operate on a fixed budget, many permittees from the Southern California area were not able to attend the earlier meetings. Moreover, it appears numerous Southern California agencies may not have been notified of the meetings. Thus, there has not been adequate time devoted to providing outreach to the Southern California area. In a spirit of transparency, the District respectfully requests that the State Water Board extend the comment period **by a minimum of 30 days and provide an additional workshop(s) in the Southern California area prior to adopting the Trash Amendments.**

Given the breadth of comments and concerns expressed by stakeholders at the July 16, 2014 workshop, the District requests that, when the revised draft of the Trash Amendments is released for public review, the entire document, not just the changed text, be open for further comment to allow stakeholders to consider the revised proposal in its entirety.

- 4. The State Water Board should include the requirement for a baseline investigation that would assess and identify localized areas of high trash generation within their jurisdictions as a first step in the proposed regulations.** The Trash Amendments have identified priority land uses that could be used to guide permittees. However, without a baseline that is specific to a local region/jurisdiction, it is unclear whether those land uses actually generate trash. The amendment should allow permittees the flexibility to customize their high priority areas based upon knowledge of local sources. This would allow limited resources to more accurately target local priority efforts.

**Additional time in the compliance schedule, to allow for baseline investigations, is also warranted.** It is important to clearly understand the local extent of an issue for a permittee to be able to identify the most appropriate

measures. As part of the Trash Monitoring and Reporting Plan, permittees could submit a plan to develop a trash baseline. The District requests that the 10-year compliance timeframe in the Trash Amendments be extended by 2-3 years to accommodate baseline investigations, which could be required through the issuance of investigative orders from local regional boards.

This approach, identified herein (baseline study to prioritize areas) supports the adaptive management process recently endorsed by the San Diego Regional Board's permits and policies, which include the 2013 Municipal MS4 Permit, the Regional Monitoring Framework and the San Diego Bay Strategy.

5. **Providing alternative compliance tracks allows permittees the flexibility to select the appropriate approach.** The District supports the State Water Board's efforts to incorporate flexibility in the Trash Amendments by including compliance track options. Track 2 incorporates a combination of strategies to address trash through implementing source control and other measures, in addition to installing full-capture systems where appropriate. This approach supports the watershed approach in the San Diego Regional Board's 2013 Municipal MS4 Permit. In addition, the installation of a network of full-capture systems through Track 1 may not be technically feasible for all permittees due to issues such as the physical constraints of the MS4 system that may limit or prohibit the ability to install these systems and could generate secondary issues, such as flooding. However, the District requests that the State Water Board provide clarification on how technical feasibility (or infeasibility) may be defined.
6. **Compliance Expectations for Track 2.** Although the District supports providing the compliance track options, there is concern that the dual alternative compliance track approach may lead to disjointed localized efforts. Permittees electing to implement Track 1 would be in compliance with implementation requirements if a network of full-capture systems were installed in the storm drains of priority land uses. However, the Trash Amendments do not identify whether these Track 1 permittees would be in violation of the trash prohibition of discharge if trash was found in their jurisdictions despite full implementation, or what may happen if this trash ends up in another downstream permittee's jurisdiction. Permittees need to know the compliance expectations prior to making a decision on a track option. To this end, **clarification is requested on what constitutes a violation and how violations will be handled.**

Additionally, the Trash Amendments require that Track 2 achieve the same performance as Track 1; however, no guidance is provided on what will be considered an acceptable implementation plan, or how equivalency should be demonstrated. At present, there is no information on what efforts will be considered "equivalent" to full trash capture. Compliance with Track 1 involves a quantitative assessment (i.e., number of full-capture systems), while compliance with Track 2 involves a qualitative assessment (i.e., effectiveness of control measures). Given the disparate nature of the compliance analysis for each track,

the District is concerned that there isn't a standard for determining the equivalence of the two tracks, and that potential liabilities may be assigned inconsistently depending on the track chosen.

Permittees incur financial and compliance risks in choosing a track which has no guidelines for determining compliance, or by placing themselves in a situation where the guidelines would be subject to ongoing interpretation. We strongly **recommend that clear guidance for the implementation plans and standards of equivalency be established** prior to -- or with -- the adoption of the Trash Amendments. Clearly, establishing these expectations is essential to inform a permittee's choice of track.

7. **Monitoring requirements for both compliance tracks should be revised.**

Permittees should be allowed to propose the method for demonstrating performance in their plans. However, the District recommends the inclusion of general monitoring and reporting requirements in the Trash Amendments that would be uniform, regardless of the track selected. Elements of monitoring for both tracks should be the ability to demonstrate the effectiveness of the overall program and ascertain variations in the amount of trash discharged from the MS4, over time. In addition, **receiving water monitoring should not be required since other sources contribute trash.** While stormwater permittees may elect to conduct receiving water monitoring to demonstrate performance, it should not be mandated.

The Trash Amendments, as currently drafted, would also require each permittee to develop and implement separate monitoring plans. The District recommends including language to provide permittees the flexibility to be able to collaborate with other agencies to develop watershed monitoring plans that could include both jurisdictional and watershed elements. This approach supports the San Diego Regional Board's watershed approach for the 2013 Municipal MS4 Permit, as well as current efforts by permittees to develop monitoring and assessment plans for watershed management areas in the region.

8. **The Trash Amendments should limit the liability of MS4 permittees for trash originating from other regulated and non-regulated sources.**

The District supports CASQA's recommendation that the State Water Board require other regulated entities to implement the proposed Trash Amendments through a regulatory process external to the MS4 permits; and that the State Water Board establish non-point sources programs to control non-regulated sources of trash. The State Water Board should also include provisions to require implementation of the Trash Amendments, not only through inclusion in an MS4 Permit, but through other NPDES Permits, Waste Discharge Requirements, and Waiver Provisions.

9. **Clarification on the definition of trash.**

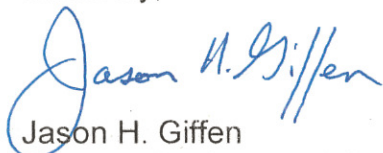
The District requests that the State Water Board clarify the definition of "trash" under the Trash Amendments. The current definition in the Trash Amendments is somewhat vague, specifically

regarding what is not included (such as green waste). This may lead to a broad interpretation across the state by local regional boards. A clear definition of trash could provide consistency for permittees throughout the state.

The District remains firm in its commitment to conduct operations and manage resources in an environmentally sensitive and responsible manner. The District also seeks to ensure that regulations effectively balance the economic feasibility of implementing pollution control measures with protecting the health of our waters. Our interest in the proposed Trash Amendments stems from the need to develop and use consistent methods for developing the regulations that impact common impairments throughout California.

We respectfully request that you consider these comments. Please contact Stephanie Bauer at (619) 400-4719 or via email at [sbauer@portofsandiego.org](mailto:sbauer@portofsandiego.org) if you have any questions or would like more information.

Sincerely,



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San Diego Unified Port District

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cc: Jason H. Giffen, Karen Holman, John Carter, Stephanie Bauer