

STATE OF CALIFORNIA
REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION

EXECUTIVE OFFICER SUMMARY REPORT
MEETING DATE: June 13, 2018

ITEM: 8C

SUBJECT: County of Alameda, Unincorporated Area, Municipal Regional
Stormwater Permit Permittee – Adoption of Cease and Desist Order

CHRONOLOGY: November 19, 2015 – Permit reissued
September 29, 2017 – 2016-17 Permit Annual Report received

DISCUSSION: The Water Board adopted the Municipal Regional NPDES Stormwater Permit, Order No. R2-2015-0049 (Permit) on November 19, 2015. Permit Provision C.10.a.i required Permittees to achieve a 70 percent trash load reduction, from a 2009 baseline, by July 1, 2017. Additionally, the provision requires Permittees to achieve an 80 percent trash load reduction by July 1, 2019.

In its Annual Report for fiscal year 2016-17, the County of Alameda reported a trash load reduction of 18.5 percent. Since this did not meet the required 70 percent reduction, the County is in violation of the Permit.

This Tentative Cease and Desist Order (Order) (Appendix A) would set deadlines for implementation of trash controls that will bring the County into compliance with the 70 percent trash load reduction requirement and to ensure compliance with the 80 percent trash load reduction requirement. The Order would require the County to achieve the 70 percent trash load reduction by July 1, 2019, and 80 percent load reduction by July 1, 2019, as required by the Permit. The County has submitted a plan to achieve this through the installation of two large trash capture devices, which will result in a total reduction of 81.6 percent from the 2009 baseline.

The County submitted a comment requesting that the Order include modified language to account for potential delays. The Prosecution Team has proposed to maintain the Order language and use enforcement discretion in considering any future delays. Additionally, the Team has made minor editorial and formatting changes to the Order since its circulation for public comment.

**RECOMMEN-
DATION:** I will have a recommendation at the end of the hearing.

APPENDICES: A - Tentative Cease and Desist Order
B - Comment Letter
C - Prosecution Team Response to Comment Letter

Appendix A
Tentative Cease and Desist Order



**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION**

CEASE AND DESIST ORDER No. R2-2018-xxxx

COUNTY OF ALAMEDA

WHEREAS the California Regional Water Quality Control Board, San Francisco Bay Region (Water Board), finds the following:

Background

1. The Water Board adopted the Municipal Regional NPDES Stormwater Permit, Order No. R2-2015-0049 (Permit) on November 19, 2015, issuing waste discharge requirements as NPDES Permit No. CAS612008. The Permit contains prohibitions, limitations, and provisions regulating the stormwater and non-stormwater discharges from each permittee's municipal separate storm sewer system (MS4).
2. Alameda County Unincorporated (Permittee) is permitted under the Permit and, as such, is subject to the Permit's requirements, including Provision C.10, which requires the Permittee to achieve certain reductions in trash discharges through the Permittee's MS4 to receiving waters.
3. Permit Provision C.10 states: "Permittees shall demonstrate compliance with Discharge Prohibition A.1, for trash discharges, Discharge Prohibition A.2, and trash-related Receiving Water Limitations through the timely implementation of control measures and other actions to reduce trash loads from municipal separate storm sewer systems in accordance with the requirements of this provision."
 - a. Discharge Prohibition A.1 states, in part: "The Permittees shall, within their respective jurisdictions, effectively prohibit the discharge of non-stormwater (materials other than stormwater) into storm drain systems and watercourses."
 - b. Discharge Prohibition A.2 states: "It shall be prohibited to discharge rubbish, refuse, bark, sawdust, or other solid wastes into surface waters or at any place where they would contact or where they would be eventually transported to surface waters, including flood plain areas."
 - c. Receiving Water Limitation B.1 states: "The discharge shall not cause the following conditions to create a condition of nuisance or to adversely affect beneficial uses of waters of the State:
 - a. Floating, suspended, or deposited macroscopic particulate matter, or foam;
 - b. Bottom deposits or aquatic growths;
 - c. Alteration of temperature, turbidity, or apparent color beyond present natural background levels;
 - d. Visible, floating, suspended, or deposited oil or other products of petroleum origin;
and

- e. Substances present in concentrations or quantities that would cause deleterious effects on aquatic biota, wildlife, or waterfowl, or that render any of these unfit for human consumption.”
4. Permit Provision C.10.a.i states: “Permittees shall reduce trash discharges from 2009 levels, described below, to receiving waters in accordance with the following schedule:
 - a. 70 percent by July 1, 2017; and
 - b. 80 percent by July 1, 2019.”
5. Trash reduction requirements have been included in the Permit since its initial adoption on October 14, 2009, as Order No. R2-2009-0074.
6. On September 29, 2017, the Permittee submitted its Annual Report for fiscal year 2016-2017 (Annual Report), which documented the Permittee’s progress in complying with Permit Provision C.10. The Permittee reported an 18.5 percent trash load reduction.
7. The Permittee is in violation of the Permit because the Permittee failed to meet the required 70 percent trash load reduction by July 1, 2017, relative to 2009 baseline conditions, as required by Permit Provision C.10.a.i.a.
8. The Permittee submitted an Action Plan and Schedule to Reach Attainment of MRP 2017 Trash Reduction Requirement (Action Plan) with the Annual Report. The Permittee most recently revised the details of the Action Plan in a letter of March 29, 2018.
9. In its letter of March 29, 2018, the Permittee updated its schedule for construction and operation of two large Hydro Dynamic Separator (HDS) units, which will capture trash from the majority of the Permittee’s high and medium trash generation rate areas. Under the proposed schedule, the Permittee expects to complete construction of the HDS units by June 30, 2019, at which point the Permittee would achieve an 81.6 percent trash load reduction, and the Permittee would be in compliance with Permit Provision C.10.a.i.b. Because of the plan to construct these two large devices simultaneously, the Permittee will achieve the 70 percent and 80 percent trash reduction requirements at the same time, when these two devices are operational.
10. In its letter of March 29, 2018, the Permittee stated that in a worst case scenario, construction of the HDS units would be completed by no later than mid-November 2019. This would delay achievement of the required 80 percent reduction in trash load past the Permit’s deadline of July 1, 2019, which would violate Permit Provision C.10.a.i.b.

Purpose of this Order

11. This Cease and Desist Order (Order) sets deadlines for implementation of trash controls that will bring the Permittee into compliance with the 70 percent and 80 percent trash load reduction relative to 2009 baseline conditions, by July 1, 2019, as required by Permit Provision C.10.a.i.b.

Cease and Desist Order Authority

12. When the Water Board finds a discharge of waste is taking place that violates or will violate requirements prescribed by the Water Board, California Water Code (Water Code) section 13301 authorizes the Water Board to issue a cease and desist order directing those persons not complying with the requirements or with discharge prohibitions to comply with them in accordance with deadlines set by the Water Board.
13. Because the Permittee's violation is ongoing and because the Permittee threatens to violate more stringent permit requirements, this Order is necessary to ensure that the Permittee returns to compliance by describing actions required to meet the permit requirements and by tracking progress toward the compliance deadline.
14. This Order is an enforcement action of existing requirements and, as such, is exempt from the provisions of the California Environmental Quality Act (Public Resources Code § 21000 et seq.) in accordance with Title 14 of the California Code of Regulations, section 15321.
15. Reports required under this Order are monitoring and reporting requirements pursuant to Water Code section 13383.
16. The Water Board notified the Permittee and interested persons of its intent to consider adoption of this Order and provided an opportunity to submit written comments and appear at a public hearing. The Water Board, in a public hearing, heard and considered all comments.

IT IS HEREBY ORDERED in accordance with Water Code section 13301 that the Permittee shall cease and desist from discharging and threatening to discharge trash in violation of the Permit by complying with the following provisions:

1. **Trash Reduction Implementation Actions.** The Permittee shall implement trash load reduction control actions within all significant trash generating areas within its jurisdiction and prohibit trash discharge in a timely manner sufficient to reach 70 percent trash load reduction and 80 percent trash load reduction relative to the 2009 baseline condition by July 1, 2019, as specified in Permit Provision C.10.a.i.b.
2. **Track and Report on Trash Control Actions.** The Permittee shall submit with the 2017-2018 Annual Report by September 30, 2018, and subsequently by March 30, 2019, a brief narrative Supplemental Report that describes the Permittee's progress toward meeting the 70 percent and 80 percent trash load reduction requirement. The Supplemental Reports shall include the following:
 - a. Regarding the two HDS units:
 - i. The status of contracting
 - ii. The status of permitting
 - iii. The status of construction
 - b. Progress toward meeting the trash reduction requirement by the deadline identified in 1. above, including the date(s) any measures were completed and operating effectively and the resulting total trash load reduction (percent).

3. **Force Majeure.*** If the Permittee is delayed, interrupted, or prevented from meeting the provisions and deadlines of this Order due to a force majeure, the Permittee shall notify the Executive Officer in writing within ten days of the date the Permittee first knows of the force majeure. The Permittee shall demonstrate that timely compliance with the Order or any affected deadlines will be actually and necessarily delayed, and that it has taken measures to avoid or mitigate the delay by exercising all reasonable precautions and efforts, whether before or after the occurrence of the force majeure.
4. **Consequences of Non-Compliance and Executive Officer Authority.** The Executive Officer is hereby authorized to take enforcement action or to request the Attorney General to take appropriate actions against the Permittee in accordance with Water Code sections 13331, 13350, 13385, and 13386. Such actions may include injunctive and civil remedies, if appropriate, or the issuance of an Administrative Civil Liability Complaint for Water Board consideration. The Water Board reserves the right to take any enforcement action authorized by law.
5. **Effective Date.** This Order shall be effective on June 13, 2018.

I, Bruce H. Wolfe, Executive Officer, do hereby certify the foregoing is a full, true, and correct copy of a Cease and Desist Order adopted by the California Regional Water Quality Control Board, San Francisco Bay Region, on June 13, 2018.

Bruce H. Wolfe
Executive Officer

* A "force majeure" is an event that could not have been anticipated by and is beyond the control of the Permittee, including an act of God; earthquake, flood, or other natural disaster; civil disturbance or strike; fire or explosion; declared war within the United States; embargo; or other event of similar import and character. "Force majeure" does not include delays caused by funding, contractor performance, equipment delivery and quality, weather, permitting, other construction-related issues, CEQA challenges, initiative litigation, adverse legislation, or legal matters (with the exception of an injunction issued by a court of law specifically preventing construction from occurring).

Appendix B
Comment Letter





May 21, 2018

Via Email (Zachary.Rokeach@waterboards.ca.gov)

Attn. Zachary Rokeach
San Francisco Bay Regional Water Quality Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612

VIA EMAIL AND US MAIL

SUBJECT: Comment Letter – Alameda County Unincorporated Area Tentative Cease and Desist Order Comments

These comments are submitted on behalf of the County of Alameda (County) and are in response to the Notice of Opportunity to Comment for the Tentative Cease and Desist Order for Alameda County Unincorporated Area (Tentative Order) sent on May 11, 2018. The County appreciates this opportunity to comment.

Background:

To meet the C.10 Trash Load Reduction requirements, the County has pursued infrastructure improvements that will provide long-term, concrete reductions in trash load. The County has focused on designing and constructing large full trash capture devices, and identifying appropriate sites for such devices. This type of construction project is complex, expensive, and time-consuming. Among other things, such construction requires addressing geotechnical, hydrology, hydraulic, real property, and right-of-way issues.

As acknowledged in the Tentative Order, the County submitted an Action Plan and Schedule to Reach Attainment of MRP 2017 Trash Reduction Requirement (Action Plan) with the 2016/17 Annual Report and revised the details of the Action Plan in the County's letter of March 29, 2018. The County's revised Action Plan provided a construction schedule. Importantly, the County's letter also set forth a "worst case scenario," in which construction of the HDS units would be completed by no later than mid-November 2019. The Tentative Order does not reflect this later date.

Unforeseen circumstances that are outside of the County's control can impact construction timing. For example, both sites have very large drainage areas. Site 1 drains 628 acres and Site 2 drains 1,791 acres. These two projects involve excavations at extreme depth and with narrow confines. Excavation depths may be up to 30 to 40 ft. As with any excavations, and especially with narrow, deep excavations, it is beyond the County's ability to accurately predict the complications that may be encountered.

The County is committed to complying with the requirements of C.10 Trash Load Reduction requirements. The County, however, recognizes that it cannot control all construction-related conditions, particularly in narrow, deep excavations. The County respectfully requests that Section 3 be amended to more clearly allow for the schedule to be revisited if there are events that are outside of the County's control. First, such a change will avoid uncertainty in interpreting the current "force majeure" language. Second, basic principles of fairness dictate that the County should not be penalized for events that are outside of its control. This is especially true where County has committed to these projects, despite their complexity, because these projects are the most effective method to achieve permanent trash reduction.

Recommendation:

The County requests that your Board either (a) acknowledge the County's submitted worst case scenario schedule in its order or (b) broaden the language used in Section 3 to recognize delays that impact construction but that are due to circumstances outside of the County's control.

For reference, below is proposed language that can be used for Section 3 to address this issue:

3. Delay. If the Permittee is delayed, interrupted, or prevented from meeting the provisions and deadlines of this Order due to circumstances outside of its control, the Permittee shall notify the Executive Officer in writing within ten days of the date the Permittee first knows of such circumstance. The Permittee shall demonstrate that timely compliance with the Order or any affected deadlines will be actually and necessarily delayed, and that it has taken measures to avoid or mitigate the delay by exercising all reasonable precautions and efforts, whether before or after the occurrence of the event outside of the Permittee's control.

While the County hopes that such a provision will not be needed, hopes are not enough. In reality, the risks inherent in any construction project make such a provision appropriate. If worst-case scenario conditions occur, the County would immediately notify the Water Board of such conditions, would provide a revised completion schedule, and would work collaboratively with the Water Board on an amendment to the compliance date.

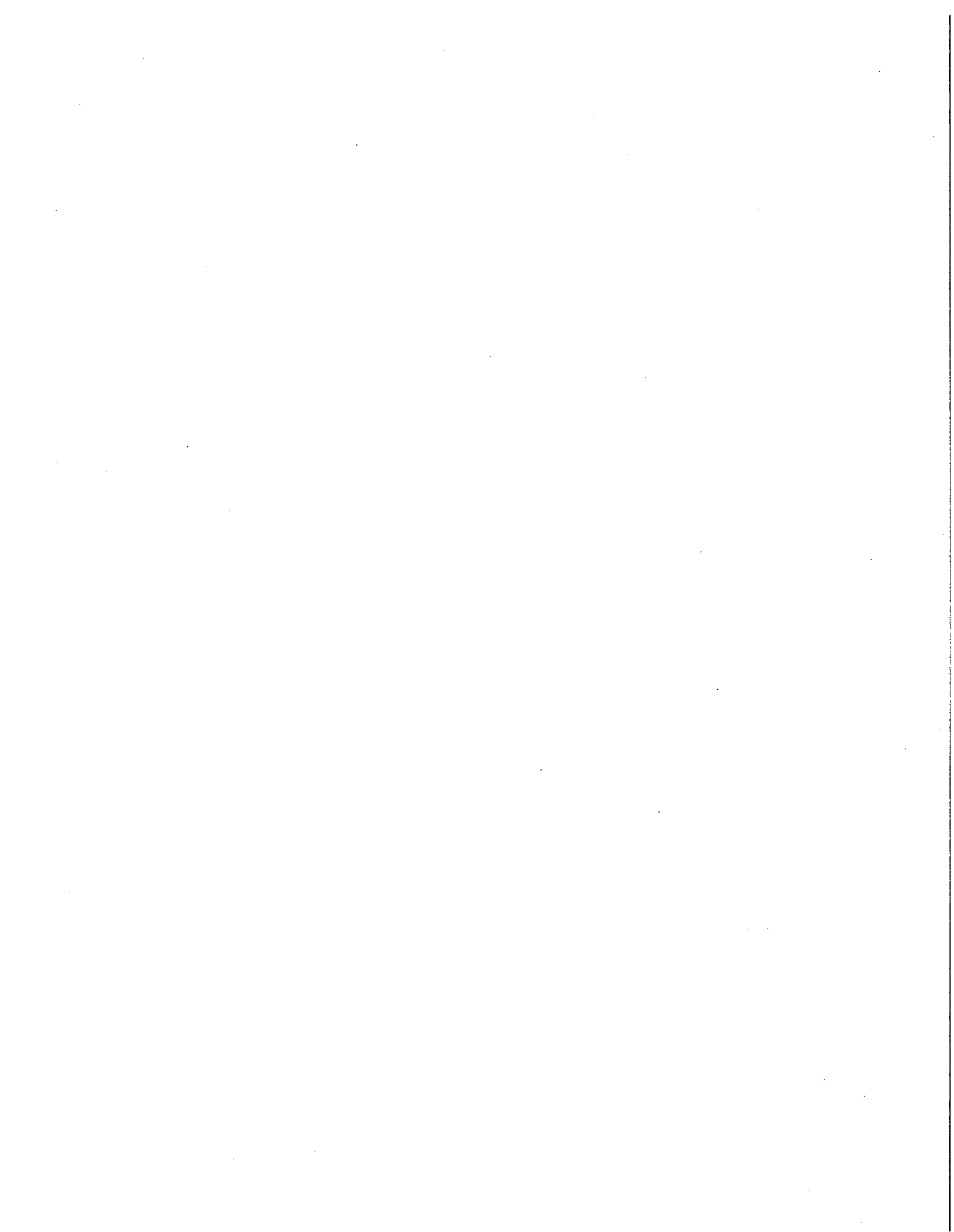
The County's requested amendments are reasonable and recognize the County's commitment to compliance with the C.10 Trash Load Reduction requirements.

Thank you for your consideration.

Yours truly,,


Daniel Woldesenbet, Ph.D., P.E.
Director of Public Works

Appendix C
Prosecution Team Response to Comment Letter



**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION**

Response to Comment on
Tentative Cease and Desist Order for
County of Alameda
Alameda County Unincorporated Area

On May 21, 2018, the Prosecution Team received a comment letter from the County of Alameda on the tentative cease and desist order (TO) for the Alameda County Unincorporated Area circulated for public comment on May 11, 2018. The following summarizes the comment received and provides the Prosecution Team's response.

Comment (summarized)

The County notes that issues associated with construction of its proposed full trash capture devices, which include relatively narrow, deep excavations, could result in delays to their completion, such that they would be completed as late as November 2019, rather than by July 1, 2019. The County proposes to modify language in the TO to avoid enforcement of the July 1, 2019, deadline should delays outside the County's control result in missing the deadline.

Prosecution Team response

We do not propose changes to the TO in response to the comment. The TO's current *force majeure* language already accounts for events that would clearly be outside the County's control, such as earthquakes and other natural disasters. While we understand the County's concern about full trash capture construction delays caused by other circumstances, many of those issues reasonably should be anticipated as part of contracting and construction, and they are issues that all other permittees have had to address as part of their compliance with the Permit's trash reduction requirements.

Rather than adding language to the TO that would give blanket protection from enforcement based on the County's unilateral determination of such circumstances, we recommend that, in the event the County is reasonably delayed due to circumstances clearly outside its control, the Board exercise enforcement discretion regarding the delay.