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## State Water Resources Control Board

June 5, 2020

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PETITION OF FALLBROOK PUBLIC UTILITY DISTRICT AND SOUTHERN CALIFORNIA ALLIANCE OF POTWS FOR REVIEW OF ORDER NO. R9-2019-0169, NPDES NO. CA0108031, FOR THE FALLBROOK PUBLIC UTILITY DISTRICT, FALLBROOK WATER RECLAMATION PLANT AND SANTA MARGARITA GROUNDWATER TREATMENT PLANT, 2376 NORTHSIDE DRIVE, STE 100, SAN DIEGO, ISSUED BY SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD SWRCB/OCC FILE A-2688: DENIAL OF REQUEST FOR STAY

Dear Messrs. Toma and Jepsen:

On March 10, 2020, the Fallbrook Public Utility District (District) and Southern California Alliance of Public Owned Treatment Works (SCAP) (collectively, Petitioners) filed a Petition for Review of Action by the California Regional Water Quality Control Board, San Diego Region, in Adopting Order No. R9-2019-0169, NPDES Permit for the Fallbrook Water Reclamation Plant and Santa Margarita Groundwater Treatment Plant (hereinafter Petition). On April 9, 2020, the State Water Resources Control Board (State Water Board) acknowledged receipt of the Petition and accompanying request for stay. On May 6, 2020, the State Water Board issued a letter indicating that the Petition

E. JOAQUIN ESQUIVEL, CHAIR | EILEEN SOBECK, EXECUTIVE DIRECTOR

was complete and soliciting a response from the San Diego Regional Water Quality

Control Board (San Diego Water Board). In addition to the Petition, the District also requested a stay of certain provisions of Order No. R9-2019-0169.<sup>1</sup> I have been appointed by Executive Director Eileen Sobeck to act as the hearing officer responsible for making a determination on this request for stay. Pursuant to this authority, I hereby deny the request for stay, for the reasons set forth below.

## **BACKGROUND**

On February 12, 2020, the San Diego Water Board adopted Order No. R9-2019-0169 (NPDES No. CA0108031) (hereinafter Permit), Waste Discharge Requirements (WDRs) that serve as a National Pollutant Discharge Elimination System (NPDES) permit for the District. The District owns and operates the Fallbrook Water Reclamation Plant and the Santa Margarita Groundwater Treatment Plant, which discharge to the Pacific Ocean via the Oceanside Ocean Outfall (OOO). The Petition seeks review of a range of provisions set forth in the District's newly-reissued permit and asks that the State Water Board stay the following categories of provisions set forth in the Permit: use of the "test of significant toxicity" (TST) statistical approach for determining compliance with a performance goal for chronic toxicity, as well as related provisions including effluent monitoring, quality assurance, and a trigger for conducting a toxicity reduction evaluation (TRE); new monitoring requirements for sampling Human Marker HF 183 (a marker identifying whether fecal coliform originates from humans), to be collected concurrently with sampling for offshore fecal coliform; other new monitoring requirements, including a climate change action plan, a plume tracking monitoring program and workplan, a State of the Ocean Report, a Pollutant Minimization Program, a Benthic Monitoring Workplan, and an Initial Investigation TRE; and a new effluent limitation for flow.

The District's new permit became effective on April 1, 2020. The District asks that the State Water Board stay the effect of the above provisions pending review of the Petition on the merits. State Water Board regulations generally require action on a petition within 270 days from the date of mailing a notice of complete petition, unless a hearing is held.<sup>2</sup> If a hearing is held, the regulation requires action within 330 days from the date of mailing the notification of complete petition, or within 120 days of the close of the hearing, whichever is later. The State Water Board may also review a regional water board action on its own motion for any reason, including failure to act within the time limits established by the regulation.<sup>3</sup>

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<sup>1</sup> The Petition was filed by the District and SCAP. However, only the District has requested a stay.

<sup>2</sup> Cal. Code Regs., tit. 23, § 2050.5, subd. (b).

<sup>3</sup> Cal. Code Regs., tit. 23, § 2050.5, subd. (c).

## LEGAL STANDARD FOR STAY REQUESTS

Water Code section 13321 provides that the State Water Board may stay, in whole or in part, the effect of a decision or order of a regional water board while the decision or order is under review. State Water Board regulations implementing the statutory provision recognize the extraordinary nature of a stay remedy and place a heavy burden on any person requesting a stay of a regional water quality control board action.<sup>4</sup> California Code of Regulations, title 23, section 2053, subdivision (a), provides that a stay shall be granted when petitioners allege facts and produce proof of **all** of the following three elements:

- (1) substantial harm to petitioner or to the public interest if a stay is not granted,
- (2) a lack of substantial harm to other interested persons and to the public interest if a stay is granted, and
- (3) substantial questions of fact or law regarding the disputed action.

The regulations further require that a request for a stay shall be supported by a declaration under penalty of perjury of a person or persons having knowledge of the facts alleged.

A request for stay is largely a fact-specific inquiry. The elements supporting a request for stay concern only the period during which a petition for review is pending before the State Water Board. Thus, the question is not whether the petitioner will suffer substantial harm over the five-year term of the NPDES permit that is being challenged. Instead, the petitioner must produce proof of substantial harm to either the petitioner or to the public interest, as well as a lack of substantial harm to other interested person and to the public interest if a stay is granted, during the period that the State Water Board reviews the petition. In this case, the State Water Board expects to resolve the Petition within the prescribed regulatory period.

## CONTENTIONS AND FINDINGS

The District's arguments in support of a stay generally contend that the District will suffer substantial harm from the new permit requirements because those provisions will result in needless new expenditures and will place the District at risk of enforcement due to permit violations resulting from monitoring results that are either unnecessary or do not reflect true exceedances of permit limitations. The District further argues that substantial harm to the public will result if a stay is not granted because of the unnecessary costs of the additional monitoring, resulting in "misdirection of scarce public resources."<sup>5</sup> Conversely, the District contends that other interested parties and

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<sup>4</sup> State Water Board Order WQ 97-05 (*Ventura County Citizens*), p. 4; State Water Board Order WQ 2012-0012 (*Ocean Mist Farms and RC Farms et al.*), p.3.

<sup>5</sup> Petition, p. 36.

the public will not incur substantial harm if a stay is granted because other requirements set forth in the Permit will continue to apply, and the Petitioner will continue to operate its facilities in accordance with previous permits.<sup>6</sup> Finally, the District asserts that substantial questions of law have been raised regarding the basis for the chronic toxicity testing approach prescribed and for the other additional monitoring.

In support of its request for stay, the District has submitted a declaration by Owni Toma, Chief Plant Operator for the Fallbrook Public Utility District. The Petition filed also includes a number of exhibits, including: the final San Diego Water Board adopted order, a comment letter submitted by the District to the San Diego Water Board, a transcript of the San Diego Water Board hearing for the February 12, 2020 adoption of the Permit, and other documents.<sup>7</sup> Each category of requirements requested to be stayed is discussed below, analyzing each of the three prongs of Section 2053.<sup>8</sup>

### **1) Chronic Toxicity Effluent Limitation and Statistical Testing Method**

The District's reissued Permit directs a different statistical approach for determining compliance with a performance goal for chronic toxicity than previously required. The San Diego Water Board directed use of the TST statistical approach described in the United States Environmental Protection Agency (US EPA) guidance document titled *National Pollutant Discharge Elimination System Test of Significant Toxicity Implementation Document* (EPA 833-R-10-003, 2010). The TST approach, which is based on a type of modified hypothesis test referred to as bioequivalence testing, is included as part of the State Water Board's proposed Toxicity Provisions and Water Quality Control Plan for Inland Surface Waters and Enclosed Bays and Estuaries of

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<sup>6</sup> Petition, p. 37.

<sup>7</sup> On March 19, 2020, a representative of the District submitted a letter to the State Water Board, urgently requesting swift action on the request for stay. (Letter from Melissa A. Thorne to Chair E. Joaquin Esquivel and Members of the State Water Resources Control Board, March 19, 2020.) The letter noted National, State and local declarations of emergency related to the Novel Coronavirus, COVID-19 and stated that Permit compliance would be even more difficult under the restrictions and shelter-in-place orders. The District also stated that the San Diego Water Board had indicated that it would issue mandatory minimum penalties within thirty days of the Permit effective date for any delays in monitoring. Apart from these general statements, the letter did not provide additional substantive support for the stay request. Consistent with the State Water Board's COVID-19 published policy, the District should notify the San Diego Water Board if there is a specific permit requirement that cannot be timely met because it would be inconsistent with current governmental directives or guidelines related to COVID-19.

<sup>8</sup> All future regulatory references herein are to California Code of Regulations, title 23, section 2053, unless otherwise noted.

California (State Water Board Proposed Toxicity Provisions).<sup>9</sup> The TST is not itself a test method and does not change the U.S. EPA toxicity test methods.<sup>10</sup> The San Diego Water Board took the position that the TST approach is more protective than the previous permit provisions because it results in fewer false negatives than the previous testing approach.<sup>11</sup>

The State Water Board Proposed Toxicity Provisions, currently under development and scheduled for consideration of adoption by the State Water Board later this year, would not apply to ocean discharges. The State Water Board's Water Quality Control Plan for Ocean Waters of California (California Ocean Plan) includes objectives and methods for determining chronic toxicity that utilize a Toxicity Units (TU) statistical approach to calculate a No Observed Effect Level, as set forth more specifically in the Ocean Plan.<sup>12</sup> TU is an older method for assessing toxicity. Future proposed amendments to the California Ocean Plan may include revising the toxicity provisions to incorporate the TST.<sup>13</sup>

The District seeks a stay of permit provisions related to chronic toxicity and the TST. These provisions include use of the TST statistical approach for determining compliance; effluent monitoring requirements for chronic toxicity using the TST; quality assurance and additional requirements; and required monitoring and a trigger for conducting a TRE.<sup>14</sup> The chronic toxicity provisions contained in Order No. R9-2019-

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[https://www.waterboards.ca.gov/water\\_issues/programs/state\\_implementation\\_policy/tx\\_ass\\_cntrl.html](https://www.waterboards.ca.gov/water_issues/programs/state_implementation_policy/tx_ass_cntrl.html)

<sup>10</sup> State Water Board, Draft Staff Report, Including Substitute Environmental Documentation for

the Proposed Establishment of the Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California; and Toxicity Provisions, dated October 18, 2019, p. 10.

<sup>11</sup> False negative refers to a situation in which a toxicity test inaccurately shows that the sample is not toxic.

<sup>12</sup> California Ocean Plan (amended 2019), p. 60. In support of the relevant requirement, the San Diego Water Board has cited Ocean Plan Section III.F.1., which allows a regional water board to establish more restrictive water quality objectives and effluent limitations as necessary to protect water quality. San Diego Water Board, Partial Transcript for February 12, 2020, Agenda Items 8, 9, 10 and 11, pp. 51, 88.

<sup>13</sup> The State Water Board adopted a Staff Report and Work Plan for 2019 Review of the Water Quality Control Plan for Ocean Waters of California on December 3, 2019. The 2019 Review and Work Plan did not establish new regulatory requirements, but rather evaluated and prioritized potential planning projects for future staff work. Revision of the Ocean Plan toxicity water quality objectives was ranked as a high priority that would increase consistency amongst statewide plans following potential adoption of the Proposed Toxicity Provisions, but it did not rank among the highest priority projects.

<sup>14</sup> See Petition, p. 32. Relevant Permit provisions requested to be stayed are: Provision IV.A.2, Table 8, chronic toxicity; Provision VII.L; and effluent monitoring

0169 include the performance goal, with the Monitoring and Reporting Program directing a minimum sampling frequency of once per quarter, which may be decreased after ten consecutive routine monitoring events if results show that the discharger is in compliance.

**a. Substantial Harm to Petitioner or to the Public Interest**

The District argues that it and the public interest are harmed by imposition of the TST statistical approach because the District is much more likely to see a “fail” result than it would have from its previous performance goal based upon TU, even if there is no actual toxicity. The District further asserts that the TST contains a high single-test false positive rate that will unnecessarily require the new accelerated TRE analyses and that the District will then be subjected to an effluent limitation, increasing the likelihood of noncompliance.<sup>15</sup> In general, these arguments assume that the permit provisions and monitoring requirements are unnecessary, improper and legally infirm.

Harm to the District alleged in the supporting declaration is based upon being “statistically guaranteed” to be in violation of the performance goal “at least five percent of the time, and possibly as much as 14 to 50 percent of the time, even when there is no real toxicity in the effluent.”<sup>16</sup> While the District has submitted a technical report and white paper regarding various aspects of toxicity testing, neither appears to offer proof of a statistical guarantee as described in the Petition and declaration.<sup>17</sup> The District otherwise makes little effort to substantiate the claimed likelihood of violations. By assuming the validity of its contentions as to the inaccuracy of the TST and flaws with its associated use in monitoring requirements and compliance determinations, the District asserts the risk of additional monitoring and the potential for stricter regulatory requirements as harm.<sup>18</sup>

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requirements for chronic toxicity set forth in Attachment E, Monitoring and Reporting Program, Table E-4 (Effluent Monitoring at Monitoring Location M-002), section III.C.5 (Quality Assurance (QA) and Additional Requirements, section III.C.7 (Accelerated Monitoring Schedule for Maximum Daily Single Result: “Fail”), and section III.C.8 (TRE Process.)

<sup>15</sup> Petition, p. 34.

<sup>16</sup> Declaration of Owni Toma in Support of the District’s Request for Stay, March 10, 2020, Paragraph 7.

<sup>17</sup> Southern California Coastal Water Research Program, Stormwater Monitoring Coalition: Toxicity Testing Laboratory Guidance Document, Technical Report 956 (Dec. 2016); California Association of Sanitation Agencies White Paper: *Ceriodaphnia dubia* Short-term Chronic Reproduction Test: Understanding the Probability of Incorrect Determinations of Toxicity in Non-toxic Samples (Nov. 28, 2018). The first addresses monitoring of stormwater discharges and involves a specific test species described as a freshwater species. The second describes toxicity testing using the same species. The District’s discharge is to marine waters.

<sup>18</sup> Toma Declaration, para. 9.

The District's claim of substantial harm includes "unwarranted compliance jeopardy" as well as "administrative[] and civil and potential criminal liability for non-compliance with requirements that the District may not consistently meet . . . [resulting in] possible unnecessary imposition of onerous fines and penalties that would be passed on to the public, and susceptibility to third-party lawsuits . . . ." <sup>19</sup> The District essentially appears to argue that the requirements are unnecessary, thus the District is exposed to such potential violations and enforcement jeopardy without basis. Such arguments go to the substance of the District's disagreement with the San Diego Water Board and do not constitute proof of harm.

Past State Water Board orders have generally rejected the threat of enforcement action as the basis for the substantial harm necessary to support a stay. State Water Board Order No. WQ 2006-0007 (Boeing Company) discussed potential harm to an NPDES permittee seeking a stay, concluding that both civil and administrative enforcement were insufficient bases, both generally speaking and as a result of specific circumstances in that case. In Boeing, the State Water Board noted underlying reasons for concerns regarding staying an order due to threat of violation and enforcement, ultimately concluding that, apart from the speculative nature of claimed future violations, neither civil nor administrative enforcement would likely become final during pendency of the petition before the State Water Board. The State Water Board also considered this issue in Order No. WQ 2012-0012 (Ocean Mist Farms), where the Board found it "extremely unlikely that the dischargers will be subject to enforcement . . . while the petitions are pending before the State Water Board."

The District also argues that it and the District's residents and ratepayers will suffer substantial harm resulting from requirements to undertake additional, more expensive monitoring, including "accelerated monitoring and/or Toxicity Reduction Evaluation analyses due to increased likelihood of false positives due to the use of the TST."<sup>20</sup> The District does not attempt to quantify these additional expenditures in its stay request. Although the San Diego Water Board's Supplemental Response to Comments Report for Tentative Order No. R9-2019-0169 assessed the District's comments on chronic toxicity monitoring costs, it is not clear whether the costs at issue in that report are the same costs alleged as harm in the request for stay.<sup>21</sup>

While the State Water Board in Order No 2012-0012 (*Ocean Mist Farms*) noted that substantial cost may constitute the harm required to meet the first prong in the required

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<sup>19</sup> Petition, p. 36. The District includes these arguments as part of its assertion of the lack of harm to other parties, insofar as issuance of a stay is characterized as preventing these potential results.

<sup>20</sup> Toma Declaration, para. 11.

<sup>21</sup> The District claimed that quarterly chronic toxicity monitoring costs could increase by up to \$11,200 per year under the new Permit requirements. The San Diego Water Board disagreed, concluding that these cost increases could have occurred under the previous permit requirements. Supplemental Response to Comments Report, February 12, 2020, p. 9 – 10.

showing for a stay, the requesting party must nonetheless allege facts and produce proof of such costs. The district has not met that burden. The San Diego Water Board articulated a basis for its toxicity testing approach, with which the District does not agree. That issue is appropriate for analysis as part of the Petition for review of Order No. R9-2019-0169.

Finally, the District asserts substantial harm to the public interest resulting from the public having a “vested interest in the government complying with its own laws and regulations.”<sup>22</sup> While there may be conceptual harm to the public resulting from unlawful application of governmental regulations, the contention again assumes the legitimacy of arguments set forth in the substance of the Petition. Accepting such alleged harm as sufficient to satisfy the high bar set forth in section 2053 would obviate much of the intent of the regulation.

**b. Lack of Substantial Harm to Other Interested Persons and to the Public Interest**

The District asserts that other interested persons and the public will not suffer substantial harm if a stay is granted, because staying the chronic toxicity performance goal “will not operate to eliminate the requirement for the Petitioner to monitor for chronic toxicity or to report those results.”<sup>23</sup> However, with the test for determining compliance stayed, it is unclear how monitoring for chronic toxicity would be interpreted or reported in a manner that is protective of water quality, although the District does state that it will comply with the performance goal in its prior permit during period of a stay.<sup>24</sup> Moreover, the District’s statement that it will continue its existing protective level of treatment and source control efforts while the stay is in effect appears intended to illustrate lack of harm to the public interest, although this is not specifically stated for this set of requirements.

As with contentions regarding substantial harm to the petitioner, the District’s proffered proof falls short of meeting the burden required for a stay of the permit provisions being challenged. General statements, including statements that assume the prior permit to be sufficiently protective, do not constitute proof of a lack of harm to the public interest and other interested persons.

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<sup>22</sup> Toma Declaration, para. 12.

<sup>23</sup> Toma Declaration, para. 13.

<sup>24</sup> Toma Declaration, para. 10. The District argues that staying the requested provisions will not eliminate the requirements to monitor for chronic toxicity in accordance with the requirements of the Ocean Plan, or to report those results. Petition, p. 36. However, the Ocean Plan requirements are implemented through permits adopted by regional water quality control boards. The District’s argument also assumes that the prior performance goal was adequately protective, an assumption that goes to the merits of the Petition.

### **c. Substantial Questions of Fact or Law**

The District raises substantial questions of fact and law for this portion of its request for a stay. This includes the legality of directing use of the TST statistical approach in place of the statistical analysis requirement set forth in the Ocean Plan. However, because the first two prongs have not been met, the District has not made the required showing for a stay of the chronic toxicity performance goal and related requirements directing use of the TST statistical approach.

#### **2) Monitoring Requirements for Human Marker HF 183 and Fecal Coliform and Enterococci**

Order No. R9-2019-0169 includes a new requirement directing collection of samples for Human Marker HF 183. The new sampling requirement is to be collected concurrently with samples collected for fecal coliform at offshore monitoring stations. HF 183 is a marker used to confirm the presence of human fecal coliform material. The San Diego Water Board included the new requirement to help resolve whether approximately 73 exceedances of bacteria receiving water limitations near the ocean outfall between 2011 to 2019 resulted from the District's wastewater discharges or from non-human sources. By contrast, during the same period, only six exceedances of bacteria receiving water limitations occurred at reference stations. While the HF 183 sample must be collected concurrently, the Permit requires that any given sample be analyzed for HF 183 only if the corresponding sample for fecal coliform exceeds the single sample maximum receiving water limitation.

The District asks that the State Water Board stay the requirement to collect samples for HF 183 at offshore stations.<sup>25</sup>

#### **a. Substantial Harm to Petitioner or to the Public Interest**

The District states that the additional monitoring related to HF 183 is not explained or adequately justified in the new Permit. As explained above, the San Diego Water Board did provide a justification. Regardless, the primary basis for the claimed substantial harm is additional costs that were not anticipated in the District's budget.<sup>26</sup>

The District's request for stay generally does not quantify the new costs associated with HF 183, although the declaration submitted states that HF 183 monitoring would require the purchase of a -80° freezer to store samples, at a cost of \$6,200.<sup>27</sup> The San Diego Water Board's Supplemental Response to Comments Report discusses the District's comments as to cost for the HF 183 monitoring, which are stated to be based upon a

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<sup>25</sup> See, Petition, p. 32. The relevant permit provisions for which the District is seeking a stay are: MRP sections IV.B.1, Table E-7 and IV.B.2, Human Marker HF 183.

<sup>26</sup> Petition, p. 34.

<sup>27</sup> Toma Declaration, para. 8.

quote to the City of Oceanside.<sup>28</sup> The San Diego Water Board finds a number of inconsistencies in the cost estimates, noting that the City of Oceanside's reported cost of \$957,600 over the five-year permit term included no description of how that number was calculated.<sup>29</sup>

The District has not made an effort to support the costs submitted by the City of Oceanside, although those costs are substantial and would represent a major increase from the prior permit. The San Diego Water Board staff materials analyzing monitoring costs indicate that these represent a worst case scenario in which every sample at every offshore monitoring location exceeds the receiving water limitation for fecal coliform and therefore requires HF 183 analysis.<sup>30</sup> This is not consistent with the record of actual exceedances that occurred during the period 2011 – 2019, which is approximately one exceedance per quarter.<sup>31</sup> Based on the monitoring frequency required by the previous NPDES permit, it appears that fewer than ten percent of the fecal coliform samples from the offshore monitoring stations taken between 2011 and 2019 exceeded the 400 per 100 ml limitation. The District has provided no acceptable rationale to explain why their cost estimates assume that they will have one hundred percent exceedances of the same limitation under the new NPDES permit.

The San Diego Water Board also notes a number of potential inconsistencies and gaps in the cost estimates from the City of Oceanside. These include a new, significantly higher price quote from a laboratory in Florida submitted in January of 2020, subsequent to estimates provided in October of 2019, with no stated basis for that selection.<sup>32</sup> The San Diego Water Board did analyze the cost from the more expensive lab, estimating a worst case scenario (all fecal coliform samples exceeding receiving water limitations) of \$586,460 per five-year permit term, which could be shared among the POTW agencies discharging to the outfall.<sup>33</sup> A more realistic estimate based upon historical exceedances was \$118,460 per permit term, potentially shared among the agencies.<sup>34</sup> Estimates from the October submission were calculated at \$83,430 per permit term for the worst case scenario and \$34,290 per permit term based upon historical exceedances, all potentially shared among the agencies.<sup>35</sup> The San Diego Water Board also allowed for alternative sample analysis methods to be proposed for approval by the Board.

The District does not address these costs, how they were obtained or calculated. Regardless, substantial harm resulting from costs of permit compliance while the Petition is pending before the State Water Board would not encompass the costs

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<sup>28</sup> Supplemental Response to Comments Report, p. 16.

<sup>29</sup> Supplemental Response to Comments Report, p. 18.

<sup>30</sup> Supplemental Response to Comments Report, p. 16.

<sup>31</sup> Supplemental Response to Comments Report, p. 17.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* p. 18.

<sup>35</sup> *Id.* p. 16-17.

incurred during the entire permit term. Nor is it reasonable to assume that every fecal coliform sample will exceed receiving water limitations. While costs associated with monitoring will generally vary somewhat, the inconsistencies and unsupported assumptions described above are not credible for the purpose of proving substantial harm to the Petitioner and to the public interest.

**b. Lack of Substantial Harm to Other Interested Persons and to the Public Interest**

The District's case for lack of substantial harm to other interested persons or to the public interest is based upon the District complying with other requirements set forth in the Permit. The District further states that a stay will not result in monitoring or reporting that is less than the level required in its prior permit. To succeed, this argument assumes that the previous permit was adequately protective, which further assumes that the increased monitoring required by the San Diego Water Board is unnecessary. The District notes that permits issued elsewhere in the state have not included these requirements.<sup>36</sup>

The District's arguments do not constitute proof of lack of harm to the public interest. If site-specific information were to provide support for the increased monitoring, a stay of those requirements would delay the San Diego Water Board's ability to gather necessary data to assess actions that may be necessary to protect water quality in the Pacific Ocean and public health. The District has not addressed this possibility.

**c. Substantial Questions of Fact or Law**

Arguably, substantial questions of fact and law may exist for this prong. While the basis for the specific costs to monitor and analyze HF 183 and for whether or not the HF 183 sampling collection is warranted possibly raise unresolved issues, the District has not adequately explained the basis for its positions. Moreover, because the other two elements of Section 2053 have not been met, the request to stay these permit requirements cannot prevail.

**3) Other New Reporting Requirements**

The San Diego Water Board added a number of newly required reports in the MRP for the District's new Permit for which the District seeks a stay. These reports include a Climate Change Action Plan, a Plume Tracking Monitoring Program and Workplan, a State of the Ocean Report, a Pollutant Minimization Plan, an Initial Investigation TRE Workplan and a Benthic Monitoring Workplan.<sup>37</sup> The San Diego Water Board provided

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<sup>36</sup> Toma Declaration, para. 15.

<sup>37</sup> See, Petition, p. 32. The relevant permit provisions for which the City is seeking a stay are: MRP Section VI.A. (Climate Change Action Plan); MRP Section VI.B (Plume Tracking Monitoring Program); MRP Section IV.F.3 (State of the Ocean Report);

explanations for these new reports as part of the Permit documentation.<sup>38</sup> For instance, the plume tracking monitoring program was included in order to determine whether the wastewater plume from the outfall was moving toward rather than away from the shore, thereby endangering public health by encroaching upon water recreational areas.<sup>39</sup> The plume tracking program was also included in order to determine future receiving water monitoring locations.<sup>40</sup> As with other Permit and MRP provisions discussed above, the District claims that the San Diego Water Board failed to sufficiently explain the need for the reports in relation to the increased costs and financial burden to the District.<sup>41</sup>

#### **a. Substantial Harm to Petitioner or to Public Interest**

The District's claims of substantial harm related to these requirements is based largely on cost. The District notes that the Permit requires submission of several workplans within 90 or 180 days of the Permit's effective date, which would or could fall within the pendency of the Petition before the State Water Board. The District maintains that the additional monitoring may ultimately prove unnecessary.<sup>42</sup>

The San Diego Water Board provided an extensive analysis in its response to comments on the costs associated with the requirements included in Order R9-2019-0169. The San Diego Water Board did revise some monitoring requirements in order to provide additional cost savings, and also revised the Benthic Monitoring Report to allow dischargers instead to fulfill the requirement through participation in a regional monitoring program.<sup>43</sup> The San Diego Water Board agreed that the Plume Tracking requirement could cost the District \$20,000 per year as its specific share of the collective cost to multiple agencies.<sup>44</sup> The San Diego Water Board did not agree with the District's estimate of \$31,647 for the Plume Tracking Work Plan and Monitoring

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Provision VI.C.3 (Pollutant Minimization Program); MRP Section III.C.6 (Preparation of an Initial Investigation Toxicity Reduction Evaluation (TRE) Work Plan); and MRP Section IV.C.4 (Benthic Monitoring Work Plan).

<sup>38</sup> See, Order No. R9-2019-0169, Attachment F, Fact Sheet, Section VII.

<sup>39</sup> Order No. R9-2019-0169, Attachment F, Fact Sheet, at F-48.

<sup>40</sup> *Id.*

<sup>41</sup> Monitoring requirements included as part of the permit are authorized based upon Water Code sections 13267 and 13383. Water Code section 13267, subd. (b)(1), provides that for any investigation of water quality established in connection with waste discharge requirements, "[t]he burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports." The statute also requires the regional water board to "identify the evidence that supports requiring that person to provide the reports." Water Code section 13383 more narrowly governs issuance of monitoring requirements "as may reasonably be required" pursuant to the State Water Board's authority to implement and enforce the Federal Water Pollution Control Act within the state of California.

<sup>42</sup> Toma Declaration, para. 11.

<sup>43</sup> See, Supplemental Response to Comments Report, p. 19.

<sup>44</sup> *Id.* pp. 5-6.

Plan, and stated that the District did not clarify whether this was the total cost to all the agencies or the District's share. The San Diego Water Board identified a lower quote of \$25,000 for a plume tracking work plan and monitoring plan at other area outfalls, a cost that could be shared among the agencies.<sup>45</sup> The District did not attempt to refute or otherwise address these lower cost estimates.

The total cost estimates for the Climate Change Action Plan, Initial TRE and Pollutant Minimization Program were \$125,000 per permit term in the District's estimate, while the San Diego Water Board's estimates ranged from \$65,000 to \$80,000 for the same period of these reports, shared by the agencies.<sup>46</sup> It does not appear that the District submitted an estimate for the State of the Ocean Report, but the San Diego Water Board estimated the cost from \$0 (for staff time only) to \$7,000.

The District has not provided a response to the San Diego Water Board's lower estimated costs, nor any breakdown of likely costs while the Petition is pending. For instance, the San Diego Water Board cost estimate for the Initial TRE Work Plan ranged from \$0, for staff time, to an upper limit of \$10,000, reasoning that the previous order already required the District to develop a TRE Work Plan, thus the new permit requirement only required an update with current information.<sup>47</sup> The State of the Ocean Report is an oral report to be presented to the San Diego Water Board, summarizing conclusions of the receiving water monitoring, required to be given no later than 180 days prior to the expiration date of the five-year Permit.<sup>48</sup> That report is unlikely to be required during the pendency of any stay issued.

The District has not adequately supported its claims, and thus has not shown substantial harm resulting from inclusion of these new reporting requirements.

**b. Lack of Substantial Harm to Other Interested Persons and to the Public Interest**

The District's arguments as to lack of harm from issuance of a stay of these other reporting requirements are similar to those stated for the HF 183 requirement discussed above. The District simply states that all other requirements in its permit will remain in effect and be subject to enforcement by the San Diego Water Board, and that the District's existing protective level of treatment will continue. These statements do not adequately show a lack of harm in issuance of a stay.

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<sup>45</sup> *Id.* pp. 6-7.

<sup>46</sup> *Id.* p. 25.

<sup>47</sup> *Id.* p. 22.

<sup>48</sup> Order No. R9-2019-0169, Attachment E, MRP, Section IV.F.3, p. E-32.

**c. Substantial Questions of Fact or Law**

The District has not shown substantial questions of fact or law associated with this portion of the request for stay.

**4) New Effluent Limitation for Flow**

The District's previous permit included a prohibition against exceeding the treatment plant's design flow. The San Diego Water Board removed that prohibition in the new Permit and instead converted it to an effluent limitation. The District asks that this new effluent limitation be stayed.<sup>49</sup>

**a. Substantial Harm to Petitioner or to Public Interest**

The District's case for substantial harm resulting from the flow effluent limitation consists of a statement that it must comply with the limit or risk incurring enforcement or mandatory minimum penalties.<sup>50</sup> However, the request for stay makes no effort to explain why the District is at risk of violating this limitation, nor why the limitation is unwarranted. As explained more fully in the sections above, threat of enforcement by itself is not a basis for substantial harm.

**b. Lack of Substantial Harm to Other Interested Persons and to the Public Interest**

The District's general claims that other permit requirements remain in effect, as explained above, do not satisfy the requirement to prove lack of harm resulting from a stay.

**c. Substantial Questions of Fact or Law**

The District has not shown substantial questions of fact or law associated with this portion of the request for stay.

**CONCLUSION**

Because the District has not met all three requirements for issuance of a stay for any of the categories of the permit provisions and monitoring requirements set forth above, the request for stay filed by the District is hereby denied. The State Water Board will continue to proceed with its review of the Petition. Consistent with the State Water Board's COVID-19 published policy, the City should notify the San Diego Water Board if there is a specific permit requirement that cannot be timely met because it would be inconsistent with current governmental directives or guidelines related to COVID-19.

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<sup>49</sup> See, p. 35. The relevant permit provision for which the District is seeking a stay is: Provision IV.A.1.c, Table 6.

<sup>50</sup> See, Petition, p. 35.

If you should have any questions regarding this matter, you may contact Marleigh Wood in the State Water Board's Office of Chief Counsel at (916) 341-5169 or at [Marleigh.wood@waterboards.ca.gov](mailto:Marleigh.wood@waterboards.ca.gov).

Sincerely,

*Original signed by*

Tam M. Doduc  
State Water Board Member

cc: See next page

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