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## State Water Resources Control Board

June 5, 2020

Lori Rigby, Compliance Officer  
Water Utilities Department  
City of Oceanside  
300 North Coast Highway  
Oceanside, CA 92054  
[lrigby@oceansideca.org](mailto:lrigby@oceansideca.org)

Cari Dale  
Water Utilities Director  
City of Oceanside  
300 North Coast Highway  
Oceanside, CA 9254  
[cdale@oceansideca.org](mailto:cdale@oceansideca.org)

PETITION OF CITY OF OCEANSIDE FOR REVIEW OF ORDER NO. R9-2019-0166, NPDES No. CA0107433, WASTE DISCHARGE REQUIREMENTS FOR THE CITY OF OCEANSIDE SAN LUIS REY WATER RECLAMATION FACILITY, LA SALINA WASTEWATER TREATMENT PLANT, AND MISSION BASIN GROUNDWATER PURIFICATION FACILITY, ISSUED BY SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD SWRCB/OCC FILE A-2689: DENIAL OF REQUEST FOR STAY

Dear Mses. Rigby and Dale:

On March 10, 2020, the City of Oceanside (City) filed a Petition for the Review of Action by the California Regional Water Quality Control Board, San Diego Region, in Adopting Order No. R9-2019-0166, NPDES Permit for the San Luis Rey Water Reclamation Facility, La Salina Wastewater Treatment Plant, and Mission Basin Groundwater Purification Facility (Petition). On April 9, 2020, the State Water Resources Control Board (State Water Board) acknowledged receipt of the above-referenced Petition and request for stay. On May 6, 2020, the State Water Board issued a letter indicating that the Petition 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 City of

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

Oceanside has also requested a stay of certain provisions of Order No. R9-2019-0166. 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. R9-2019-0166 (NPDES No. CA0108433) (hereinafter Permit), Waste Discharge Requirements (WDRs) that serve as a National Pollutant Discharge Elimination System (NPDES) permit for the City of Oceanside (City, or Petitioner). The City owns and operates the San Luis Rey Water Reclamation Facility, the La Salina Wastewater Treatment Plant and the Mission Basin Groundwater Purification Facility, all of which discharge to the Pacific Ocean via the Oceanside Ocean Outfall. The City filed its Petition seeking review of a range of provisions set forth in the City's newly-reissued NPDES permit and asking that the State Water Board stay the following categories of provisions set forth in the Permit: an effluent limitation for chronic toxicity that directs use of the "test of significant toxicity" (TST) statistical method for determining compliance, as well as related provisions including monitoring 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 and enterococci; 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 Petitioner's newly reissued NPDES permit became effective on April 1, 2020. The Petitioner 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>1</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>2</sup>

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<sup>1</sup> Cal. Code Regs., tit. 23, § 2050.5, subd. (b).

<sup>2</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>3</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 Petitioner's arguments in support of a stay generally contend that the Petitioner will suffer substantial harm from the new permit requirements because those provisions will result in needless new expenditures and will place the Petitioner 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 Petitioner 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>4</sup> Conversely, the Petitioner contends that other interested parties and the public will not incur substantial harm if a stay is granted because other

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<sup>3</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>4</sup> Petition for Review filed by the City of Oceanside (hereinafter Petition), p. 39.

requirements set forth in the Permit will continue to apply, and the Petitioner will operate its facilities in accordance with its previous permit.<sup>5</sup> Finally, the Petitioner asserts that substantial questions of law have been raised regarding the basis for the chronic toxicity statistical approach prescribed and for the other additional monitoring.

In support of its request for stay, the Petitioner has submitted a declaration by Lori Rigby, Compliance Officer for the City of Oceanside's Water Utilities Department. The Petition filed also includes a number of exhibits, including: the final San Diego Water Board adopted order, a comment letter submitted by the City of Oceanside 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>6</sup> Each category of permit requirements challenged is discussed below, analyzing each of the three prongs of Section 2053.<sup>7</sup>

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

The Petitioner's reissued Permit contains a new effluent limitation for chronic toxicity where the prior permit had included only a performance goal. In addition to assigning the new effluent limitation, 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

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<sup>5</sup> Petition, p. 40.

<sup>6</sup> On March 19, 2020, a representative of the City 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 City 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 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.

<sup>7</sup> All future regulatory references herein are to California Code of Regulations, title 23, section 2053, unless otherwise noted.

Bays and Estuaries of California (State Water Board Proposed Toxicity Provisions).<sup>8</sup>

The TST is not itself a test method and does not change the U.S. EPA toxicity test methods.<sup>9</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>10</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>11</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>12</sup>

The Petitioner seeks a stay of permit provisions related to chronic toxicity and the TST. These provisions include the effluent limitation for chronic toxicity; use of the TST statistical approach for determining compliance; and required monitoring and a trigger for conducting a TRE.<sup>13</sup> The chronic toxicity provisions contained in Order No. R9-

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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>9</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>10</sup> False negative refers to a situation in which a toxicity test inaccurately shows that the sample is not toxic.

<sup>11</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>12</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>13</sup> See Petition, p. 35. Relevant Permit provisions requested to be stayed are: Provision IV.A.1.d, Table 7, chronic toxicity; Provisions IV.A.1.d, Table 7, note 2 and Provision VII.L; and effluent monitoring requirements for chronic toxicity set forth in

2019-0166 include a daily maximum limitation, while the Monitoring and Reporting Program directs a minimum sampling frequency of once per month, which may be decreased after one year if results show that the discharger is in compliance.

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

The Petitioner argues that it and the public interest are harmed by the new toxicity limitation and by imposition of the TST statistical method and associated monitoring requirements because the toxicity limitation is without basis, given a lack of exceedances of the previous performance goal. The Petitioner further asserts that the TST contains a high single-test false positive rate that will result in violations of the Permit requirements and subject the Petitioner to citizen suits and discretionary penalties. In general, these arguments assume that the Permit requirements are unnecessary, improper and legally infirm.

Harm to the Petitioner alleged in the supporting declaration includes jeopardy of permit violations based upon being “statistically guaranteed” to be in violation “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>14</sup> While the Petitioner 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>15</sup> Intrinsic to the allegation of harm is the Petitioner’s lack of exceedances of the previous performance goal, with no results close to an exceedance, so the Petitioner claims that it is thus exposed to potential violations of the new effluent limitation and enforcement jeopardy without basis.<sup>16</sup> These arguments go to the substance of the Petitioner’s disagreement with the San Diego Water Board and, even assuming the accuracy of facts about compliance with the previous permit’s toxicity performance goal, 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

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Attachment E, Monitoring and Reporting Program, Table E-5 (Effluent Monitoring at Monitoring Location M-004), section III.C.7 (Accelerated Monitoring Schedule for Maximum Daily Single Result: “Fail”), and section III.C.8 (TRE Process).

<sup>14</sup> Declaration of Lori Rigby in Support of the City’s Request for Stay, March 9, 2020, Paragraph 8.

<sup>15</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 Petitioner’s discharge is to marine waters.

<sup>16</sup> Rigby Declaration, Paragraphs 6 and 7.

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.<sup>17</sup> 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.<sup>18</sup> 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.”<sup>19</sup>

The Petitioner makes little effort to substantiate the claimed likelihood of violations, let alone enforcement actions. By assuming the validity of its contentions as to the inaccuracy of the TST method and flaws with its associated use in monitoring requirements and compliance determinations, the Petitioner asserts the risk of enforcement as harm.<sup>20</sup> The Petitioner further states that it recently settled a citizen suit over alleged permit compliance issues as illustration of the concrete nature of the citizen enforcement threat, but does not discuss the basis for the citizen suit or its relation to the constituents at issue in the contested Permit provisions. Such generalized statements do not constitute proof of substantial harm. Based upon the Petitioner’s submission, there is no reliable basis to assume occurrence of future violations or administrative enforcement by the San Diego Water Board that would become final before resolution of the Petition.<sup>21</sup>

In a contention repeated for other monitoring requirements set forth below, the Petitioner also argues that it and the City’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>22</sup> The Petitioner 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. R9-2019-0166 assessed the Petitioner’s comments on chronic

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<sup>17</sup> State Water Board Order WQ 2006-0007, p. 9.

<sup>18</sup> *Id.*, p.10.

<sup>19</sup> State Water Board WQ 2012-0012, p. 8.

<sup>20</sup> Rigby Declaration, para. 10.

<sup>21</sup> The San Diego Water Board, aware of the Petitioner’s arguments as to the legality of directing use of the TST, acknowledged that further direction from the State Water Board would come in the form of action on any petition filed in response to Order No. R9-2019-0166. See, San Diego Water Board Transcript, February 12, 2020, pp. 151-152.

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

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>23</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 showing for a stay, the requesting party must nonetheless allege facts and produce proof of such costs. The Petitioner has not met that burden. The San Diego Water Board articulated a basis for its toxicity testing approach, with which the Petitioner does not agree. That issue is appropriate for analysis as part of the Petition for review of Order No. R9-2019-0166.

Finally, the Petitioner 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>24</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 Petitioner asserts that other interested persons and the public will not suffer substantial harm if a stay is granted, because staying the chronic toxicity effluent limitation “will not operate to eliminate the requirement for the Petitioner to monitor for chronic toxicity or to report those results.”<sup>25</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.<sup>26</sup> Moreover, the Petitioner’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.

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<sup>23</sup> San Diego Water Board, Supplemental Response to Comments Report, February 12, 2020, p. 12. The San Diego Water Board did agree that costs for chronic toxicity monitoring for the new Permit may increase by \$24,500 per five-year permit term but noted that monthly monitoring could be reduced to semiannual after the first year. San Diego Water Board, Supplemental Response to Comments Report, February 12, 2020, p. 12.

<sup>24</sup> Rigby Declaration, para. 13.

<sup>25</sup> Rigby Declaration, para. 14.

<sup>26</sup> The Petitioner states that, during the effect of a stay, the Petitioner would comply with the chronic toxicity performance goal included in its prior permit. Rigby Declaration, para. 11. This assumes that the performance goal was adequately protective, an assumption that goes to the merits of the Petition.

As with contentions regarding substantial harm to the Petitioner, the Petitioner'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.

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

The Petitioner raises substantial questions of fact and law for this portion of its request for a stay. These include the basis for including an effluent limitation rather than a performance goal for chronic toxicity and 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 Petitioner has not made the required showing for a stay of the chronic toxicity limitation 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. R9-2019-0166 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 Petitioner'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 Petitioner asks that the State Water Board stay the requirement to collect samples for HF 183 at offshore stations. The Petitioner also seeks a stay of nearshore fecal coliform and enterococci sampling requirements at increased frequency from the prior permit requirements.<sup>27</sup>

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<sup>27</sup> See, Petition, p. 35. The relevant permit provisions for which the City is seeking a stay are: MRP sections IV.B.1, Table E-8 and IV.B.2, Human Marker HF 183); and sections IV.A, Table E-7, notes 2 and 3 ( surf zone monitoring for fecal coliform and enterococci).

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

The Petitioner states that the additional monitoring related to both HF 183 and fecal coliform and enterococci is not explained or adequately justified in the new Permit and poses a “severe financial burden to the City.”<sup>28</sup> As with the TST requirements, the primary basis for the claimed substantial harm is additional costs that were not included in the City’s budget, constituting a financial hardship.<sup>29</sup>

While the declaration submitted by the Petitioner does not itself quantify any costs associated with the new requirements, the Petitioner’s request for a stay includes the detail that HF 183 monitoring would require the purchase of a -80° freezer to store samples, at a cost of \$6,200.<sup>30</sup> The request for stay included with the Petition also includes as an exhibit a presentation included as part of the Petitioner’s testimony before the San Diego Water Board on February 12, 2020. That presentation includes a cost breakdown for additional monitoring in the Petitioner’s reissued Permit. No separate cost is presented for the increased fecal coliform and enterococci monitoring, but an entry for HF 183 collection includes a new cost of \$957,600 over the five-year permit term, or \$192,520 per year.<sup>31</sup>

The costs alleged by the Petitioner to comply with sampling for HF 183 are substantial and represent a major increase from the prior permit. However, the Petitioner’s submission does not provide a basis for calculation of these costs. Moreover, information available on the San Diego Water Board website showing supporting documentation for the Water Board’s February 12, 2020 consideration of the Permit illustrates potential inconsistencies with these numbers, in addition to lack of support. 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>32</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>33</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

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<sup>28</sup> Rigby Declaration, para. 9.

<sup>29</sup> The declaration submitted does not separately address the HF 183 and fecal coliform/enterococci requirements as potentially resulting in enforcement actions or Permit violations, although broad statements averring harm to the general public from additional costs claimed to be unnecessary together with potential enforcement actions do mention HF 183 in passing. Rigby Declaration, para. 12.

<sup>30</sup> Petition, p. 39. While the document refers to paragraph 9 of the accompanying declaration, this information does not appear in that document. The Petition also refers to a slide presented to the San Diego Water Board, which does include that figure.

<sup>31</sup> Permit, Exhibit C, slide 6; Supplemental Response to Comments Report, p. 7.

<sup>32</sup> Supplemental Response to Comments Report, at 10.

<sup>33</sup> Supplemental Response to Comments Report, p. 10.

the offshore monitoring stations taken between 2011 and 2019 exceeded the 400 per 100 ml limitation. The Petitioner 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.

In addition, it appears that cost estimates submitted to the San Diego Water Board were revised upward between October of 2019 and January of 2020. Based upon the October estimates, San Diego Water Board staff reported a worst case scenario of \$83,430 per permit term, shared among the three publicly owned treatment works (POTW) agencies discharging to the common outfall.<sup>34</sup> The expected cost for HF 183 monitoring based upon historical exceedances occurring approximately once per quarter rather than at every sampling event was \$34,290 per permit term, shared among the agencies.<sup>35</sup> The San Diego Water Board noted that the regulated entities stated a need to assume the unlikely worst case scenario because of budgeting issues.<sup>36</sup>

The estimates submitted in January were much higher, reaching a worst-case scenario of up to \$957,600 per permit term. The substantial increase was attributed in part to obtaining price quotes from a laboratory in Florida rather than in Southern California. However, even accepting the necessity of using the Florida laboratory and assuming the worst case scenario, the San Diego Water Board was unable to replicate the Petitioner's estimate, instead calculating an upper limit of \$586,460 per permit term shared among the agencies.<sup>37</sup> Use of historical exceedances between 2011 to 2019 would yield an expected cost of \$118,460 for all three POTW agencies discharging through the Oceanside Ocean Outfall. The San Diego Water Board also allowed for alternative sample analysis methods to be proposed for approval by the Board.

The Petitioner has not explained the basis for its very high estimates for the contracting laboratory in Florida.<sup>38</sup> Nor is there an effort to reconcile the differing estimates calculated by the Petitioner and the San Diego Water Board. Regardless, substantial

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

<sup>35</sup> The Petitioner represented at the hearing that it could only obtain individual cost quotations for the monitoring requirements, not the Petitioner's portion of shared costs. San Diego Water Board Hearing Transcript, p. 43. Nonetheless, the City uses these same quotations as the basis for substantial harm resulting from imposition of requirements that are common to several dischargers. Because the dischargers need not duplicate each other's monitoring, the resulting financial burden for each discharger would, of course, be substantially less than the quoted amounts.

<sup>36</sup> San Diego Water Board Hearing Transcript, p. 22.

<sup>37</sup> Supplemental Response to Comments Report, p. 11.

<sup>38</sup> The Petitioner stated at the February hearing that it had been unprepared to provide meaningful cost quotations for the HF 183 sampling because the requirement had not been included in the administrative draft previously provided. San Diego Water Board Hearing Transcript, at p. 43-44. However, the issue is not addressed in the stay request.

harm resulting from costs of permit compliance while the Petition is pending before the Board would not encompass the costs 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 Petitioner's case for lack of substantial harm to other interested persons or to the public interest is based upon the Petitioner complying with other requirements set forth in the Permit. The Petitioner 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 Petitioner notes that permits issued elsewhere in the state have not included these requirements.<sup>39</sup>

The Petitioner'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 Petitioner 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 sample collection and increased sampling for fecal coliform and enterococci are warranted possibly raise unresolved issues, the Petitioner 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 Petitioner's new Permit for which the Petitioner 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

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<sup>39</sup> Rigby Declaration, para. 16.

Workplan and a Benthic Monitoring Workplan.<sup>40</sup> The San Diego Water Board provided explanations for these new reports as part of the Permit documentation.<sup>41</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 for beachgoers and for other water recreational purposes.<sup>42</sup> The plume tracking program was also included in order to determine future receiving water monitoring locations.<sup>43</sup> As with other Permit and MRP provisions discussed above, the Petitioner 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 Petitioner.<sup>44</sup>

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

The Petitioner's claims of substantial harm related to these requirements are based largely on cost. The Petitioner 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 Petitioner states that its approved budget does not include these costs, which present a financial hardship, and further maintains that the additional monitoring is unnecessary.<sup>45</sup> The Petitioner further notes that the new requirements will divert resources that would otherwise pay for infrastructure upgrades that benefit public health and safety.

The San Diego Water Board provided an extensive analysis in its response to comments on the costs associated with the requirements included in Order R9-2019-0166. The San Diego Water Board did reduce some previous permit requirements in

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<sup>40</sup> See, Petition, p. 35. 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); 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>41</sup> See, Order No. R9-2019-0166, Attachment F, Fact Sheet, Section VII.

<sup>42</sup> Order No. R9-2019-0166, Attachment F, Fact Sheet, at F-53.

<sup>43</sup> Order No. R9-2019-0166, Attachment F, Fact Sheet, at F-48.

<sup>44</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>45</sup> Rigby Declaration, para. 12.

order to help offset some of the additional costs, and also revised the Benthic Monitoring Report to allow dischargers instead to fulfill the requirement through participation in a regional monitoring program.<sup>46</sup> The San Diego Water Board agreed that the Plume Tracking requirement would cost at least \$341,000, but noted that the cost could be shared among the dischargers.<sup>47</sup> The total cost estimates for the remaining reports for the five-year permit term ranged from \$65,000 to \$87,000, which could be shared among the dischargers.

The Petitioner has not provided a response to the San Diego Water Board's lower estimated costs, nor has there been any effort to document the actual costs to the Petitioner, 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 Petitioner to develop a TRE Work Plan, thus the new requirement only required an update with current information.<sup>48</sup> The State of the Ocean Report, which the San Diego Water Board also stated did not require new information or analyses, 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>49</sup>

The Petitioner 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 Petitioner's arguments as to lack of harm from issuance of a stay of these other reporting requirements are the same as those stated for the HF 183 and fecal coliform and enterococci monitoring discussed above. The Petitioner 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 Petitioner's existing protective level of treatment will continue. These statements do not adequately show a lack of harm in issuance of a stay.

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

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

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<sup>46</sup> See, Supplemental Response to Comments Report, pp. 14-15.

<sup>47</sup> *Id.*, pp. 8, 15.

<sup>48</sup> *Id.*, p. 14.

<sup>49</sup> *Id.*, p. 15; Order No. R9-2019-0166, Attachment E, MRP, p. E-36.

#### **4) New Effluent Limitation for Flow**

The Petitioner's previous permits have 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 Petitioner asks that this new effluent limitation be stayed.<sup>50</sup>

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

The Petitioner'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>51</sup> However, the request for stay makes no effort to explain why the Petitioner 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 Petitioner'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 Petitioner has not shown substantial questions of fact or law associated with this portion of the request for stay.

#### **CONCLUSION**

Because the Petitioner has not met all three requirements for issuance of a stay for any of the categories of permit and monitoring requirements set forth above, the request for stay filed by the City of Oceanside 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>50</sup> See, Petition of City of Oceanside, p. 35. The relevant permit provision for which the City is seeking a stay is: Provision IV.A.1. d - e, Tables 7 and 8.

<sup>51</sup> See, Petition of City of Oceanside, p. 38.

Lori Rigby  
Cari Dale

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June 5, 2020

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

<p><b>[via U.S. Mail and email]</b> Melissa A. Thorme, Esq. Downey Brand LLP 621 Capitol Mall, 18th Floor Sacramento, CA 95814-4686 <a href="mailto:mthorme@downeybrand.com">mthorme@downeybrand.com</a></p> <p>Joann Lim <b>[via email only]</b> Water Resources Control Engineer San Diego Regional Water Quality Control Board 2375 Northside Drive, Suite 100 San Diego, CA 92108 <a href="mailto:Joann.Lim@waterboards.ca.gov">Joann.Lim@waterboards.ca.gov</a></p> <p>David W. Gibson <b>[via email only]</b> Executive Officer San Diego Regional Water Quality Control Board 2375 Northside Drive, Suite 100 San Diego, CA 92108 <a href="mailto:David.Gibson@waterboards.ca.gov">David.Gibson@waterboards.ca.gov</a></p> <p>Emel Wadhvani, Esq. <b>[via email only]</b> Office of Chief Counsel State Water Resources Control Board 1001 I Street, 22<sup>nd</sup> Floor [95814] P.O. Box 100 Sacramento, CA 95812-0100 <a href="mailto:Emel.Wadhvani@waterboards.ca.gov">Emel.Wadhvani@waterboards.ca.gov</a></p> <p>Jennifer L. Fordyce, Esq. <b>[via email only]</b> Office of Chief Counsel State Water Resources Control Board 1001 I Street, 22<sup>nd</sup> Floor [95814] P.O. Box 100 Sacramento, CA 95812-0100 <a href="mailto:Jennifer.Fordyce@waterboards.ca.gov">Jennifer.Fordyce@waterboards.ca.gov</a></p> <p>Marleigh Wood, Esq. <b>[via email only]</b> Office of Chief Counsel State Water Resources Control Board 1001 I Street, 22<sup>nd</sup> Floor [95814] P.O. Box 100 Sacramento, CA 95812-0100 <a href="mailto:Marleigh.Wood@waterboards.ca.gov">Marleigh.Wood@waterboards.ca.gov</a></p>	<p>Catherine George Hagan, Esq. <b>[via email only]</b> Office of Chief Counsel, State Water Board c/o San Diego Region, Regional Water Quality Control Board 2375 Northside Drive, Suite 100 San Diego, CA 92108 <a href="mailto:Catherine.Hagan@waterboards.ca.gov">Catherine.Hagan@waterboards.ca.gov</a></p> <p>Vincent Vu, Esq. <b>[via email only]</b> Office of Chief Counsel State Water Resources Control Board 1001 I Street, 22<sup>nd</sup> Floor [95814] P.O. Box 100 Sacramento, CA 95812-0100 <a href="mailto:Vincent.Vu@waterboards.ca.gov">Vincent.Vu@waterboards.ca.gov</a></p> <p>Philip Wyels, Esq. <b>[via email only]</b> Office of Chief Counsel State Water Resources Control Board 1001 I Street, 22<sup>nd</sup> Floor [95814] P.O. Box 100 Sacramento, CA 95812-0100 <a href="mailto:Philip.Wyels@waterboards.ca.gov">Philip.Wyels@waterboards.ca.gov</a></p> <p>Elizabeth Sablad, Chief <b>[via email only]</b> Permits Office U.S. EPA, Region 9 75 Hawthorne Street San Francisco, CA 94105 <a href="mailto:Sablade.Elizabeth@epa.gov">Sablade.Elizabeth@epa.gov</a></p> <p>Eric Magnan, Chief <b>[via email only]</b> Clean Water Act Compliance (NPDES) U.S. EPA, Region 9 75 Hawthorne Street San Francisco, CA 94105 <a href="mailto:Magnan.Eric@epa.gov">Magnan.Eric@epa.gov</a></p> <p>Listserve</p>
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