May 15, 2020

Sent via electronic-mail to: commentletters@waterboards.ca.gov

The Honorable E. Joaquin Esquivel
Chair, State Water Resources Control Board (State Water Board)
1001 I Street
Sacramento, CA 95814

Subject: White Paper Discussion on Economic Feasibility Analysis in Consideration of a Hexavalent Chromium MCL

Dear Chair Esquivel:

On behalf of the California Association of Sanitation Agencies (CASA), I write to provide comments on the recently released “White Paper Discussion on Economic Feasibility Analysis in Consideration of a Hexavalent Chromium MCL” (White Paper). CASA represents more than 125 public agencies and municipalities that engage in wastewater collection, treatment, recycling, and resource recovery. Though the economic feasibility analysis that the State Water Board will utilize in the upcoming development of the revised maximum contaminant level (MCL) for hexavalent chromium (CrVI) may not impact most wastewater agencies in the short term, these comments are submitted in consideration of the White Paper’s acknowledgement that the “ideas and methodologies arising from the CrVI rulemaking process may be applied in the development of other drinking water standards.”

Impacts to Wastewater Treatment Plants’ Operations Should be Included in the Costs of Compliance with an MCL

Health & Safety Code § 116365(b)(3) requires the State Water Board to “consider the costs of compliance to public water systems, customers, and other affected parties with the proposed primary drinking water standard.” [Emphasis added.] In calculating the costs of compliance for the purposes of performing a feasibility analysis, the costs to numerous wastewater agencies should be included due to how they are impacted by an MCL. Around the state, there are multiple regions in which adopted MCLs are incorporated by reference into basin plans and automatically becomes an enforceable water quality objective (WQO). Depending on the extent that compliance issues arise, this will result in treatment requirements and associated cost consequences which will add to the local burden for utility user charges. Additionally, the California Water Code requires regional water quality control boards to consider multiple factors when adopting water quality objectives\(^1\), and these too should be incorporated into the framework for the costs of compliance and economic feasibility due to the nexus between MCLs and WQOs.

The White Paper Differentiates “Affordability” from “Economic Feasibility,” but This Distinction Is Not Recognized by the Court in CMTA v. SWB

In 2017, the Superior Court of Sacramento invalidated the previously adopted CrVI MCL in California Manufacturers & Technology Association v. State Water Board (CMTA v. SWB). The White Paper specifies:

> In this document, affordability refers to the ability of an individual household to pay their own water bill and economic feasibility refers to the ability of the general state population served by public water systems to pay for compliance to a drinking water standard... The connection between affordability and economic feasibility

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1. a) Past, present, and probable future beneficial uses of water; b) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto; c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area; d) Economic considerations; e) The need for developing housing within the region; f) The need to develop and use recycled water.
is complex and beyond the scope of this document. While affordability considers the impact on the individual, economic feasibility focuses on the impact to the community of water systems as a whole (p.9).

The court in *CMTA v. SWB* expressly rejected the underlying dichotomy of this proposition: “The court is not convinced that it is reasonable to spread the cost of compliance among every household in California where it is clear that the cost will be borne by a much smaller subset” (p. 11). This suggests that “economic feasibility” cannot be premised on the costs being diffused statewide, in direct contrast to the White Paper’s assertion that “[e]stablishing economic feasibility criteria based on less than 5% of the State’s population jeopardizes health protection for the remaining 95% and is not an acceptable public health policy” (p.6). The connection between “affordability” and “economic feasibility” should not be deemed beyond the scope of the White Paper and excluded from the discourse. Accordingly, we recommend that the White Paper delve into the intersection of these two terms, especially given the court’s observation in *CMTA v. SWB* that:

Economically feasible has to mean something, and it is difficult to conceive of a definition that does not at least consider affordability. In determining economic feasibility, the Department is directed to consider one thing: how much compliance will cost. (§ 116365, subd. (b)(3).) At least one other court has found that the term "feasible" means both "technically possible and affordable..." Whether one uses the term “economically feasible” or the term “affordable,” the court is concerned that some families will not have the income or resources to pay a water bill that increases by $5,600 per year (p. 12-13).

To that end, CASA additionally requests the White Paper include a more defined process for the assessment and determination of economic feasibility. A standardized framework for assessing the economic feasibility of a proposed MCL is necessary, whereas as utilizing varied approaches for different potential rulemakings is the opposite of a systematic method that consistently uses metrics for evaluating economic feasibility.

**Clarification of Responsible Parties Contemplated in the Consideration of Anthropogenic Contaminants**

The White Paper states that “[c]onsideration of a natural or anthropogenic origin of a contaminant has not been used in the past but may have relevance to the MCL process, especially if there are responsible parties that could reasonably be anticipated to assist in cleanup or treatment” (p. 4). We would like further information about the scope of this statement. Though it does not make the connection explicitly to economic feasibility, the implication seems to be that this contribution would offset and lower the costs of compliance therefore making an MCL more feasible economically. Given this has not been used in the past, we would caution against a strategy that builds into its model uncertain prospective financial responsibility, and we seek clarity for whether the idea that unidentified responsible parties “could reasonably be anticipated to assist” is predicated on the probability of prevailing in litigation for which liability is imposed upon the responsible parties.

**Methods for Quantifying Benefits Exist and Should be Further Explored**

The White Paper describes numerous impediments for assessing economic feasibility. Itemizing them here, we request further exploration of these various challenges and whether at least some of the benefits of a proposed MCL can be quantified through either the many contemporary economic modeling tools utilized in healthcare cost estimations, or by professional economists or academics in the state’s university system.

“This document describes challenges faced by the State Water Board in considering economic feasibility during the development of MCLs and concludes there is no simple formula capable of generating an economically feasible MCL” (p. 1).

“Determining an MCL cannot be reduced to a simple formula. Arguments have been advanced advocating the use of cost-benefit analyses to establish MCLs at a point where the cost of the MCL equals its benefit to health.
However, this document discusses that a cost-benefit approach is not feasible because of its inability to accurately account for and monetize the benefits and impacts of selecting one MCL versus another” (p. 4).

“To develop a comprehensive cost-benefit analysis the cost of treating CrVI at each proposed MCL level must be contrasted with direct and indirect healthcare costs, loss of productivity in the workforce, cost offsets for alternative water supplies, cost of reduction in quality of life, emotional and psychological costs, loss of business development in a community unable to provide high quality water, etc. Quantifying these costs presents an insurmountable hurdle for the State Water Board and does not include costs associated with the health protective concentration” (p. 5).

“Including the economic impact of these costs is not feasible due to the lack of specific information in the PHG report, especially as they relate to liver developmental and how reproductive toxicities manifest themselves in the human population and their subsequent treatment and recovery. Without that information, the State Water Board is challenged to establish and identify a complete inventory of the benefits (prevention of adverse health effects) or adverse impacts that would be avoided with a proposed MCL. Without a complete accounting of all the potential health benefits any attempt at a traditional cost-benefit analysis would be seriously flawed. As a result, an economic feasibility assessment can only provide a quantitative economic feasibility assessment based on averting stomach cancer without a qualitative consideration of the numerous other health impacts” (pp. 5 - 6).

“Economic feasibility cannot be determined by a simple formula. Even if such a formula existed, accurately ascribing value on the costs and benefits of reducing exposure to known carcinogens is limited” (p. 11).

Though we recognize the inherent challenges and difficulties for assessing feasibility, they do not relieve the State Water Board of the responsibility to develop an economic model with as much information about the benefits as can be gathered, assessed, and quantified. Perhaps some of the information that is referred to as missing in the PGH report can be supplied through the current work on CrVI’s PHG. As is, if the many difficulties are not surmounted, there will be less confidence that the costs of compliance were considered in a determination of feasibility, and this could be compounded by the assessment of another contaminant’s MCL with a different set of metrics because of the lack of a unified framework for making a determination of economic feasibility.

**Conclusion**

CASA appreciates the opportunity to submit these comments, especially on a subject overlaying the field of law and economics with California water policy. If there are any questions about these remarks, please do not hesitate to reach out directly at (916) 694–9269 or jvoskuhl@casaweb.org.

Thank you,

Jared Voskuhl
Manager of Regulatory Affairs