SUBJECT: Comments on A-2688/2689 Proposed Order

Dear Ms. Townsend,

On behalf of the California Association of Sanitation Agencies (CASA), thank you for the opportunity to provide comments on the Draft Order for the Petitions for Review of the permits of the City of Oceanside (Oceanside) and Fallbrook Public Utilities District (Fallbrook) issued by the San Diego Regional Water Quality Control Board (San Diego Water Board). CASA represents more than 125 local public agencies engaged in the collection, treatment and recycling of wastewater and biosolids to protect public health and the environment. Our mission is to provide trusted information and advocacy on behalf of California clean water agencies, and to be a leader in sustainability and utilization of renewable resources. CASA does not routinely comment on actions in individual regions, except in circumstances such as these, where the outcome may have statewide implications or a precedential effect, specifically as it relates to the approximate $1.7 million in new costs to Permittees over the terms of the permits.

At the outset, we want to thank the staff at the San Diego Water Board for their efforts to dialogue and work with the permittees over several months to strive toward mutually acceptable provisions in the new permits. The Draft Order documents numerous instances where San Diego Water Board Staff reduced requirements to try to ease the burden, and these efforts should be acknowledged.

Our principal concerns on this matter are with the new permit requirements for monitoring and reporting and special studies, and the San Diego Water Board’s underlying rationales for imposing these requirements. The issues of interest include: (1) the interpretation of Water Code § 13383, (2) the inclusion of § 13267, (3) the relation to § 13241, and (4) new case law articulating an analytical framework for application of § 13241. Accordingly, we seek your reconsideration of the aggregate costs of the new permits’ provisions and the sufficiency of that analysis in light of multiple costly water recycling projects that will significantly lower the volume of water discharged through the Oceanside Ocean Outfall (OOO) by 40%. We request that the State Water Board remand the new monitoring and reporting permit requirements and special studies for further analysis of costs and appropriate revisions.

(1) Water Code § 13383 Incorporates a Reasonableness Standard

The Draft Order observes, “Regional water boards acting pursuant to section 13383 may further require an NPDES discharger to ‘provide other information as may reasonably be required’” (p. 11) [emphasis added]. The Draft Order goes on to interpret the statute:

“Section 13383, which authorizes the San Diego Water Board to impose the monitoring and reporting requirements challenged by the Petitioners, does not require analysis of the burden of monitoring requirements relative to the benefits. Because section 13383 provides independent authority that is tailored specifically for regulating NPDES dischargers, section 13267 does not apply” (Draft Order p. 12).

Though Water Code § 13383 does not expressly call for analysis of costs or the “burden of monitoring requirements relative to the benefits,” as the Draft Order acknowledges, it incorporates a “reasonableness” standard. While § 13383 may be independent authority for imposing these monitoring requirements apart from
§ 13267, the “reasonableness” that § 13383 does require encompasses, at a minimum, a well-reasoned basis analogous to the standard for considering the appropriateness of permit requirements articulated in § 13267. The Draft Order’s conclusion that “section 13267 does not apply” to requirements derived from § 13383 does not mean that the underlying costs and balancing provided for in § 13267 are not relevant to § 13383 analysis nor that they do not bear upon the ultimate matter of “reasonableness.”

(2) Water Code § 13241 Details Specific Factors Which May Be Considered to Assess Reasonableness

Further guidance as to the determination of reasonableness can be found in a similar statutory requirement for reasonableness in developing water quality objectives in Water Code § 13241. In pertinent part, § 13241 states:

“**It is recognized that it may be possible for the quality of water to be changed to some degree without unreasonably affecting beneficial uses. Factors to be considered by a regional board in establishing water quality objectives shall include, but not necessarily be limited to, all of the following:**

(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.”

While each of these factors may be relevant in assessing the reasonableness of permit obligations, those most relevant to determining the reasonableness of the Oceanside and Fallbrook permit requirements are economic considerations and the need to develop and use recycled water. The economic considerations are discussed below in the context of a recent Court of Appeals opinion which provides guidance on evaluating the appropriateness of a permit requirement.

With regard to the need to develop and use recycled water — a high priority for the State Water Board — due to the City of Oceanside’s recent $30 million tertiary plant upgrade and the $97 million indirect potable reuse project being brought online the end of 2021, approximately 40% of their effluent will be recycled, thereby significantly reducing the discharge from the OOO. As such, the simultaneous ramping up of various monitoring and reporting and special studies in excess of $1.5 million dollars is inconsistent with the reduction in discharge volumes, and seemingly ignores the significant water quality benefits advanced by this project. (To be sure, the funding sources for these projects include nearly $70 million from WIFIA and $45 million from a Local Resource Program with Metropolitan Water District, and it is not indicative of the ability to raise rates to cover the new imposed costs.)

The supporting rationale for the new requirements is conspicuously silent on this fundamental operational change, insofar as it references historical instances for justification of the HF 183 monitoring and reporting, which now will be under conditions and circumstances that are dramatically different.

(3) The Courts have Provided an Analytical Framework for Compliance with § 13241

In the very recent decision in **City of Duarte v. State Water Resources Control Board**, the Court of Appeal examined the Water Boards’ consideration of economics in the process of issuing the Los Angeles municipal separate storm
sewer system permit. The Court noted its discussion of the § 13241 factors “is intended to provide an analytical framework.”

In upholding the Water Board’s economic analysis, the Court identified the key aspects of the review:

“The Water Control Boards’ analysis of the economic considerations identified in the Permit satisfied their obligation to consider the subdivision (d) factor [economic considerations] of Water Code section 13241. Among other things, the Water Control Boards explained that the cost of regulating discharges is “highly variable” among the Permittees, provided ranges and averages of cost data and economic impacts in several categories, considered how much more the Permittees’ costs might be under the Permit’s terms, identified potential sources of funds to cover the costs of the Permit, and concluded the failure to regulate would increase health-related expenses.”

In comparison, while the San Diego Water Board did fulfill some of these, their analysis falls short in several ways:

- The Draft Order itemizes various costs of the new permit terms for Oceanside and Fallbrook, however, we think it is critically important these costs be considered together in full when they are combined. It is not just the individual basis for each permit requirement that matters, but also the aggregate amount of all the permit requirements must be contextualized for determining their reasonableness.

- The Draft Order offers cost sharing multiple times as a means of reducing the burden on the Permittees. However, in City of Duarte, the trial court opined that allowing the Permittees to share costs of compliance and to phase in implementation in order to avoid significant initial cost outlays did not address the economic considerations factor of Water Code section 13241, a conclusion not overturned by the Appellate Court’s analysis.

- The Draft Order says for the Permits “that the [HF 183] monitoring will be used to determine whether the discharge is causing the approximately 73 bacteria exceedances [between 2011 and 2019] in the vicinity of the outfall, given that delineating the bacteria as human in origin would eliminate other potential sources such as birds or marine life,” (p. 17) notably omitting the mouth of the San Luis Rey river’s proximity to the OOO and contributions from it.

- Oceanside has been treating recycled water since 1991, and constructed a new $15 million dollar tertiary treatment facility, which went online in 2018, thus increasing the recycled water capacity to 3 MGD. Additionally, a $19 million dollar recycled water distribution project is underway to add additional recycled water users, and a second phase is planned in the future. Beyond the tertiary recycled water treatment plant, Oceanside is constructing an advanced water treatment plant and associated utilities for indirect potable reuse of 3 MGD scheduled to go online in later 2021. This would reuse a total of 6MGD and reduce ocean discharges by approximately 40%. Oceanside has committed to reusing wastewater, and reducing discharges to the Pacific Ocean. This is directly pertinent to the real need for the costly new HF 183 monitoring required by the permits and the source investigation rationale for it, as the Pure Water Oceanside project significantly reduces the likelihood the OOO would be the source of bacterial exceedances. Thus, the analysis fails to adequately conclude how or whether the failure to regulate and not order the HF 183 monitoring would increase health-related expenses.

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2 Id at 17.
3 Id.
4 Id at 14.
Additionally, there are significant concerns with the reliance on HF 183 monitoring. Researchers exploring the utility of HF 183 have cautioned decisionmakers, “Care should be taken to interpret results obtained from waterways that might be potentially contaminated with dog fecal matter or poultry litter.” This caution is relevant in the present instance. Notably, the mouth of the San Luis Rey river is in the vicinity of the OOO, and its impact and relevance as a source of HF 183 should not be minimized nor excluded in an analysis of whether the monitoring in the permits is reasonable.

Also as it relates to HF 183, missing from the analysis is an acknowledgement that the monitoring may not yield reliable or useful information. “Routine monitoring for a wide variety of pathogenic microorganisms can be expensive and challenging due to their uneven distribution among the host population and the affected waters.” The expense and challenge are even greater for producing high-quality, reliable data that may be appropriately used by regulators to base monitoring and reporting requirements. “Since the HF183 marker can occasionally be present in nontarget animal fecal samples, it is recommended that HF183 along with HAdVs or HPyVs should be used for human fecal pollution tracking...” Since the monitoring called for in the permit does not include these additional dimensions, it further undermines the value and quality of the data that would be produced under the terms of the permits.

Even if it did include those additional features (at an even greater expense to the Permittees), a similar more robust study in Southern California does not support use of the proposed HF 183 monitoring in the permits. In 2018, the City of Santa Barbara engaged with multiple stakeholders to conduct a comprehensive, 3-year, $2 million research investigation featuring rigorous hypothesis testing to evaluate all viable sources of bacteria. That study concluded that bather shedding was the source of HF183 input, not wastewater treatment plant discharge. This casts further doubt on the San Diego Water Boards’ rationale for the design and need of HF 183 monitoring in the permits.

Underscoring this point with other HF 183 research in the San Diego region, scientists sampled water from two paired sites—freshwater inlets to the ocean and the ocean itself. One of the watersheds was highly urbanized and had a small creek, and the other, the San Diego river, was much larger and more diverse. The authors found much higher pathogen counts in stormwater entering the oceans than in the water collected from the beaches. They repeatedly found evidence of human fecal matter in the stormwater even though the area had separate storm and sanitary sewers, and concentrations of pathogens in the ocean during a rainstorm were markedly lower than in the watersheds.

Moreover, the San Diego Water Board staff have received updates on source tracking efforts in the South Orange County region using an adaptation of the HF183 method, and it has shown that as treatment level increases and virus log removal increases, the signal of live HF183 copies decreases under the limit of quantification, which affirms the benefit of the Pure Water Oceanside project and its relevance to the proffered basis for the HF 183 requirement in the permits.

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7 Id at 1321.
Altogether, given the expensive and extensive plant upgrades at the City of Oceanside and the limits on effectiveness of HF 183 monitoring for the purposes of source attribution, it is a leap to surmise the costly HF 183 monitoring will produce actionable data that will result in the reduction of health related expenses. Because such discrete factors for “economic considerations” have been articulated and an expressly detailed analytical framework, arguably these must be considered in an assessment of “reasonableness” pertaining to the Oceanside and Fallbrook permits.

(4) In View of the Above, We Request Remand of the Additional Monitoring and Reporting
We appreciate the Draft Order “seeks to ensure that the costs incurred to comply with monitoring and reporting requirements result in appropriate data needed to evaluate water quality and other impacts of the discharges and ensure that beneficial uses are protected” (p. 12), and we recognize that “the San Diego Water Board made several modifications to the monitoring and reporting requirements to reduce the Petitioners’ costs” (p. 12). However the cumulative impact of those changes were not sufficient to ease the burden upon permittees, and the aggregated new costs which remain – approximately $1.7 million – are still extensive and not sufficiently supported. Further, the Draft Order observes, “some of the special studies in the Permits are unique to the San Diego Region,” (p. 12) which heightens the bar for the reasonableness of these monitoring and reporting requirements and whether the data is necessary to evaluate water quality and other impacts of the discharges.

In consideration of all the above, we respectfully request the State Water Board modify the Draft Order to remand the HF 183, plume monitoring, additional reports, and special studies for further analysis of the reasonableness of those permit requirements. We urge the State Water Board to remand the permits to additionally require the San Diego Regional Board to formally analyze the reasonableness of the asserted necessity of the monitoring and reporting, in consideration of the permittees’ new $30 million water recycling project.

Thank you for your consideration of these comments. If there any questions, please do not hesitate to reach me directly at (916) 694-9269 or jvoskuhl@casaweb.org.

Sincerely,

Jared Voskuhl
Manager of Regulatory Affairs

Attached: 3/24/20 CASA Comment Letter on Requests for Stay Related to Petitions for Review
March 23, 2020

Submitted via e-mail to Joaquin.Esquivel@waterboards.ca.gov

Joaquin Esquivel
Chair, State Water Resources Control Board
1001 I Street
Sacramento, CA 95814


Dear Chair Esquivel,

The California Association of Sanitation Agencies (CASA) requests that the State Water Board take up the petitions from the City of Oceanside (Oceanside), Fallbrook Public Utility District (Fallbrook), and the Southern California Alliance of POTWs challenging specified provisions in Oceanside’s and Fallbrook’s permits. (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, and, Order No. R9-2019-0169, NPDES Permit Reissuance: Waste Discharge Requirements for the Fallbrook Public Utility District, Fallbrook Water Reclamation Plant, and Santa Margarita Groundwater Treatment Plant.) For 60 years, CASA has been the leading voice for public wastewater agencies on regulatory, legislative and legal issues. CASA is an association of local agencies, engaged in advancing the recycling of wastewater into usable water, generation of renewable energy, and other valuable resources. Through these efforts CASA’s members help create a clean and sustainable environment for Californians.

CASA rarely urges the State Water Board to accept specific petitions, except in circumstances such as this, where the challenged regional board action could have significant statewide implications. The provisions of the Permits adopted by the San Diego Regional Water Quality Control Board (Regional Board) may set a precedent that will affect future permits in the San Diego region and elsewhere in the state. The approach to issues pertaining to HF-183 monitoring, plume tracking, and other burdensome requirements contained in the Permits are disconcerting to CASA’s members statewide. Specifically, we are concerned about the requirements contained in the Permits for the following reasons:

1. Increased Monitoring and Reporting Requirements, Including Plume Tracking, are Overly Burdensome and Amount to an Expensive, Ratepayer Funded Research Project

The Permits include several new or expanded monitoring programs and reporting requirements that significantly increase the burdens on the Permittees. The Permittees estimate the combination of increased monitoring requirements, special studies, and workplan reports will dramatically increase compliance costs by more than $1.5 million without any demonstrated corresponding improvement to water quality and despite the City of Oceanside’s near shore monitoring showing full compliance with indicator bacteria in the 2019 calendar year. For these reasons, the increased monitoring frequencies for bacteria and the new “Plume Tracking” monitoring provisions are particularly concerning as the Regional Board has failed to explain how the tracking is protective of the environment. The only justification provided for these requirements is that they are designed to “determine if the plume is moving towards the shore or surface where it may encroach upon water recreation areas” and will capture “atypical oceanographic conditions.” This essentially amounts to a data gathering project at the expense of the Permittees and their ratepayers.
Considering this, it is unreasonable to require Plume Tracking when this requirement is estimated to cost the Permittees well over $300,000. Moreover, it is troubling that when asked about the justification for these requirements, staff told the Regional Board that the idea came from the Southern California Coastal Water Research Project (SCCWRP), who is not a party. NPDES permit requirements for public entities are not appropriate venues for implementing SCCWRP research projects at the expense of local ratepayers.

2. HF 183 Monitoring Requirements are Expensive, Unnecessary and Unjustified

The Permits also include extensive monitoring requirements for Human Marker HF-183. The Permits state that such monitoring is required for “information purposes” and to “confirm the presence of human fecal material” when fecal coliform receiving water limitations are exceeded, despite the Permittees’ acknowledgement that wastewater would contain human markers, and the fact that no receiving water limitations or water quality objectives exist for HF-183. The Regional Board does not explain the specific questions this monitoring is designed to answer, nor does it identify how it will use the information gathered.

HF-183 sampling and analyses are exceptionally expensive, and the requirements are estimated to cost the Permittees nearly $1 million over the term of the Permits. At the same time, very little useful information can be gained from this effort. Human markers are known to be in domestic wastewater and can be present in deactivated bacteria. There are many potential sources for HF-183 (and fecal coliform) unrelated to the discharge governed by the Permits, including but not limited to stormwater, swimmers, and the homeless. Detecting HF-183 does not provide useful information about the actual source of bacteria in the receiving water, and little to no benefit is gained from requiring the expensive and burdensome monitoring. If inclusion of HF-183 monitoring requirements represents a trend or precedent in future NPDES permits, this is very concerning to CASA members, as it represents a fundamental misunderstanding of wastewater systems and defines an issue by an incomplete subset of research questions.

To the extent the items above are described in the Petitions filed on behalf of Oceanside and Fallbrook, we urge the State Water Board to take up these petitions in order to address these issues. This item is of significant importance to CASA member agencies within the San Diego region and our larger statewide membership. Accordingly, we urge the State Water Board to stay the challenged provisions of the Permits, or negotiate a stipulated stay with the Regional Board, in advance of the April 1, 2020 effective dates.

We appreciate your consideration of our request to take up these petitions and look forward to the State Water Board addressing these issues.

Sincerely,

Adam Link
Executive Director, CASA

Cc: Philip Wyels, SWRCB Asst. Chief Counsel, Philip.Wyels@waterboards.ca.gov
David Gibson, San Diego Regional Water Quality Control Board Executive Officer David.Gibson@waterboards.ca.gov