



South Orange County Wastewater Authority

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SAN DIEGO REGIONAL  
WATER QUALITY  
CONTROL BOARD

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Regional Water Quality Control Board  
San Diego Region  
9174 Sky Park Court, Suite 100  
San Diego, CA 92123-4353

Re: Complaint No. R9-2009-0028 for Administrative Civil Liability for Water Code Section 13385 Mandatory Minimum Penalties; San Juan Creek Ocean Outfall – South Coast Water District Groundwater Recovery Facility (Alleged Violation of Order No. R9-2006-0054, NPDES No. CA0107417)

Dear Members of the Regional Water Quality Control Board:

This letter is submitted on behalf of the South Orange County Wastewater Authority ("SOCWA") and South Coast Water District ("SCWD") regarding the above-referenced Administrative Civil Liability Complaint (ACLC), dated February 27, 2009.

SOCWA and SCWD have had numerous conversations with and met with your staff in September 2008 to resolve the issues in a prior version of the ACLC without a hearing before the Regional Water Quality Control Board (Regional Board). However, your staff has unequivocally indicated that because mandatory minimum penalties are being invoked, it has no discretion to negotiate with us to reduce the penalty even though we have vehemently argued that (1) the change in the sampling protocol in NPDES permit should have been limited to POTWs; (2) the brine effluent from SCWD's groundwater recovery facility ("GRF") should not be going to the sewer as it will compromise the plant's recycled water program; and (3) SCWD should have been allowed to enter into a time schedule order to "stop" the penalties. We submit that the Board has the discretion to choose not to impose mandatory minimum penalties in the present case and/or reduce such penalties under the unique circumstances.

**I. Factual Background**

SCWD is a retail water agency organized and existing as a County Water District under California Water Code Section 30000 *et seq.* SCWD serves approximately 12,500 water accounts with an estimated winter population of 40,000<sup>1</sup> in the South Laguna and Dana Point areas.

SCWD imports approximately 7,500 acre-feet (6.7 million gallons per day ("gpd")) of potable water annually. SCWD maintains approximately 32 million gallons of water storage in 14 area reservoirs (an approximately 4.8-day water supply). The SCWD service area has been identified by the Bureau of Reclamation as an area of "Potential

<sup>1</sup> Summer populations in the area vary dramatically due to the presence of beach resorts.

Water Supply Crisis" by 2025.<sup>2</sup> SCWD's wholesale water providers, the Municipal Water District of Orange County ("MWDOC") and the Metropolitan Water district ("MWD"), have encouraged the development of alternative local water supply sources within the area served by SCWD.<sup>3</sup>

With the support of MWD, SCWD spent \$5.8 million to construct the subject groundwater recovery facility ("GRF") which produces approximately 10% of SCWD's potable water. To support local water development, MWD subsidizes \$250 per acre-foot of water produced, approximately \$5 million in subsidies over 20 years.

The GRF treats low quality groundwater removed from the San Juan Valley Groundwater Basin (the "Basin") to produce drinking water that is distributed to SCWD customers. The GRF water treatment process primarily consists of reverse osmosis (RO) treatment and iron/manganese removal.

SCWD designed the GRF in the 2001-2002 timeframe when NPDES Permit No. CA 0104717 (Order Number R9-2000-0013, April 12, 2000) (the "2000 NPDES Permit") allowed sampling at the San Juan Creek Ocean Outfall ("SJCOO" or the "outfall"). It took two years to construct the plant beginning in approximately June 2005. In 2006, SOCWA engaged in protracted negotiations with the Regional Board with respect to the NPDES permit and in August 2006, the Regional Board issued the new permit, Order Number R9-2006-0054 (August 16, 2006) (the "2006 NPDES Permit"), effective October 2006, which required SOCWA's member agencies to sample their effluent at their respective facilities, prior to discharging into the outfall. This mandate directly impacted SCWD as it was about to begin operating the GRF which was designed to discharge directly into the outfall. At that time, it was unclear whether the GRF's treatment process would be sufficient to meet the standards set forth in the NPDES permit.

Between June 2007 and February 2008, ECO Resources, Inc. operated the GRF. During this period, the plant was operating only sporadically as adjustments were made to the operations to address start up issues including the sampling of effluent. In fact, the plant did not begin 24/7 operations until March 5, 2008, and even after that date, the GRF had periods of shut down due to equipment issues. SCWD was aware of exceedances of the permit for total suspended solids ("TSS"), settleable solids ("SS"), and turbidity during the start up period, but it did not know if it was an operational issue or a sampling issue. For example, in September 2007, SOCWA reported to the Regional Board that the test results for August 2007 "were substantially higher than the feed water from the source well." See Attachment A.

In October 2007, SOCWA reported to the Regional Board that SCWD had redesigned the sampling location to obtain more representative samples of the discharge and that the plant had been "off-line since the change to the sampling location." See Attachment B. In December 2007, SCWD finally concluded that the exceedances were cause by an operational issue and its engineers, in consultation with TetraTech, its plant designer, began working on a solution. After considering various solutions including settling tanks, adjusting pH, etc., in May 2008, SCWD's engineers developed the solution that SCWD eventually implemented, i.e., the installation of a holding tank and diversion of the brine flow via above-ground pipe to the sewer system for disposal through the South Orange County Wastewater Authority's J.B. Latham Treatment Plant located in Dana Point, California.

<sup>2</sup> Bureau of Reclamation "Water 2025 Report".

<sup>3</sup> MWD Integrated Resources Water Management Plan.

On or about June 27, 2008, the Regional Board issued ACL Complaint No. R9-2008-0064 which detailed effluent violations of the 2006 NPDES Permit at the GRF from August 2007 through March 2008. On July 10, 2008, SCWD's board approved the implementation of the proposed remedy. On or about August 14, 2008, the Regional Board issued ACL Complaint No. R9-2008-0093 which superseded the earlier ACL complaint. On August 27, 2008, SCWD entered into a contract with Pascall & Ludwig ("Pascall") to implement the proposed remedy. Pascall completed the project on or about November 22, 2008 at a cost of approximately \$225,000. On or about February 27, 2009, the Regional Board issued the above-referenced ACL Complaint which supersedes the August 14, 2008 ACL complaint and includes all the purported violations through implementation of the remedy in October 2008.

The GRF is currently in compliance with the 2006 NPDES Permit because SCWD is discharging the brine effluent into the sewer system rather than the outfall.

## II. Regulatory Background

In the words of the State Water Resources Control Board (the "State Board"),

"California is facing an unprecedented water crisis.

The collapse of the Bay-Delta ecosystem, climate change, and continuing population growth have combined with a severe drought on the Colorado River and failing levees in the Delta to create a new reality that challenges California's ability to provide the clean water needed for a healthy environment, a healthy population and a healthy economy, both now and in the future."

Recycled Water Policy, Adopted February 3, 2009 by the State Board.

The State Board has declared that it "will achieve [its] mission to 'preserve, enhance and restore the quality of California's water resources to the benefit of present and future generations,'" and it "strongly encourage[s] local and regional water agencies to move toward clean, abundant, local water for California by emphasizing appropriate water recycling, water conservation, and maintenance of supply infrastructure and the use of stormwater (including dry-weather urban runoff) . . . ." *Id.*

Consistent with this backdrop, Water Code Section 13241 provides that in establishing water quality objectives, each regional board must consider "the need to develop and use recycled water." Water Code § 13241(f).

The 2006 NPDES Permit establishes effluent limitations for the GRF based on Table A of the 2005 California Ocean Plan ("Ocean Plan").<sup>4</sup> See 2006 NPDES Permit at 13 (attached as Attachment C). These effluent limitations are also the same for the outfall. According to the Ocean Plan, Table A effluent limitations appear to be a "default" standard as they "apply only to publicly owned treatment works and industrial discharges for which Effluent Limitations Guidelines have not been established pursuant to Sections 301, 302, 304, or 306 of the Federal Clean Water Act." See Ocean Plan at 12.

<sup>4</sup> The Ocean Plan can be found at [http://www.swrcb.ca.gov/water\\_issues/programs/ocean/docs/oplans/oceanplan2005.pdf](http://www.swrcb.ca.gov/water_issues/programs/ocean/docs/oplans/oceanplan2005.pdf)

Section 13385 provides that any person who violates any waste discharge requirement "shall be liable civilly in accordance with this section." Water Code § 13385(a). Furthermore,

"In determining the amount of any liability imposed under this section, the regional board, the state board, or the superior court, as the case may be, shall take into account the nature, circumstances, extent, and gravity of the violation or violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on its ability to continue its business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and other matters that justice may require. At a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation."

Water Code § 13385(e). However, subsection (h) states that

"Notwithstanding any other provision of this division, and except as provided in subdivisions (j), (k), and (l), a mandatory minimum penalty of three thousand dollars (\$3,000) shall be assessed for each serious violation."<sup>5</sup>

Water Code § 13385(h). The exceptions to the mandatory minimum penalties are as follows:

- (1) A violation caused by one or any combination of the following:
  - (A) An act of war.
  - (B) An unanticipated, grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight.
  - (C) An intentional act of a third party, the effects of which could not have been prevented or avoided by the exercise of due care or foresight.
  - (D) The operation of a new or reconstructed wastewater treatment unit during a defined period of adjusting or testing, not to exceed 90 days for a wastewater treatment unit that relies on a biological treatment process and not to exceed 30 days for any other wastewater treatment unit
- (2) A violation of an effluent limitation where the waste discharge is in compliance with either a cease and desist order or a time schedule order (if all requirements are met).

See Water Code § 13385(j).

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<sup>5</sup> A "serious violation" means any waste discharge that violates the effluent limitations contained in the applicable waste discharge requirements for a Group II pollutant, as specified in Appendix A to Section 123.45 of Title 40 of the Code of Federal Regulations, by 20 percent or more or for a Group I pollutant, as specified in Appendix A to Section 123.45 of Title 40 of the Code of Federal Regulations, by 40 percent or more. Water Code § 13385(h)(2).

In addition, subsection (l) allows a discharger to direct a portion of the penalty amount to be expended on a supplemental environmental project ("SEP") in accordance with the enforcement policy of the State Board. "If the penalty amount exceeds fifteen thousand dollars (\$15,000), the portion of the penalty amount that may be directed to be expended on a supplemental environmental project may not exceed fifteen thousand dollars (\$15,000) plus 50 percent of the penalty amount that exceeds fifteen thousand dollars (\$15,000)." Water Code § 13385(l)(1).

### **III. The NPDES Permit Should Not Have Been Amended to Require Sampling at the GRF Rather Than at the Outfall**

As a threshold matter, it has become clear that SCWD's violations of the 2006 NPDES Permit resulted solely from the change in the monitoring location which require samples to be taken at the GRF rather than at the outfall

The Regional Board was fully aware of the planned GRF discharge to the SJCOO under the 2000 NPDES Permit. This permit described the disposal of the waste stream from the planned SCWD GRF as the following: "...0.32 M [million] gallons/day will be discharged through the Chiquita Land Outfall to the [South East Reclamation Regional Authority] SERRA Ocean Outfall."<sup>6</sup> According to the Monitoring and Sampling plan, the combined effluent was sampled at a point "...downstream of any in-plant return flows, and disinfection units, where representative samples of the effluent discharged through the ocean outfall can be obtained."

SCWD designed and began construction of the GRF with full expectation of compliance with the 2000 NPDES Permit as was documented by the Regional Board in that Order. After construction of the SCWD GRF was well underway, the 2000 NPDES Permit was superseded by the 2006 NPDES Permit. Unlike the monitoring of combined effluent prescribed in the prior permit pursuant to which the SCWD GRF was designed to be in compliance, the 2006 NPDES Permit requires the SCWD GRF contributions to the SJCOO to be monitored at the following location:

M-001F Brine discharge from the SCWD GRF prior to mixing with any other flows directed to the Ocean Outfall

After commencement of the facility operations, SCWD received notification of compliance violations from the Regional Board. The Regional Board indicated that the GRF discharged effluent to the SJCOO with levels of turbidity, settleable solids, and total suspended solids that exceeded the discharge requirements. Following receipt of the notification of violations, SCWD temporarily terminated operations at the facility. To prevent further violations, the outflow at the GRF was redirected to a sewer lift station that contributes to the SOCWA sewage treatment facility and the SCWD GRF does not currently discharge effluent directly to the SJCOO, a solution which is both undesirable and unnecessary.

The 2006 NPDES Permit required individual monitoring of the GRF effluent prior to discharge to the SJCOO, resulting in violations even though there was no change to the SCWD GRF design or effluent quality anticipated and documented by the Regional Board in the 2000 NPDES Permit. Thus, it is clear that the violations claimed by the

<sup>6</sup> The SERRA Ocean Outfall was later named the SJCOO.

Regional Board result solely from the changes in the monitoring location and not from any changes in the operation of the SCWD GRF or in the quality of effluent being discharged at the SJCOO.

The change in monitoring location was Regional Board staff decision made after the start of construction and was apparently supported by the United States Environmental Protection Agency ("EPA"). See Letter from Douglas E. Everhardt to David Hanson dated December 8, 2004 (attached as Attachment D). It is clear, however, that EPA's concern was with POTWs:

"We understand that the discharger prefers the point of compliance be determined at the outfall, however we support the Regional Board's determination that compliance should be determined at the individual treatment plants. Secondary treatment is a technology-based standard and should be met after the treatment process. According to the Clean Water Act (CWA), all [POTWs] must meet effluent limitations for secondary treatment. . . ."

EPA did not appear to make any observations with respect to the GRF which is clearly not a POTW. Nevertheless, Regional Board staff treated the GRF in the same manner as a POTW by requiring that the point of compliance be determined at the GRF rather than the outfall.

**A. The GFR Brine Effluent Did Not Impact the Outfall**

We have performed extensive analysis of the impact of the brine effluent on the outfall and we have concluded that the GRF's contribution of Total Suspended Solids ("TSS") at the outfall is approximately 1.1 mg/L to the average 11.5 mg/L total.<sup>7</sup> See Letter from eGIS to Betty Burnett dated April 20, 2009 ("eGIS Letter") at 6-7, attached as Attachment E. The outfall is permitted for 36.3 MGD and TSS compliance could easily be met with the brine discharge. Therefore, the GRF's contribution to the outfall is nominal and does not result in any significant environmental impact.

**B. Other NPDES Permits Allow Brine Discharge to be Blended at Outfalls**

In spite of the Regional Board's policy requiring SCWD to sample at the GRF, this policy has not been consistently executed neither by this Regional Board or other regional boards in the state. The Central Coast RWQCB, in particular, has made it very clear that its policy is to promote the benefits of recycled water production by specifically diverting brines directly to POTW outfalls where commingled discharge is monitored for compliance with the Ocean Plan.

**1. Oceanside**

The City of Oceanside operates a Brackish Groundwater Desalination Facility ("BGDF") that treats groundwater extracted from the Mission Hydrologic Subarea for potable uses. The facility provides treatment consisting of pH adjustment, filtration, and demineralization by reverse osmosis. The BGDF disposes waste brine to the Oceanside Ocean Outfall ("OOO") under NPDES Permit CA0107433 (Order Number R9-2005-0136) ("Oceanside Permit"), which is managed by the Regional Board. Waste effluent from the San Luis Rey Wastewater Treatment Plant (SLRWTP) and La Salina Wastewater Treatment Plants (LSWTP) is also discharged to the OOO under this NPDES permit. Discharges from these facilities and the BGDF are also commingled with discharge from the Fallbrook Public Utility District, US Marine Corps Base Camp Pendleton and the Biogen IDEC Pharmaceuticals Corporation. See eGIS Letter at 9.

Unlike the outfall monitoring requirements for the SCWD GRF, brine effluent to the OOO is not monitored directly from the BGDF. Instead, monitoring location M-003 characterizes the comingled effluent from the numerous contributors to the OOO including the BGDF. In other words, the waste brine is monitored at the outfall rather than the facility, exactly the condition described in the 2000 NPDES Permit under which the SCWD GRF was designed, yet the BGDF can clearly operate without any violation.

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<sup>7</sup> Further note that SCWD's permit violations involve turbidity and suspended solids caused primarily by iron and manganese (which are not regulated by the Ocean Plan).

## 2. Monterey

The Monterey Regional Water Pollution Control Agency (MRWPCA) discharges up to 81.2 MGD of secondary treated wastewater and brine waste from its Regional Treatment Plant (RTP) to the Monterey Bay via a diffuser approximately 11,260 feet offshore. This discharge is performed under NPDES permit CA004851 (Order R3-2008-0008) ("Monterey Permit") issued by the Central Coast RWQCB. According to the NPDES documents, regional, commercial, and industrial wastewater is conveyed to the RTP, which is treated and comprises the majority of the secondary treated wastewater. The MRWPCA also accepts 30,000 to 50,000 gallons per day of brine wastes that include softener regenerant waste, groundwater nitrate removal brine and reverse osmosis brines. These brines are trucked to the RTP from businesses that would otherwise dispose these wastes to the sanitary sewer. The brines wastes are held at the RTP in a 375,000-gallon, lined holding pond and are ultimately discharged or blended with secondary treated wastewater from the RTP before being discharged to the diffuser. As such, like the Oceanside BGDF, the brine wastes are discharged to the outfall. See eGIS Letter at 7-8.

The Monterey Permit further clarifies that "brine waste samples shall be collected as grab samples and manually composited per the Discharger's current brine waste and outfall facility configuration and sampling protocols." See eGIS Letter at 8. Based on this information and the monitoring points identified in the NPDES documentation, although brine influent is sampled, brine effluent from the RTP is not monitored individually, but is instead monitored as part of the total blended effluent at location EFF-001. *Id.* Sampling of brine is conducted solely to determine how much of the blended secondary effluent is needed so that discharges to the outfall will meet permit conditions.

Furthermore, as noted in the Monterey Permit, during the dry season the facility "is recycling essentially 100% the wastewater flow less what is needed for blending with brine wastes". *Id.* Under this permit, the facility blends secondary treated effluent with brine as needed to meet the permit conditions for brine waste discharges. The permit contains a single set of water quality based effluent limitations (WQBELS) that are consistent with the Ocean Plan and applicable to any ratio of blended secondary effluent and brine waste flows, and dictate the amount of secondary effluent required for blending with brine waste.<sup>8</sup> *Id.*

### C. Other NPDES Permits Have Allowed Other Standards Appropriate for Non-municipal Discharges

It is not unprecedented for a groundwater recovery facility to be held to a different standard from POTWs and other industrial discharges. For example, Lower Sweetwater River Basin Groundwater Demineralization Plant (NPDES Permit CA0108952, Order No. R9-2004-0111) discharges brine concentrate from a reverse osmosis system and the discharge is considered "innocuous nonmunicipal wastewaters." Under the Water Quality Control Policy for the Enclosed Bays and Estuaries of California, Adopted November 16, 1995 (the "Bays and Estuaries Policy"), "innocuous nonmunicipal wastewaters," include "clear brines, washwater, pool drains," and "are not necessarily considered industrial process wastes, and may be allowed by Regional Boards under

<sup>8</sup> Central Coast RWQCB Staff report for regular meeting of March 20-21, 2008

discharge requirements that provide protection to the beneficial uses of the receiving water." Bays and Estuaries Policy at 9.<sup>9</sup>

Although the Bays and Estuaries Policy does not govern in the present case, it nevertheless demonstrates that there is flexibility available to address situations like this. The brine discharge from a groundwater recovery facility should not be cast in the same category as industrial process waste, and the focus should be on protection of the beneficial uses of the receiving water. Discharge of the brine effluent from the GRF to the SJCOO simply does not compromise the beneficial uses of the receiving waters from the outfall and as such, it should be allowed.

#### **IV. Discharging the Brine Effluent into the Outfall is the Best Option Under the Circumstances**

To avoid additional violations, SCWD has implemented the undesirable and unnecessary remedy of rerouting the brine effluent discharge to the sewer. However, this solution creates a conflict with the State policy promoting the development and use of recycled water sources. SOCWA is in the final phase of design for constructing a 7.0 million gallon per day tertiary treatment facility at the J.B. Latham plant to provide a sustainable source of recycled water for landscape irrigation. This future recycled water project is an important link in the potable water resource chain for South Orange County because like SCWD's GRF, it will significantly reduce the need to import water into the region from great distances.

The diversion of the brine from the GFR to the sewer system contributes an additional 200 mg/L to the J.B. Latham effluent total dissolved solids concentration. The SCWD GRF brine discharge to the wastewater treatment plant will result in high concentrations of TDS affecting the quality of recycled water produced by the planned facility. This is exactly the situation that was avoided by the Central Coast RWQCB with respect to the Monterey Permit (as discussed above) which diverts brine from the POTW "to combat high salt concentrations in reclaimed wastewater."

The brine discharge also contains iron and manganese in concentrations which are orders of magnitude higher than the recycled water limits and these metals should be removed in the course of treatment at the plant. However, there is the potential for fine colloidal particles of iron or manganese to pass through the treatment chain which could also contribute to recycled water quality violations.

The supply water pumped to the GRF represents the final opportunity for the region to collect, treat, and reuse the underlying San Juan Basin Groundwater for potable purposes, before the water flows underground to the Pacific Ocean. It does not make sense to return the brine produced by the GRF back to the upper reaches of the basin in the form of recycled water when in the absence of the groundwater recovery facility the brackish groundwater would reach the ocean naturally.<sup>10</sup>

<sup>9</sup> The Bays and Estuaries Policy can be found at [http://www.waterboards.ca.gov/board\\_decisions/adopted\\_orders/resolutions/1995/rs1995\\_0084.pdf](http://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/1995/rs1995_0084.pdf).

<sup>10</sup> Note that brine cannot be eliminated – it is either disposed of in liquid form (in effluent) or as a solid (via drying). Thus, brine effluent can be discharged into the sewer or outfall, or dried and hauled to a landfill. Of these choices, it is clear that discharging to the outfall presents the least harm particularly since iron and manganese occur naturally in seawater.

V. **Request for Reduction in Penalties**

SCWD has met with Regional Board staff and we understand that staff feels that it has no discretion not to apply mandatory minimum penalties in this situation. We disagree for the following reasons.

A. **Mandatory Minimum Penalties Should Not Apply to Groundwater Recovery Facilities Given Public Policy Considerations**

The GRF is the very sort of project that the State Water Quality Control Board ("SWQCB") encourages in its newly adopted recycled water policy, yet SCWD is being penalized for the quality of its brackish groundwater source, a penalty that arises from a Regional Board staff policy decision made after the start of construction. That policy decision, however, was based primarily on concerns that *POTWs* meet effluent limits at the point of discharge from each plant, but broadly applied it has affected the GRF. Nevertheless, the NPDES permit for the GRF was amended to require compliance at the point of discharge at the GRF rather than the outfall. Consequently, SCWD violated the terms of the NPDES permit and is now being ordered to pay MMPs in the amount of \$204,000.

As discussed above, the plant cost \$5.8 million to construct, and an acre foot of water costs approximately \$900 per acre foot (or approximately \$1,700 per acre foot, including capital costs) to produce at the GRF. SCWD can purchase an acre foot of water from MWD for approximately \$603 per acre foot.<sup>11</sup> In addition, SCWD spent more than \$225,000 on implementing the remedy (redirecting the brine effluent to the sewer) that is both undesirable and unnecessary because it defeats the State Board's policy in favor of the development and use of recycled water, and has no effect on the quality of effluent at the outfall. As discussed below, SCWD does not receive any monetary gain from operating the GRF; to the contrary, it would be more economical for SCWD to purchase the water from MWD. To add another \$204,000 in penalties would seriously compromise the economic feasibility of operating the GRF.

We believe that the benefit of developing a reliable local source of potable water clearly outweighs the negligible harm of discharging relatively small amounts of brine effluent to the outfall. Moreover, as discussed above, redirecting the brine effluent to the Latham plant is not a viable long-term solution as the brine compromises the plant's ability to recycle water. Given these public policy considerations and the State and Regional Board's policy in favor of the development and use of recycled water, we respectfully request that the Regional Board exercise its discretion and find that MMPs do not apply in this circumstance.

B. **The Regional Board has the Discretion to Waive the Initial Violations of the NPDES Permit During the GRF's Start-up Period of Adjusting and Testing**

Even if the mandatory minimum penalty statute (Water Code § 13385) applies, we believe the GRF's start-up period should not have been penalized. Although the statute provides immunity during the startup of a *wastewater treatment plant*, the statute is silent with respect to groundwater recovery facilities. In our view, it is clear that

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<sup>11</sup> MWD recently approved a 19.7% increase to begin September 2009 and another increase of 21.5% in January 2011 due to the shortage of water.

the mandatory minimum penalty statute was never intended to apply to these types of groundwater recovery and recycling facilities. The GRF does not treat any wastewater, it simply extracts local groundwater and filters and treats the water for potable use. Most industrial dischargers **generate** contaminated effluent as a result of industrial processes. In contrast, the GRF's brine effluent is simply a concentrated form of the natural constituents in the groundwater.

Moreover, unlike POTWs where the treatment technology is well established, groundwater recovery facilities are not supported by established technology. Each groundwater recovery facility deals with different issues caused by the variance in hydrology and water quality of each site. As such, it is not unusual for this type of facility to have a long start up period during which adjustments must be made to address operational issues.<sup>12</sup>

Prior to March 5, 2008, the GRF was not fully in production. In December 2007, the total runtime of the plant was approximately 4.97 days (about 16% of the time for the month). The GRF was also shut down 13 days in December 2007. In January 2008, the GRF had a total runtime of approximately 4.75 days (about 15% of the time) and was shut down for 11 days. In February 2008, the GRF had a total runtime of approximately 3.48 days (about 12% of the time). After March 5, 2008, the plant went on line and began producing water full time. As such, we believe that any violations, if applicable, should not have accrued until after March 5, 2008.

**C. SCWD Should have had the Opportunity to Enter into a Time Schedule Order**

At our meeting with Regional Board staff on September 18, 2008, we indicated that SCWD was interested in entering into a time schedule order to allow SCWD some time to implement a remedy. We were told by Brian Kelley and Jeremy Haas that it would take over 5 months to get a time schedule order in place. At the time, SCWD estimated that the remedy would be implemented within 6-8 weeks. We asked if we could still go through the time schedule order process and have the order be retroactive such that SCWD would not be liable for violations during the implementation phase. We were told that time schedule orders can not be retroactive.

First of all, the circumstance surrounding the GRF is exactly the type of situation time schedule orders were intended to cover:

"It is the intent of the State Water Board that compliance schedules for NDPES permits only be granted when the discharger must implement actions to comply with a more stringent permit limitation, such as designing and constructing facilities or implementing new or significantly expanded programs and securing financing, if necessary, to comply with permit limitations implementing new, revised, or newly interpreted water quality objectives or criteria in water quality standards, and that any schedules be granted for the minimum amount of time necessary to achieve compliance."

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<sup>12</sup> Given the shortage of water in Southern California, the Regional Board will undoubtedly continue to see more projects like the GRF which will have different design elements and source water qualities that will bring new complexities to ocean outfall disposal. As such, we urge the Regional Board to give due consideration to the issues we present and take appropriate action to facilitate these projects.

State Water Resources Control Board Resolution No. 2008-0025, Policy for Compliance Schedules in National Pollutant discharge Elimination System Permits. The GRF received a more stringent permit limitation by virtue of having to meet the Ocean Plan effluent limitations at the facility as opposed to the outfall.

Moreover, neither the statute nor the policy concerning time schedule orders prohibits the compliance schedule to be retroactive. SCWD simply should not be penalized by the Regional Board's lengthy administrative process. We propose that to the extent the Regional Board finds that mandatory minimum penalties are appropriate in this case, they should only run until July 10, 2008, the date SCWD's Board approved implementation of the remedy. Had we entered into a time schedule order, we would have requested this date since implementation of the remedy began immediately after board approval.

**D. The Imposition of Mandatory Minimum Penalties in this Case Raises Due Process Considerations.**

Although the Regional Board may impose reasonable penalties as a means of securing obedience to statutes, "oppressive" or "unreasonable" statutory penalties may be invalidated as violative of due process. See *Hale v. Morgan*, 22 Cal.3d 388, 398-99 (1978). Uniformly, courts "have looked with disfavor on evermounting penalties and have narrowly construed the statutes which either require them or permit them." *Id.* at 387.

In this case, we believe the mandatory minimum penalties assessed against SCWD are unreasonable because (1) there is no or minimal harm associated with discharge of the brine effluent to the outfall; (2) each sample is subject to three separate penalties; and (3) as a public agency, SCWD derives no economic benefit from the violations.

Normally, in assessing any civil penalty pursuant to Water Code Section 13385, the Regional Board is generally required to take into account the nature and circumstances of the violation, the degree of harm, and any economic benefit derived by the violator. See Water Code § 13385(e). In this case, the nature and circumstance is the operation of a groundwater recovery facility which provides a local source of potable water. The discharge resulting in the violations is brine effluent containing iron and manganese, neither of which are regulated substances under the Ocean Plan. The source of this brine is the brackish groundwater being processed for potable use. As discussed above, the brine effluent does not impact to the outfall, i.e., the outfall would remain in compliance with the Ocean Plan and the NPDES permit even if the brine effluent is discharged to the outfall. Furthermore, as discussed above, in the absence of the GRF the brine would reach the ocean naturally.

Moreover, for each sampling event, SCWD was assessed for an "instantaneous max," "average weekly," and "average monthly," violation. This in and of itself appears to be unreasonable. Each sampling event should not result in three mandatory minimum penalties (\$9,000), particularly under the circumstances where SCWD is operating a groundwater recovery facility as opposed to a POTW.

Finally, SCWD did not derive any economic benefit from violating the NPDES permit. As discussed above, it costs SCWD approximately \$300 per acre foot (or \$1,100, including capital costs) more to produce water at the GRF rather than to

purchase the water from MWD. Even with the \$250 per acre foot subsidy from MWD, the cost to produce water at the GRF significantly exceeds the cost to simply purchase the water.

All of these factors clearly justify a reduction in the penalty assessed for the GRF. Without any such reduction, we strongly believe that the \$204,000 penalty assessed is unreasonable under the circumstances and is violative of SCWD's due process rights.

## **VI. Proposed Supplemental Environmental Projects**

To the extent the Regional Board decides that mandatory minimum penalties are appropriate in this case and assesses a penalty for SOCWA and SCWD (either reduced or not reduced), we propose the following two SEP projects. To the extent any penalty assessed by the Regional Board exceeds \$15,000, SOCWA and SCWD propose to fund a SEP project in lieu of a portion of the penalty by the Regional Board in the amount of \$15,000 plus fifty percent of the remaining penalty. We will implement whichever project the Regional Board deems more suitable in this case.

### **A. Aliso Creek Runoff Recovery and Reuse Project**

This project would collect about 0.8 Million gallons per day of abandoned urban runoff from Aliso Creek, treat the water through a reverse osmosis treatment process and combine the water with Title 22 Recycled Water for use as recycled water for irrigation uses. See attached SEP Application for Aliso Creek Runoff Recovery and Reuse Project at Attachment F. The urban water would be collected approximately 1.5 miles from the confluence of Aliso Creek and the Pacific Ocean and treated through a package filtration process located at the South Orange County Wastewater Authority's Coastal Treatment Plant (CTP). The effluent would be mixed with the CTP recycled water effluent and as a result the total dissolved solids content would be lowered thereby enhancing the recycled water quality and reducing the amount of urban runoff that reaches the Pacific Ocean. The Life Cycled Cost for the first five years of operation is projected to be 1.5 million dollars. The total capital costs associated with the treatment system is projected to be \$ 600,000.

### **B. Southern California Bight 2008 Regional Marine Monitoring Survey (Bight '08) Rocky Reef Workplan**

This project would determine the status of the rocky reef resources in the Southern California Bight. See attached SEP Application for Bight'08 Rocky Reef Study at Attachment G. The study administered by the Southern California Coastal Water Research Project ("SCCWRP") will attempt to determine the geographic distribution of hard bottom habitats, the current status of the natural biological conditions of the reefs, and how human activity impacts the conditions of Southern California rocky reefs. The Total Life Cycle Cost for Project is estimated to be approximately one million dollars including in-kind services from all study participants. The Rocky Reef Study will be conducted from February 2008 through December 2010. A sample summary report for the RWQCB can be completed by December 2011.

SCCWRP has been conducting ocean monitoring studies for 35 years. The San Diego RWQCB executive officers serve on the SCCWRP Board of Commissioners ensuring timely completion of the study.

In closing, SOCWA and SCWD sincerely appreciate your consideration of our appeal. We look forward to our hearing on May 13, 2009. Should you have any questions, please do not hesitate to contact us.

Sincerely,

South Orange County Wastewater Authority



Tom Rosales  
General Manager

South Coast Water District



Michael Dunbar  
General Manager

cc: Michael P. McCann, Assist. Executive Officer  
Betty Burnett, Esq.  
Patricia Chen, Esq.