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BEFORE THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
 SAN DIEGO REGION

In the matter of

Administrative Civil Liability for  
 Mandatory Minimum Penalties  
 Against South Orange County  
 Wastewater Authority for Effluent  
 Violations of Order No.  
 R9-2006-0054

OPPOSITION TO MOTION TO STRIKE  
 PORTIONS OF SOUTH ORANGE COUNTY  
 WASTEWATER AUTHORITY'S  
 EVIDENTIARY SUBMITTAL DATED APRIL  
 21, 2009

South Orange County Wastewater Authority ("SOCWA") and South Coast Water District  
 ("SCWD") are perplexed by the Motion to Strike filed by the Prosecution Staff. As the  
 Prosecution Staff points out, California Code of Civil Procedure section 436(a) states that "the  
 court may . . . strike out any irrelevant, false, or improper matter inserted in any pleading." The  
 statute defines a "pleading" as "a demurrer, answer, complaint, or cross-complaint." Civ. Proc.  
 Code § 435(a)(2). This proceeding is not before a court, nor has any demurrer, answer,  
 complaint, or cross-complaint been filed by SOCWA and SCWD. It is an administrative  
 adjudication before the Regional Board and as such, the motion to strike is inappropriate and  
 should not be entertained by the Regional Board.

1           Moreover, according to the “Administrative Adjudication Statutes Applicable to Water  
2 Boards”<sup>1</sup> an adjudicative hearing

3           “need not be conducted according to technical rules relating to evidence and  
4 witnesses, except as hereinafter provided. Any relevant evidence shall be admitted  
5 if it is the sort of evidence on which responsible persons are accustomed to rely in  
6 the conduct of serious affairs, regardless of the existence of any common law or  
7 statutory rule which might make improper the admission of the evidence over  
8 objection in civil actions.”

9 Govt. Code § 11513(c). Thus, the Regional Board has wide latitude to consider relevant evidence  
10 and the technical rules relating to evidence do not necessarily apply.

11           Notwithstanding the impropriety of the Motion to Strike, SOCWA and SCWD submit that  
12 the Prosecution Staff has not demonstrated that SOCWA and SCWD have raised irrelevant and  
13 improper issues. In its motion, the Prosecution Staff attempts to simplify the matters surrounding  
14 Administrative Civil Liability Complaint No. R9-2009-0028 and presupposes that the statutory  
15 mandatory minimum penalties apply in this case. Because of this assumption, the Prosecution  
16 Staff asserts that the Regional Board has no discretion to review any facts the Prosecution Staff  
17 deems to be unrelated to the mandatory minimum penalties. In effect, the Prosecution Staff  
18 argues that the Regional Board has no discretion to find that mandatory minimum penalties do not  
19 apply in this case. If this is the case, what is the Regional Board’s adjudicatory role? *The*  
20 *assumption that the mandatory minimum penalties apply would render the hearing*  
21 *meaningless.*

22           SOCWA and SCWD argue that the Regional Water Quality Control Board (the “Regional  
23 Board”) has the discretion not to apply mandatory minimum penalties and/or to reduce the  
24 mandatory minimum penalties assessed by its staff. SOCWA and SCWD contend that mandatory  
25 minimum penalties should not apply because “the benefit of developing a reliable local source of  
26 potable water clearly outweighs the negligible harm of discharging relatively small amounts of

27 <sup>1</sup> The “Administrative Adjudication Statutes Applicable to Water Boards” may be found on the Regional Board’s  
28 website at [http://www.waterboards.ca.gov/laws\\_regulations/docs/admin\\_adj\\_statutes\\_chp4\\_5excerpts.pdf](http://www.waterboards.ca.gov/laws_regulations/docs/admin_adj_statutes_chp4_5excerpts.pdf).

1 brine effluent to the outfall.” *See* Letter dated April 21, 2009 from Tom Rosales and Michael  
2 Dunbar to the Regional Board (the “Letter”) at 10. In order to contextualize this public policy  
3 argument, SOCWA and SCWD explain the background of the NPDES permit governing  
4 SCWD’s Groundwater Recovery Facility (the “GRF”) and the change in sampling locations  
5 which lead to the alleged violations at the GRF. *See* Section III of the Letter. It is important for  
6 the Regional Board to understand why the permit was amended in 2006 and the concerns that  
7 were expressed by the Environmental Protection Agency with respect to Public Owned Treatment  
8 Works (“POTWs”) as opposed to groundwater recovery facilities.

9 Moreover, SCWD retained eGIS to assess the potential harm caused by discharging the  
10 GRF brine effluent to the San Juan Creek Ocean Outfall (the “Outfall”) which is a factor relevant  
11 to assessing civil penalties (to the extent mandatory minimum penalties do not apply). *See* Water  
12 Code § 13385(e). SOCWA and SCWD compare this potential harm with the harm of discharging  
13 the brine effluent to the sewer (which was the remedy implemented by SCWD) to demonstrate  
14 that discharging to the Outfall is actually less harmful. *See* Section IV of the Letter. SOCWA  
15 and SCWD submit that such information should not be stricken unless the Regional Board indeed  
16 finds that the mandatory minimum penalties apply and that it has no authority to consider the  
17 factors set forth in Water Code Section 13385(e).

18 Finally, with respect to the Prosecution Staff’s argument that Sections III and IV of the  
19 letter should have been timely raised within 30 days of the Regional Board’s adoption of the 2006  
20 NPDES permit, the Regional Board should note that the permit was adopted on or about August  
21 16, 2006, but the GRF did not begin operating until June 2007. As such, as described in the  
22 letter, SCWD was not aware of the serious effect of the change in sampling location until  
23 December 2007, when it concluded that the exceedances were caused by an operational issue and  
24 not a sampling problem. *See* Letter at 3. SOCWA and SCWD may well seek a formal  
25 amendment to the 2006 NPDES permit in the future, however, they are aware that this issue is not  
26 before the Board at this time, and they have not asked the Regional Board to take any action on  
27 the 2006 NPDES permit.

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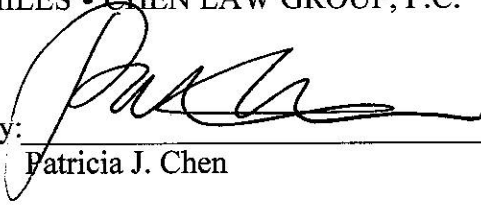
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Given the procedural and substantive latitude the Regional Board has to consider evidence in this proceeding pursuant to Government Code Section 11513, it is clear that the Regional Board should be allowed to weigh the relevant evidence presented by SOCWA and SCWD in Sections III and IV of their letter. As such, SOCWA and SCWD respectfully request that the Regional Board deny the Motion to Strike.

Date: May 6, 2009

Respectfully submitted,

MILES • CHEN LAW GROUP, P.C.

By:   
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