



State Water Resources Control Board



Linda S. Adams
Secretary for
Environmental Protection

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Arnold Schwarzenegger
Governor

May 4, 2009

[Sent via email]

Ms. Catherine Hagan
Senior Staff Counsel
San Diego Regional Water Quality Control Board
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SUBJECT: Prosecution Staff Evidentiary Objections for Administrative Civil Liability
for Mandatory Minimum Penalties Against South Orange County
Wastewater Authority for Effluent Violations of Order No. R9-2006-0054

Dear Ms. Hagan:

Please find enclosed the Prosecution Staff's evidentiary objections and Motion to Strike Portions of South Orange County Wastewater Authority's Evidentiary Submittal Dated April 21, 2009. Per your email to the Designated Parties dated April 15, 2009, this submittal complies with the amended deadline of May 4, 2009 for evidentiary objections.

Should you have additional questions or concerns, please contact me at (916) 341-5674.

Sincerely,

Mayumi E. Okamoto
Counsel for the Prosecution Staff

Encl.

[see page 2 for cc list]

Ms. Catherine Hagan
May 4, 2009

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[via email only]

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9 Attorney for the Prosecution Staff

10 BEFORE THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, SAN
 11 DIEGO REGION

12 In the matter of

13 **Administrative Civil Liability for**
 14 **Mandatory Minimum Penalties Against**
 15 **South Orange County Wastewater**
 16 **Authority for Effluent Violations of**
 17 **Order No. R9-2006-0054**

18 MOTION TO STRIKE PORTIONS OF
 19 SOUTH ORANGE COUNTY
 20 WASTEWATER AUTHORITY'S
 21 EVIDENTIARY SUBMITTAL DATED
 22 APRIL 21, 2009

23 _____
 24 Notice is given that the Prosecution Staff hereby moves the California Regional
 25 Water Quality Control Board, San Diego Region (Regional Water Board) to strike portions
 26 of the South Orange County Wastewater Authority's (Discharger) evidentiary submittal
 27 from the administrative record pursuant to California Code of Civil Procedure sections 435
 28 and 436. Specifically, the Prosecution Staff moves to strike Sections III and IV of the
 Discharger's April 21, 2009 letter (Letter), and those sections' corresponding Exhibits
 marked as Attachments D and E as irrelevant and improper and not filed in conformity
 with the laws of this state. (CCP § 436(a) and (b).)

The California Code of Civil Procedure section 436 subdivision (a) states that the
 court may "strike out any irrelevant, false, or improper matter inserted in any pleading."
 Section 436 subdivision (b) states the court may "strike out all or any part of any pleading
 not drawn or filed in conformity with the laws of this state, a court rule, or an order of the
 court."

1 **THE DISCHARGER'S ARGUMENTS AND CORRESPONDING EVIDENCE UNDER**
2 **SECTIONS III AND IV OF THE LETTER ARE OUTSIDE THE SCOPE OF THE NOTICED**
3 **HEARING**

4 The Prosecution Staff contends that the arguments the Discharger raises in
5 Sections III and IV of the Letter and corresponding exhibits marked as Attachments D and
6 E are outside the scope of the Notice of Public Hearing for this adjudicatory proceeding,
7 as Sections III and IV raise issues and considerations associated with the permitting
8 process rather than issues and arguments associated with mandatory minimum penalties
9 (MMPs).¹ Therefore, the Prosecution Staff requests that the Regional Board strike
10 Sections III and IV of the Letter and Attachments D and E as irrelevant and improper
11 pursuant to section 436 subdivision (a) of the Code of Civil Procedure.

12 On April 4, 2009 and April 10, 2009, the Regional Board published notice of this
13 proceeding on its website and in the Orange County Register, respectively. The Notice of
14 Hearing states that the Regional Board will consider issuing an Administrative Civil
15 Liability (ACL) Order against the Discharger for \$204,000 in MMPs for allegations cited in
16 ACL Complaint No. R9-2009-0028 including violations of effluent limitations of Regional
17 Board Order No. R9-2006-0054 (2006 Permit) for the discharge of brine waste from the
18 South Coast Water District's Groundwater Recovery Facility. The arguments raised in
19 Sections III and IV of the Letter attempt to justify: 1) why the sampling and monitoring
20 location for brine discharges in the previous NPDES Permit, Regional Board Order No.
21 2000-0013 should not have been amended to the current location in the 2006 Order and
22 2) why the current sampling and monitoring location for brine discharges is improper.
23 These sections are outside the scope of the noticed hearing and clearly raise arguments
24 that should have already been considered during the adoption process of the 2006 Permit
25 and are improper and irrelevant for the current enforcement action. The Prosecution
26 Staff respectfully requests that the Regional Board strike Sections III and IV and

27 ¹ The Prosecution Team asserts only Sections I, II, V and VI are relevant for purposes of this Administrative Civil
28 Liability hearing for MMPs.

1 Attachments D and E from the administrative record.

2 **THE DISCHARGER'S ARGUMENTS AND CORRESPONDING EVIDENCE UNDER**
3 **SECTIONS III AND IV OF THE LETTER SHOULD HAVE BEEN TIMELY RAISED**
4 **WITHIN 30 DAYS OF THE REGIONAL BOARD'S ADOPTION OF THE 2006 PERMIT**
5 **PURSUANT TO WATER CODE SECTION 13320**

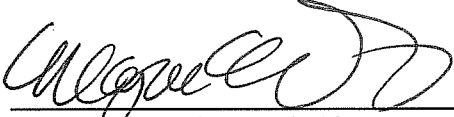
6 The Prosecution Staff asserts that the Discharger's inclusion of the arguments and
7 exhibits, including but not limited to those regarding the amended sampling and
8 monitoring location, in Sections III and IV of the Letter for the purposes of the current
9 adjudicatory proceeding is not in conformity with the laws of the State of California.
10 Moreover, the Discharger had notice of the Regional Board's adoption of the 2006 Permit.
11 Therefore, the Prosecution Staff requests that the Regional Board strike Sections III and
12 IV and Attachments D and E pursuant to section 436 subdivision (b) of the Code of Civil
13 Procedure.

14 Water Code section 13320 prescribes the process by which an aggrieved party
15 may petition the State Water Resources Control Board (State Board) within 30 days of
16 any action by a Regional Board. (CWC § 13320(a).) The Discharger could and should
17 have raised the arguments and corresponding evidence in Sections III and IV of the
18 Letter and timely filed a petition to the State Board within the 30-day petition period in
19 order to preserve its right to a review of the Regional Board's final action in amending the
20 sampling and monitoring location for brine discharges in the 2006 Permit. The Discharger
21 failed to file a petition to challenge the Regional Board's final action and request review of
22 the Regional Board's adoption of the 2006 Permit pursuant to Water Code section 13320.
23 This would have been the appropriate procedural mechanism for reviewing the Regional
24 Board's final action and reasoning for adopting the 2006 Permit with the amended
25 sampling and monitoring location. Raising these challenges to the 2006 Permit in the
26 present enforcement action through the Discharger's evidentiary submittal is not the
27 appropriate procedural mechanism or the appropriate venue to consider these arguments
28 and they should be stricken.

California Code of Civil Procedure section 436 subdivision (b) authorizes a

1 challenge to "all or any part of any pleading not drawn or filed in conformity with the laws
 2 of this states, a court rule, or an order of the court." (CCP § 436(b).) This section
 3 authorizes the striking of a pleading due to improprieties in its *form* or in the *procedures*
 4 pursuant to which it was filed. (see *Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509,
 5 528.) The Discharger did not follow the proper procedure in Water Code section 13320 to
 6 petition the State Board for review of the Regional Board's adoption of the 2006 Permit
 7 and subsequently, the Discharger should be barred from raising these arguments in the
 8 present adjudication. The Prosecution Staff requests that the Regional Board strike
 9 Sections III and IV and Attachments D and E from the administrative record because the
 10 Discharger's inclusion of these arguments and exhibits is improper in the present
 11 enforcement proceeding.

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13
14 Respectfully submitted,

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 16 _____
 17 MAYUMI E. OKAMOTO
 18 Attorney for the Prosecution Staff

19 5/4/09
 20 _____
 21 Date

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