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.
Moreover, according to the "Administrative Adjudication Statutes Applicable to Water Boards" an adjudicative hearing

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

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

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

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

1 The "Administrative Adjudication Statutes Applicable to Water Boards" may be found on the Regional Board's website at http://www.waterboards.ca.gov/laws_regulations/docs/admin_adj_statutes_chp4_5excerpts.pdf.
brine effluent to the outfall.” See Letter dated April 21, 2009 from Tom Rosales and Michael Dunbar to the Regional Board (the “Letter”) at 10. In order to contextualize this public policy argument, SOCWA and SCWD explain the background of the NPDES permit governing SCWD’s Groundwater Recovery Facility (the “GRF”) and the change in sampling locations which lead to the alleged violations at the GRF. See Section III of the Letter. It is important for the Regional Board to understand why the permit was amended in 2006 and the concerns that were expressed by the Environmental Protection Agency with respect to Public Owned Treatment Works (“POTWs”) as opposed to groundwater recovery facilities.

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

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

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