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BEFORE THE SANTA ANA
REGIONAL WATER QUALITY CONTROL BOARD

In the Matter of:

COSTA MESA SANITARY DISTRICT,

ACLC NO. R8-2015-0025

) PROSECUTION TEAM'S
) EVIDENTIARY BRIEF, EXHIBIT LIST
) AND WITNESS LIST

) A proposed Order will be provided to the
) Advisory Team in Word format with the
) Rebuttal Brief

) June 5, 2015

Pursuant to the final Hearing Procedures in this matter, the Prosecution Team submits this Brief in support of the Administrative Civil Liability Complaint (ACLC) issued in this matter, along with a witness list and an exhibit list.

Costa Mesa Sanitary District provides sanitary sewer service to residents in and around the City of Costa Mesa and portions of the City of Newport Beach. The sewage collection system consists of approximately 219 miles of gravity sewer pipeline, 20 sewage lift stations, and 5 miles of sewage force main pipeline. Costa Mesa Sanitary District serves approximately 116,000 residents within its service area. As described in the ACLC, the first discharge is termed the "Irvine Sewage Lift Station Discharge" and occurred on August 31, 2013 (Labor Day Weekend) and the second is called the "Indus Line Discharge" and occurred on January 1, 2015.

The recommended penalty set forth in the ACLC was derived using the California Water Code Section 13385 factors and the State Water Resources Control Board Enforcement Policy penalty calculation methodology. The Enforcement Policy was approved by the Office of Administrative Law on May 29, 2010 and has been used by the Regional Boards ever since, in both

1 settlements and hearings. It incorporates the factors in Section 13385 and makes the parties, both
2 Prosecution Team and Discharger, make precise determinations about the discharge in question.¹
3 The discharger must demonstrate that the penalty should be less than the statutory maximum in
4 Water Code Section 13385. See Enforcement Policy, p. 9. In order to reduce the recommended
5 penalty, the Regional Board must make specific findings regarding any particular modifications to
6 the recommendations in the initial amount proposed in the ACL complaint. Enforcement Policy,
7 pp. 21-22. The Prosecution Team's basis for its selected penalty factors are presented in
8 Attachments A [Irvine Sewage Lift Station Discharge] and B [Indus Line Discharge], while the two
9 penalty methodology calculations are presented in Excel format in Attachment C. A few of what
10 the Prosecution Team expects to be contested factors are presented in this brief.

11 ARGUMENT

12 **I. The Prosecution Team's Penalty Recommendations for Harm are Fair and** 13 **Appropriate**

14 **A. Factor 1: Harm or Potential Harm to Beneficial Uses**

15 Step 1 is to determine the harm presented by the discharge, and in this case there are two
16 discharges, the Irvine Sewage Lift Station Discharge and Indus Line Discharge, which the
17 Prosecution Team "scored" the same. Step 1 has 3 factors, and the first is harm or to potential
18 harm to beneficial uses. Factor 1 is the "*where* did the discharge go," while factor 2 is "*what* is the
19 discharge." The Prosecution Team selected a factor of 4, which states that the discharge:
20

21 4 = Above moderate – more than moderate threat to beneficial uses (i.e., impacts are
22 observed or likely substantial, temporary restrictions on beneficial uses (e.g., less than 5
23 days), and human or ecological concerns).

24 Enforcement Policy, p. 12. Both the Irvine Sewage Lift Station Discharge and Indus Line
25 Discharge resulted in beach closures. The beneficial uses of Upper Newport Bay are listed in
26

27 ¹ The methodology can also be used for non-discharge violations, such as reporting violations, such as the failure to
28 submit an annual report. None of those types of violations are at issue in the present ACLC.

1 Paragraph 24 of the ACLC and include water contact recreation, non-contact water recreation,
2 commercial and sport fishing, wildlife habitat, and preservation of biological habitats of special
3 significance. Closures due to the Irvine Sewage Lift Station were posted from Saturday (the day
4 the discharge commenced) through Monday of the Labor Day weekend. For the Indus Line
5 discharge, closures were posted from Thursday through Sunday (January 1 - January 4). A score of
6 4 is warranted.

7 B. Factor 2: The Physical, Chemical, Biological or Thermal Characteristics of the
8 Discharge

9 Again, the Prosecution Team scored the Irvine Sewage Lift Station Discharge and Indus
10 Line Discharge the same, because in both instances, the material discharged was the same. The
11 Prosecution Team selected a "3," which provides that:

12 3 = Discharged material poses an above-moderate risk or a direct threat to potential
13 receptors (i.e., the chemical and/or physical characteristics of the discharged material
14 exceed known risk factors and/or there is substantial concern regarding receptor protection).

15 Enforcement Policy, p. 13. Potential receptors are those identified considering human,
16 environmental, and ecosystem health exposure pathways. In both cases, the raw sewage has above-
17 moderate risk and reasonable direct impact to human and aquatic life by the way of pathogens or
18 bacteria for human health and nutrients for fish life and ecosystem health. Both discharges were to
19 the Upper Newport Bay, a sensitive aquatic habitat and a high Regional Board priority waterbody
20 in order to reduce the introduction of bacterial and nutrient inputs through the adoption of a total
21 maximum daily load for both of these pollutants. The occurrence of sewage spills works to
22 undermine the efforts of source reduction of these pollutants by municipal government within the
23 watershed.

24 C. Susceptibility to Cleanup or Abatement

25 A score of 0 is assigned for this factor if 50% or more of the discharge is susceptible to
26 cleanup or abatement. A score of 1 is assigned for this factor if less than 50% of the discharge is
27 susceptible to cleanup or abatement. This factor is evaluated regardless of whether the discharge
28 was actually cleaned up or abated by the discharger. While in the Irvine Sewage Lift Station

1 Discharge, approximately 2,000 gallons may have been recovered (ACLC, paragraphs 12 and 14),
2 less than 50% of each discharge was recoverable and therefore a score of 1 was assigned for both
3 discharges. For both discharges, the total for each factor is summed to arrive at 8 [4 + 3 + 1 = 8].

4 D. Deviation from Requirement

5 The Enforcement Policy next requires the Prosecution Team, Discharger, and Regional
6 Board to analyze the Permit's requirements and apply them to the Discharger's efforts in preventing
7 the discharge. This is reflected in the "deviation from requirement" factor, and while one may
8 select a "minor," "moderate," or "major," the real task is considering what the Discharger should
9 have done to prevent the discharge in the first place. The Statewide General Waste Discharge
10 Requirements for Sanitary Sewer Systems (Order No. 2006-0003-DWQ, "SSO Order") prohibits
11 discharges entirely, so often Prosecution Teams select a major for that reason alone. Here, for both
12 discharges, the Prosecution Team selected the more conservative (and favorable to Costa Mesa and
13 the ultimate penalty) moderate.

14 This is despite significant (and therefore *at least* moderate) deviations from the following
15 SSO Order provisions:

16 6.(iii) There were no feasible alternatives to the discharge, such as temporary storage or
17 retention of untreated wastewater, reduction of inflow and infiltration, use of **adequate**
18 **backup equipment**, collecting and hauling of untreated wastewater to a treatment facility,
19 or an increase in the capacity of the system as necessary to contain the design storm event
20 identified in the SSMP [Sewer System Management Plan]. It is inappropriate to consider
21 the lack of feasible alternatives, if the Enrollee does not implement a periodic or continuing
22 process to identify and correct problems.

23 SSO Order, p. 8 (emphasis added).

24 (iv) Operations and Maintenance Program. The SSMP must include those elements listed
25 below that are appropriate and applicable to the Enrollee's system:

26 (b) Describe routine preventative operation and maintenance activities by staff and
27 contractors, including a system for scheduling regular maintenance and cleaning of the
28 sanitary sewer system **with more frequent cleaning and maintenance targeted at known**

1 **problem areas.** The Preventative Maintenance (PM) program should have a system to
2 document scheduled and conducted activities, such as work orders;

3 ...

4 (d) Providing training on a regular basis for staff in sanitary sewer system operations and
5 maintenance, and **require contractors be appropriately trained;** and

6 (e) Provide equipment and replacement part inventories....

7 SSO Order, pp. 11-12 (emphasis added).

8 (vi) Overflow Emergency Response Plan ... At a minimum, this plan must include the
9 following:

10 (a) Proper notification procedures so that the primary responders and regulatory agencies
11 are informed of all SSOs in a timely manner;

12 (b) **A program to ensure an appropriate response to all overflows;**

13 SSO Order, p. 12 (emphasis added).

14 The highlighted portions of the SSO Order indicate where Costa Mesa's actions fell well
15 short of the permit's expectations. For the Irvine Sewage Lift Station Discharge, there were delays
16 in notification, and a failure of the alarm system intended to monitor high wet well conditions and
17 send an alarm if operating parameters are exceeded. For the Indus Line Discharge, Costa Mesa's
18 contractor was not appropriately trained. Furthermore, there is evidence that the Indus Line has
19 needed additional targeted maintenance since at least 2007 – based upon video inspections of the
20 sewer pipeline. This type of delayed maintenance is in violation of the SSO Order and likely
21 contributed to the discharge.

22 A selection of “moderate” reflects that the intended effectiveness of the permit requirement
23 has been partially compromised (e.g., the requirement was not met, and the effectiveness of the
24 requirement is only partially achieved). The Prosecution Team could have easily selected a
25 “major” deviation from requirement, and instead selected moderate.

26 E. High Volume Discharges

27 The maximum penalty amount under Water Code Section 13385 is \$10,000 per day of
28 discharge, plus \$10.00 per gallon of material discharged, minus the first 1,000 gallons discharged.

1 Under the Enforcement Policy, this maximum amount can be reduced when the discharged material
2 is considered “high volume” and results in a large penalty. However, in this case, the Prosecution
3 Team does not consider the spill of 77,000 (reduced by the first 1,000 gallons to 76,000) gallons to
4 be “high volume,” and therefore \$10/gallon was used to calculate the initial base liability. The use
5 of \$10.00 per gallon is consistent with the manner in which other regional boards have applied the
6 Enforcement Policy to ACLs issued for discharges of storm water and sewage, and given the
7 significance of Upper Newport Bay. *See for example*, Order No. R5-2013-0123 (see Exhibit 30,
8 Attachment A, p. 3). In that Order, the Prosecution Team argued for the high volume discount to
9 apply to a 76,000 discharge of stormwater, and the discharger argued that would incentivize
10 dischargers to allow spills to reach a “high volume” figure – whether it be 100,000 gallons or some
11 other figure – to get a reduction in penalty. The high volume reduction in the Enforcement Policy
12 is discretionary in nature; the penalty recommended by the Prosecution Team, and ultimately to be
13 considered by the Board is subject to discretion. If any facts indicated that the Discharger did not
14 act with diligence and care in responding to the discharge or intentionally delayed providing
15 appropriate mitigation, not only would the high volume reduction not be applied, but the culpability
16 factor would serve to increase the recommended penalty. The Region 5 Board agreed, and the only
17 Order on this issue is attached as Exhibit 30.

18 Order No. R5-2013-0123 involved stormwater. This ACLC involves raw sewage, and the
19 need to forego the reduction in penalty is even more compelling.

20 Alternatively, the Enforcement Policy may allow for a reduction to a per dollar calculation
21 to something other than \$2.00 if \$2.00 would result in an appropriately low penalty, as we feel it
22 would here (the \$503,214 recommended penalty that the Prosecution Team alleges is appropriate,
23 would be reduced to \$182,190, changing only the high volume factor to \$2.00). This size of a
24 penalty would not “address, correct, and deter water quality violations,” at the Costa Mesa facility
25 or other sanitary sewer facilities. Enforcement Policy, p. 9. The “high volume discharge” factor
26 provides the Prosecution Team with the discretion to reduce the penalty when appropriate. In the
27 Cambria settlement agreement, there were three discharges, and a high volume (256,600 gallons)
28 spill was reduced appropriately, while two non-high volume discharges (approximately 34,000 and

1 41,000 gallons) were assessed at \$4.00 per gallon because the final overall penalty (\$226,826.60)
2 was determined to be acceptable to both the Prosecution Team and the Discharger. *See* ACLO R3-
3 2014-0008 for Cambria Community Services District; *see also* ACLO R3-2014-0038 for Santa
4 Cruz County Sanitation District, where \$6.00 was used (Cambria and Santa Cruz and Exhibits 29
5 and 28, respectively).

6 In many cases involving sanitary sewer overflows, the final penalty calculation per gallon
7 exceeds \$2.00 after the adjustment factors in the Enforcement Policy are applied. These cases
8 include North Bay Construction, R1-2013-0067, \$9.53/gallon (9,000 gallon discharge); Grass
9 Valley, R1-2011-0109, \$4.69/gallon (27,384 gallon discharge); Ukiah, R1-2010-0070, \$4.42/gallon
10 (1,985 gallon discharge); UCLA, R4-2014-0049, \$3.41/gallon (27,267 gallon discharge); Irvine
11 Ranch, R8-2010-0059, \$2.06/gallon (20,875 gallon discharge). These cases are provided by
12 reference and should be publicly available on the various regional board websites.

13 **II. The Adjustment Factors for Culpability, Cleanup and Cooperation, and History of**
14 **Violations, Have Also Been Assessed Appropriately**

15 **(a) Culpability**

16 The Prosecution Team selected a 1.1 for culpability for both discharges. The Enforcement
17 Policy states that higher liabilities should result from intentional or negligent violations than for
18 accidental or non-negligent violations. Any number below 1 reduces the penalty and any number
19 above 1 increases the penalty, and the range is 0.5 and 1.5. The Prosecution Team selected a factor
20 that slightly increases the penalty because implementation of required elements in the SSO Order
21 and available industry standard practices² could have prevented both discharges. In the case of the
22 Irvine Sewage Lift Station Discharge, implementing recommended industry standard practices³ for
23 uninterruptible power supply (UPS) maintenance could have prevented the discharge. In the case
24 of the Indus Line Discharge, once the 2007 video inspection revealed several vertical pipe
25 misalignments and pipe damage allowing root intrusion, more aggressive routine cleaning and root

26 ² *See* industry standard practices in “Best Management Practices for Sanitary Sewer Overflow (SSO) Reduction
27 Strategies” (Exhibit 19) and “Core Attributes of Effectively Managed Wastewater Collection Systems” (Exhibit 34).

28 ³ *See* “UPS: Preventative Maintenance Ensures Power Supply,” (Exhibit 35).

1 control measures and timely pipe repair should have taken place. In the alternative, better standard
2 operating procedures and adherence to the SSO Order could have mitigated discharge impacts
3 including but not limited to: (1) response time to discharges, especially during off-work hours; (2)
4 alarms on the system; (3) training of personnel; (4) reliance on contractors for off-hour spill
5 response; and (5) the over-dependence on nearby public agencies for the proper functioning of
6 Costa Mesa's system and response to discharges. All of these failures to prepare adequately led the
7 Prosecution Team to conclude that the discharges were not accidental, but the result of delayed
8 maintenance and failure to adhere to the permits and standards, and thus selected a factor of 1.1.

9 **(b) Cleanup and Cooperation**

10 The Prosecution Team selected a 1, a neutral factor, for cleanup and cooperation. The range for
11 this factor is 0.75 to 1.5. Based on Costa Mesa's reliance on others immediately after the
12 discharges, the Prosecution Team could have selected an increasing factor. However, it did attempt
13 to recover material to the best of its ability, and the lack of training is captured by other factors that
14 the Prosecution Team feels is more appropriate. Costa Mesa has provided information about the
15 discharges voluntarily when requested. Therefore, the Prosecution Team feels a 1 is appropriate.

16 **(c) History of Violations**

17 A review of sewer overflow records maintained by both the State Water Resources Control
18 Board and the Orange County Health Care Agency reveal a history of overflows from the sewer
19 pipelines in Anniversary Lane that are tributary to the Irvine Lift Station since 1992 and the Indus
20 Line (Exhibit 25). While individually any one overflow may not have been a violation of the Water
21 Code prior to the adoption of Order No. 2006-0003-DWQ, taken collectively they suggest multiple
22 incidents that likely discharged sewage to the Santa Ana Delhi Channel given the close proximity
23 of street drainage catch basins to sewer manholes. The six overflow incidents from the Indus Line
24 system since 1999 have contributed a significant volume of sewage to the Santa Ana Delhi
25 Channel. The Regional Board records do not indicate enforcement ensued from these discharges,
26 but that Costa Mesa should have been alerted to the need for correction prior to the commencement
27 of this action.

28 While the parties were involved in settlement negotiations, which were extensive – see
email exchanges from 2013 through December 2014 - the second (the Indus Line Discharge)

1 occurred. The Prosecution Team was frustrated by this, as one of the main goals of an enforcement
2 action is to bring the discharger back into compliance. Based on the previous overflows, the
3 Prosecution Team selected a 1.2⁴ for the Irvine Sewage Lift Station Discharge, and a 1.1 Indus Line
4 Discharge.

5 **(d) Ability to Pay, Staff Costs, and Economic Benefit**

6 (i) Ability to Pay: As stated in Attachments A and B, Costa Mesa has a net surplus. Therefore,
7 it is not anticipated that the recommended liability would cause a financial hardship.
8 Furthermore, inability to pay is an affirmative defense for which Costa Mesa bears the
9 burden.

10 (ii) Staff Costs: “The costs of investigation and enforcement are “other factors as justice may
11 require”, and should be added to the liability amount.” Enforcement Policy, p. 19.
12 These costs have been calculated and described in the ACLC. These costs continue to
13 accrue through hearing.

14 (iii) Economic Benefit: The Prosecution Team submitted information related to economic
15 benefit in the ACLC, and remind the Regional Board that the economic benefit in all
16 matters is only a floor, and that the penalty recommended by the Prosecution Team
17 recovers the economic benefit plus 10%, as required by the Enforcement Policy.

18 **III. Conclusion**

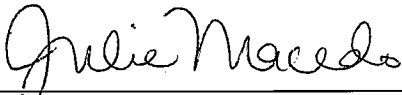
19 The Santa Ana Region does not bring many cases before the Board. Often, this is because the
20 Enforcement Unit can achieve compliance through cooperative agreement and settlement. Here,
21 however, the Prosecution Team felt a significant penalty was appropriate to address significant
22 deficiencies in Costa Mesa’s system that have and continue to present threats to water quality and
23 human health because of the discharge of raw sewage to waters with beneficial uses that include
24 water contact recreation. In the ACLC, including attachments, and this brief and accompanying
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27 ⁴ Note that scores higher than 1.1 are acceptable as long as the total penalty does not exceed the maximum penalty. See
28 for example the Santa Cruz settlement, Exhibit 28.

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attachments, the Prosecution Team has provided justification for the selected Enforcement Policy penalty methodology factors. The recommended penalty is appropriate and fair.

June 4, 2015



Julie Macedo,
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