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7 BEFORE THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

8  
 9 SAN DIEGO REGION

10 In the Matter of: )  
 )  
 11 **Administrative Civil Liability for** )  
**Mandatory Minimum Penalties Against** ) **Prosecution Staff Post-Hearing Brief**  
 12 **South Orange County Wastewater** )  
**Authority for Effluent Violations** )  
 13 \_\_\_\_\_ )

14 **I. INTRODUCTION**

15 On May 13, 2009, the San Diego Regional Water Quality Control Board (Regional  
 16 Water Board) held a public hearing to consider Administrative Civil Liability Complaint  
 17 (ACLC) No. R9-2009-0028 issued to South Orange County Wastewater Authority  
 18 (SOCWA) and the South Coast Water District for \$204,000 in mandatory minimum  
 19 penalties (MMPs). At the close of the hearing, the Regional Water Board requested that  
 20 the Prosecution Staff and SOCWA submit legal briefs on whether it must assess MMPs  
 21 against SOCWA. The Prosecution Team contends that the Regional Water Board *must*  
 22 impose MMPs for specific effluent limitation violations. Furthermore, SOCWA has not  
 23 met its burden of proof demonstrating that an affirmative defense or exemption applies  
 24 exempting the imposition of MMPs against SOCWA.

25 **II. LEGAL AUTHORITY**

26 Water Code section 13385 (h)(1) states, "Notwithstanding any other provision of  
 27 this division, and except as provided in subdivisions (j), (k), and (l), a mandatory minimum  
 28 penalty of three thousand dollars (\$3,000) shall be assessed for each serious violation.

1 Water Code section 13385 (h)(2) defines a “serious violation” as “any waste  
2 discharge that violates the effluent limitations contained in the applicable waste discharge  
3 requirements for a Group II pollutant, as specified in Appendix A to section 123.45 of  
4 Title 40 of the Code of Federal Regulations, by 20 percent or more or for a Group I  
5 pollutant, as specified in Appendix A to section 123.45 of Title 40 of the Code of Federal  
6 Regulations, by 40 percent or more.”

7 Water Code section 13385 (i)(1) states, “Notwithstanding any other provision of  
8 this division, and except as provided in subdivisions (j), (k), and (l), a mandatory minimum  
9 penalty of three thousand dollars (\$3,000) shall be assessed for each violation whenever  
10 the person does any of the following four or more times in any period of six consecutive  
11 months, except that the requirement to assess the mandatory minimum penalty shall not  
12 be applicable to the first three violations:

13 (A) Violates a waste discharge requirement effluent limitation.”

### 14 III. ARGUMENT

#### 15 A. An Application of the Plain Meaning Rule and an Inquiry into the Statute’s 16 Legislative Purpose Indicate the Legislature Intended these Provisions to be 17 Mandatory Leaving the State and Regional Boards Without Any Discretion

18 The cardinal rule of statutory construction is to pursue the intention of the  
19 Legislature and effectuate the purpose of the law. (*S.D. Myers, Inc. v. City and County of*  
20 *San Francisco* (2003) 336 F.3d 1174, 1179.) The California Supreme Court has held that  
21 when the court interprets any statute, it is well settled that it begins with the statute’s  
22 words “because they generally provide the most reliable indicator of legislative intent.”  
23 (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 871.) If the language is clear and unambiguous,  
24 there is ordinarily no need for judicial construction. (See *Murphy v. Kenneth Cole*  
25 *Productions, Inc.* (2007) 40 Cal.4th 1094, 1103.) In construing a provision, “we presume  
26 the Legislature meant what it said” and the plain meaning governs. (*People v. Snook*  
27 (1997) 16 Cal.4th 1210, 1215.)

28 The language of section 13385(h) is clear. A MMP of three-thousand dollars “shall  
be assessed for each serious violation.” (emphasis added.) Additionally, the language of

1 section 13385(i) is similarly clear stating that a MMP of three-thousand dollars “shall be  
2 assessed for each violation whenever the person does any of the following four or more  
3 times in any period of six consecutive months...” (emphasis added.) The use of the  
4 mandatory language “shall” indicates a legislative intent to impose a mandatory duty; no  
5 discretion is granted. (*In re Luis B.* (2006) 142 Cal.App.4<sup>th</sup> 1117, 1123.)

6 Furthermore, the State Water Resources Control Board (State Water Board)  
7 previously considered this Regional Water Board’s ability to settle an administrative action  
8 for MMPs for less than the mandated minimum. (In the Matter of the Petition of  
9 Escondido Creek Conservancy and San Diego Coast Keeper, Order WQ 2007-0010, 3.)  
10 The State Water Board determined that the San Diego Regional Water Board could not  
11 adopt an Order approving a settlement agreement for less than the MMP unless the MMP  
12 was improperly assessed or an affirmative defense applied.

13 In its decision, the State Water Board stated, “The Legislature removed discretion  
14 from the water boards when it enacted MMPs in 1999.” (*Id.* at 6.) The State Water Board  
15 further explained, “If violations occur that are subject to MMPs and an administrative civil  
16 liability complaint is issued, any administrative action that results in a fine lower than the  
17 minimum statutory requirement must be accompanied by a determination either that the  
18 MMP was not correctly assessed or that the discharger proved an appropriate affirmative  
19 defense.” (*Id.* at 5-6.) This means that MMPs will apply unless there was an error in  
20 assessing the violation as one that is subject to a MMP or a discharger has met its burden  
21 of proof demonstrating an affirmative defense. The State Water Board vacated the Order  
22 and remanded the matter back to the Regional Water Board ordering that “[t]he amount  
23 of liability to be assessed must be no less than the minimum liability required by Water  
24 Code section 13385, based on factual determinations of the San Diego Water Board.”  
25 (*Id.* at 7.)

26  
27 **B. In the Alternative, Should the Regional Water Board Not Agree that the**  
28 **Statute Contains Express Language and the Express Intent of the**  
**Legislature, an Examination of the Legislative Intent is Warranted**

1 MMPs were enacted in 1999 in two bills, Senate Bill (SB) No. 709 and Assembly  
2 Bill (AB) No. 1140. Each bill incorporated the following legislative finding, "Recent  
3 investigations indicate that current enforcement efforts of the state board and the regional  
4 boards may not be achieving full compliance with waste discharge in a timely manner,  
5 and that swift and timely enforcement of waste discharge requirements will assist in  
6 bringing the state's waters into compliance and will ensure that violators do not realize  
7 economic benefits from noncompliance." (Stats.1999, ch. 92, § 2, subd. (d) AB 1104;  
8 ch. 93, § 2, subd. (d) SB 709.) As explained in the legislative findings, the impetus for  
9 these measures was mounting evidence that state and regional water boards were failing  
10 in their fundamental missions to implement and enforce state and federal water quality  
11 laws. The mandatory penalties represent a further move away from discretion and  
12 detailed fact-finding and toward a swifter and more predictable enforcement. (*City of*  
13 *Brentwood v. Central Valley Regional Water Quality Control Board* (2004) 123 Cal.App.4<sup>th</sup>  
14 714, 725.)

15 An inquiry into the statutory language and legislative purpose for this statute's  
16 enactment indicate that if a "serious violation" occurs, the state or regional water boards  
17 are *mandated* by statute to impose a MMP of three-thousand dollars for each serious  
18 violation. A contrary interpretation would defeat the purpose of the statute's enactment,  
19 render the statute meaningless, and be entirely contrary to the legislative intent.

20  
21 **C. As the Effluent Limitation Violations Reported in SOCWA's Self-Monitoring**  
22 **Reports are "Serious Violations," the Regional Board Must Impose a MMP of**  
23 **Three-Thousand Dollars for each "Serious Violation."**

24 ACLC No. R9-2009-0028 included a calculation of MMPs based on reported  
25 monitoring results from August 2007 through December 2008 and excerpted self-  
26 monitoring report pages from August 2007 through December 2008. (See ACLC  
27 Attachments 1 and 2.) The excerpted reports indicate that effluent limitation violations for  
28 settleable solids, total suspended solids, and turbidity occurred during the relevant  
monitoring period. (See Supporting Document 3 – Attachment 2.) SOCWA submitted the

1 reports excerpted in Attachment 2 in accordance with its Monitoring and Reporting  
2 Program (MRP) and the Standard Provisions. (See Supporting Document 5C, Attachment  
3 E – MRP and Attachment D – Standard Provisions.) Specifically, SOCWA submitted  
4 these reports pursuant to Title 40 sections 122.41(k) and 122.22 of the Code of Federal  
5 Regulations certifying under penalty of perjury that the information submitted is true,  
6 accurate, and complete. SOCWA does not dispute that the violations occurred.

7 Attachment 1 to the ACLC consolidates the violations noted in SOCWA's self-  
8 monitoring reports in Attachment 2 into a chart to identify the type of the effluent limitation  
9 violation assessing whether the violation is "serious" or "chronic" subjecting those  
10 violations to MMPs pursuant to section 13385(h) and (i), respectively. Attachment 1  
11 indicates there are 56 "serious violations". Because settleable solids, total suspended  
12 solids, and turbidity are considered Group I pollutants, section 13385(h) defines a  
13 "serious violation" as any waste discharge that violates the effluent limitations contained  
14 in the applicable waste discharge requirements for a Group I pollutant by 40 percent or  
15 more. Attachment 1 indicates there are 10 "chronic violations." As stated above in  
16 Section II, a MMP shall be imposed when a person violates a waste discharge effluent  
17 limitation four or more times in any period of six consecutive months. As the effluent  
18 limitation violations noted in Attachments 1 and 2 fall into the category of "serious" or  
19 "chronic" violations as described in section 13385(h) and (i), the Regional Water Board  
20 must impose MMPs in the amount of \$204,000.

21 Presently, the alleged effluent limitation violations, which are characterized as  
22 "serious" or "chronic" violations, are not challenged and SOCWA does not contend that  
23 the MMP was incorrectly assessed. Therefore, according to the State Water Board's  
24 decision in the *Petition of Escondido Creek and the San Diego Coast Keeper*, the only  
25 way the Regional Water Board could justify imposing a penalty that is less than the  
26 mandatory minimum is if SOCWA has successfully met its burden of proof demonstrating  
27 that an affirmative defense or exemption applies.

**D. An Affirmative Defense or Exemption Under Section 13385(j) Does Not Apply, Therefore, the Regional Board Must Impose the MMP of \$204,000**

In its May 13, 2009 presentation, SOCWA made several assertions as to why it felt MMPs should not apply and why, if applicable, MMPs should be reduced. (Presentation Before the Regional Water Quality Control Board, San Diego Region.) Exceptions to liability for violations of NPDES effluent limitations under the Clean Water Act are affirmative defenses. (*US v. CPS Chemical Co., Inc.* (1991) 779 F.Supp. 437, 454.) If the discharger asserts one of the permitted defenses in section 13385 subdivision (j)(1), then it bears the burden of proof by a preponderance of the evidence. (see *City of Brentwood*, 123 Cal.App.4<sup>th</sup> at 726.) Requiring water quality control boards to affirmatively disprove each of the exception in that subdivision would undermine the legislative goal of simple and swift enforcement with a minimum of fact-finding an investigation. (*Ibid.*) SOCWA must present evidence so that the Regional Water Board can make a factual determination as to the asserted defense. (Order WQ 2007-0010, 6.) In the case of MMPs, a water board cannot simply accept a discharger's "assertions" of an affirmative defense – the board must weigh those claims and make appropriate findings supported by the record. (*Ibid.*)

MMPs will apply unless there was an error in assessing the violation as one that is subject to a MMP or a discharger has met its burden of proof demonstrating a permitted affirmative defense. Section 13385 subdivision (j)(1) lists the permitted affirmative defenses. (*City of Brentwood*, 123 Cal.App.4<sup>th</sup> at 725.) The majority of SOCWA's assertions as to why MMPs should not apply are not recognized affirmative defenses within section 13385 subdivision (j)(1). Rather, SOCWA argues that MMPs should not apply because imposing MMPs does not further the Regional Water Board's implementation of the State Water Board's Recycled Water Policy. The MMP statutory scheme exists independently and applies to specific effluent limitation violations regardless of the existence of the Recycled Water Policy.

Moreover, SOCWA argues that even if MMPs are imposed, they should be reduced based on three arguments. First, the amount of the MMP is unreasonable and

1 oppressive given the absence of harm and violates due process. Second, the initial  
2 violations during the start up period should be waived. Finally, SOCWA should have had  
3 the opportunity to enter into a time schedule order. (Presentation Before the Regional  
4 Water Quality Control Board, San Diego Region; April 21, 2009 Evidentiary Submission  
5 Cover Letter, pp. 10-12.)

### 6 1. Due Process

7 SOCWA argues that the assessment of MMPs is unreasonable and violates due  
8 process based on *Hale v. Morgan*. ((1978) 22 Cal.3d 388.) In *Hale*, the California  
9 Supreme Court considered whether, either as enacted or as specifically applied, the  
10 penalties in former Civil Code section 789.3 were authorized as reasonable and proper or  
11 arbitrary and oppressive. (*Id.* at 399.) Ultimately, the Court held the penalty as  
12 specifically applied constitutionally excessive in violation of due process with a caveat  
13 stating, "We cannot conclude, however, that all applications of section 789.3's penalty  
14 formula would be unconstitutional. The imposition of the \$100 daily penalty over a limited  
15 period may indeed, in a given case, be a perfectly legitimate means of encouraging  
16 compliance with law." (*Id.* at 404.).

17 The Court in *Hale* begins with a recitation of a well settlement principle, "In the  
18 exercise of its police power a Legislature does not violate due process so long as an  
19 enactment is procedurally fair and reasonably related to a proper legislative goal." (*Id.* at  
20 398.) A statute is presumed to be constitutional and must be upheld unless its  
21 unconstitutionality clearly, positively, and unmistakably appears. (*Id.* at 404.) In its  
22 analysis, the Court discusses several factors which, in combination, contribute to its  
23 determination. First, the duration of the penalties in section 789.3 are potentially  
24 unlimited because the penalty cumulates on a per-day basis rather than on a per-violation  
25 basis. (*Id.* at 399.) Second, no discretion is permitted to the trier of fact in fixing the  
26 penalty and culpability of the actor is not considered. (*Ibid.*) Third, the penalty is  
27 potentially more severe than those provided by the Legislature for more serious violations  
28 pertaining to similar issues. (*Id.* at 400.) Fourth, the penalty provision of section 789.3 is

1 wholly inconsistent with the statutory norm. (*Id.* at 401.) It's severity appears to exceed  
2 that of sanctions imposed for other more serious civil violations in California and for  
3 similar prohibited acts in other jurisdictions. (*Id.* at 404.) Given these considerations in  
4 totality, the Court determined that section 789.3 *may* produce constitutionally excessive  
5 penalties but did not conclusively state that all applications of the mandatory penalty  
6 would be unconstitutional. (*Ibid.*)

7 Presently, in determining whether Water Code section 13385 (h) and (i) could  
8 produce constitutionally excessive penalties these MMP provisions and section 789.3  
9 similarly grant no discretion to the trier of fact in fixing the penalty amount. However,  
10 Water Code section 13385 (h) and (i) is distinguishable from section 789.3 in several  
11 ways. First, the MMP is calculated on a per-violation basis rather than on a per-day  
12 basis. This difference in the way the penalty is calculated militates against a  
13 constitutionally excessive determination as the concern for infinite penalty accrual is not a  
14 concern. Second, in comparison to the penalty schemes for more serious violations in  
15 Chapter 5.5 of Porter-Cologne, there is a correlation between the severity of the MMP  
16 and its corresponding violation in relation to the discretionary penalty provision in Water  
17 Code section 13385(c). Not only does this section assign administrative civil liability  
18 penalties at \$10,000 per-day in which the violation occurs, but there is also an additional  
19 penalty that may be added on based on the number of gallons discharged at \$10 per  
20 gallon. (Wat. Code § 13385(c)(1) and (2).) Furthermore, the mandatory penalty scheme  
21 serves the purpose of public protection by deterring water pollution and depriving  
22 dischargers of the economic benefits of violations. The mandatory penalty scheme as  
23 enacted is reasonably related to this legislative goal. Therefore, the statute should be  
24 upheld as constitutional.

## 25 **2. Waiver of the Violations During the Startup Period**

26 SOCWA also argues that initial violations during the facility's startup period should  
27 be exempted pursuant to section 13385(j)(1)(D). Section 13385(j)(1)(D), added in 2002  
28 by Assembly Bill No. 2351, provides for an exemption from MMPs for violations occurring



1 during “the operation of a new or reconstructed wastewater treatment unit during a  
2 defined period of adjusting or testing, not to exceed 90 days for a wastewater treatment  
3 unit that relies on a biological treatment process and not to exceed 30 days for any other  
4 wastewater treatment unit” if certain requirements are met. SOCWA’s argument as to  
5 why the Regional Water Board should waive the initial violations has no legal basis. The  
6 statutory language specifies when the exemption will apply. By its own concession,  
7 SOCWA’s groundwater recovery facility is not a wastewater treatment facility. From the  
8 plain meaning of the statute, this provision exempts violations occurring during the  
9 adjusting and testing phase for facilities that use specific treatment processes. The  
10 processes employed define when this exemption should apply. Furthermore, the  
11 legislative purpose indicates that one of the purposes of AB 2351 is to mitigate MMPs in  
12 certain circumstances because of the complex nature of wastewater treatment in general,  
13 especially where it includes biological processes and microbiological systems. (AB 2351  
14 Assembly Bill – Bill Analysis; June 24, 2002 Senate Committee on Environmental  
15 Quality.) On its face and through its legislative purpose, section 13385(j)(1)(D) does not  
16 apply to exempt SOCWA from violations occurring during the startup period.

### 17 **3. Time Schedule Order (TSO)**

18 SOCWA argues that it should have had the opportunity to enter into a TSO.  
19 Section 13385(j)(3) allows for an exemption from MMPs for effluent limitation violations  
20 “where the waste discharge is in compliance with either a cease and desist order or a  
21 time schedule order” if certain requirements under this section are met. (Wat. Code  
22 §13385(j)(3).) If the requirements of this section are met and a TSO is adopted, a  
23 discharger will be prospectively exempt from accruing MMPs from the date of TSO  
24 adoption if its waste discharge remains in compliance with the TSO. There is no legal  
25 support for interpreting section 13385(j)(3)’s exemption from MMPs as being allowed to  
26 have a retroactive application allowing an exemption to apply prior to the adoption of a  
27 TSO. A plain reading of the statute stating that MMPs will not apply to “a violation of an  
28 effluent limitation where the waste discharge *is in compliance* with either a CDO or TSO”

1 necessarily means that a waste discharge cannot be in compliance with a TSO until that  
2 TSO has been issued. (Wat. Code §\_13385(j)(3), emphasis added.)

3 A TSO pursuant to section 13300 is the mechanism that would trigger the  
4 application of the exemption in section 13385(j)(3). Section 13167.5 requires a 30 day  
5 notice period to allow for public comment prior to final adoption for TSOs issued under  
6 section 13300. SOCWA met with Regional Water Board staff on September 18, 2008 to  
7 discuss the TSO process. At that time, 56 of the 68 violations occurred with the  
8 remaining 12 violations occurring within four weeks after that meeting. (Supporting  
9 Document 7.) Given the dates of the violations and the 30-day notice requirement, the  
10 TSO could not have feasibly been adopted before the discharges subject to MMPs  
11 occurred to provide prospective exemption from MMPs for those violations.

#### 12 IV. CONCLUSION

13 SOCWA does not dispute the alleged effluent limitation violations  
14 characterized as "serious violations" for purposes of MMP assessment. Because these  
15 serious violations occurred, the Regional Water Board must abide by its legislative  
16 mandate and impose a MMP of \$204,000. The only justification for imposing a penalty  
17 that is less than the mandatory minimum is if SOCWA successfully satisfied its burden of  
18 proof demonstrating that an affirmative defense or exemption applies. Presently,  
19 SOCWA has not satisfied this burden of proof demonstrating that an appropriate  
20 affirmative defense or exemption applies. Moreover, there is no evidence in the record  
21 that would support the Regional Water Board's finding that an affirmative defense or  
22 exemptions applies because SOCWA has not met its burden of proof. Therefore, a MMP  
23 of \$204,000 must be assessed against SOCWA for violations of Regional Board Order  
24 No. R9-2006-0054.

25 Respectfully submitted,

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28 Attorney for the Prosecution Staff

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