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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	SOCWA AND SCWD'S POST-HEARING BRIEF

Pursuant to the request of the Regional Water Quality Control Board ("Regional Board") at the hearing on the above-referenced matter on May 13, 2009, South Orange County Wastewater Authority ("SOCWA") and South Coast Water District ("SCWD") hereby submits additional briefing on the following issues:

(1) Does the Regional Board have any discretion not to apply mandatory minimum penalties ("MMPs") in this case?

(2) If MMPs must be applied, can they be reduced?

SOCWA and SCWD answer both of these questions in the affirmative. In the interest of administrative economy and to avoid duplication, SOCWA and SCWD hereby incorporate their

prior submission dated April 21, 2009 and the Powerpoint presentation they presented at the May 13, 2009 hearing.

I. The Regional Board has Some Discretion to Choose Not to Apply Mandatory Minimum Penalties.

Perhaps Governor Gray Davis put it best when he expressed his concern about Senate Bill 709 which first implemented mandatory minimum penalties ("MMPs"):

> "[I]t is critical to ensure that the mandatory penalty provisions of Senate Bill 709 do not create the unintended consequence of unjustly penalizing businesses and public agencies. Although I believe the certainty of penalty for those who pollute is sound public policy, there may be instances where discretion is appropriate."

Stats 1999 ch. 93 (SB 709). This case certainly brings Governor Davis's concern to fruition as SCWD stands to be unjustly penalized for developing a low quality groundwater source for potable use.

In enacting the MMP Statute (the Clean Water Enforcement and Pollution Prevention Act of 1999 as codified in Cal. Water Code § 13885), the Legislature found that numerous water bodies were not meeting water quality standards due to various sources of water quality impairments including "point sources such as ***industrial discharges*** and municipal ***public owned treatment works (POTWs)***."[1] Stats 1999 ch. 93 (SB 709) (emphasis added). In addition, the Legislature found that:

> ". . . current enforcement efforts of the state board and the regional boards may not be achieving full compliance with waste discharge requirements in a timely manner, and that ***swift and timely enforcement of waste discharge requirements will assist in bringing the state's waters into compliance and will ensure that violators do not realize economic benefits from noncompliance***."

[1] The Prosecution staff has repeatedly argued that the MMP Statute is clear on its face and that MMPs "shall be assessed for each serious violation," and "shall be assessed for each violation whenever the person [violates a waste discharge requirement effluent limitation]." However, SOCWA and SCWD submit that the MMP statute is ambiguous on its face as to which ***facilities*** it applies to. A "person" cannot per se violate an effluent limitation – it is the facility that violates it. The statute does not specifically indicate which classes of dischargers are (or that all classes of dischargers are) subject to MMPs.

Id. (emphasis added).

"The objective sought to be achieved by a statute as well as the evil to be prevented is of prime consideration in its interpretation." *Wotton v. Bush*, 41 Cal.2d 460, 467 (1953). These statements by the Legislature suggest (1) it was focused on bringing industrial dischargers and particularly POTWs into compliance with their NPDES permits; (2) it felt that MMPs would assist in bringing the state's waters into compliance; and (3) it felt that MMPs would prevent violators from realizing economic benefits. SOCWA and SCWD contend that applying MMPs in this case is not consistent with these objectives because (1) SCWD is neither an industrial discharger or POTW; (2) abatement of SCWD's discharge of brine effluent to the outfall does not assist in bringing the outfall into compliance; and (3) no economic benefit could result from SCWD's non-compliance with the effluent limits. Thus, it would be incongruous with Legislative intent to apply MMPs to SCWD.

A. <u>The GRF is Neither a POTW or Industrial Discharger</u>

Consistent with Legislative intent, the MMP Statute extensively refers to "wastewater treatment" and POTWs, and does not mention groundwater recovery facilities or other facilities that develop local water sources or recycled water. It is clear that the mandatory minimum penalty statute was never intended to apply to facilities like the GRF. ***The GRF does not treat any wastewater***, it simply extracts local groundwater and filters and treats the water for potable use. Nor can the GRF be considered an industrial discharger. While the statute does not define "industrial discharger," the FWPCA defines "industrial user" as

> "those industries identified in the Standard Industrial Classification Manual, Bureau of the Budget, 1967, as amended and supplemented, under the category of 'Division D-Manufacturing' and such other classes of significant waste producers as, by regulation, the Administrator deems appropriate."

33 U.S.C. § 1362(18). SCWD and the GRF certainly do not fall within this definition.

Most industrial dischargers ***generate*** waste as a result of industrial processes. In contrast, the GRF's brine effluent is simply a concentrated form of the natural constituents in the groundwater. Thus, the GRF falls into neither category of POTW or industrial discharger.

B. MMPs will not Help Bring the Outfall into Compliance

As discussed in SOCWA and SCWD's April 21, 2009 submittal, abatement of the GRF's brine discharge to the outfall does not result in compliance at the outfall because the outfall was in compliance even with the brine effluent. The GRF's contribution of Total Suspended Solids ("TSS") to the outfall was approximately 1.1 mg/L. The averge outfall TSS concentration over the period of GRF discharge was 11.5 mg/L which was well under the standard permit limit of 30 mg/L. Therefore, the GRF's contribution to the outfall was nominal and did not result in any significant environmental impact.

C. No Economic Benefit Resulted or Could Result from the GRF's Non-compliance

As discussed in SOCWA and SCWD's April 21, 2009 submittal, it costs SCWD approximately $900 per acre foot (or $1,700, including capital costs) to produce water at the GRF rather than to purchase the water from Metropolitan Water District ("MWD"). Even with the $250 per acre foot subsidy from MWD, the cost to produce water at the GRF significantly exceeds the cost to simply purchase the water. Thus, no economic benefit could have been realized from the GRF's non-compliance.

Given the ambiguity in the MMP Statute and the fact that the application of MMPs to the GRF violations does not satisfy any of the stated objectives of the statute, SOCWA and SCWD strongly believe the Legislature did not intend for MMPs to apply to facilities like the GRF, which extract and treat groundwater for potable use.

D. Strict Application of MMPs to the GRF Would Lead to Absurd Results

To the extent the Regional Board finds that MMPs unequivocally apply to the GRF, SOCWA and SCWD submit that such an interpretation of the statute would lead to absurd results. *See J.A. Jones Constr. Co. v. Superior Court*, 27 Cal.App.4th 1568, 1575 (1994) (plain text controls unless it leads to absurd results). As discussed in SOCWA and SCWD's April 21, 2009 submittal, the GRF is the very sort of project that the State Water Quality Control Board ("SWQCB") encourages in its newly adopted recycled water policy, yet SCWD is being penalized for the quality of its brackish groundwater source. More specifically, the GRF

violations are the result of a Regional Board staff policy decision made after the start of construction to require compliance at the point of discharge at the GRF rather than at the outfall. That policy decision, however, was based primarily on concerns that POTWs meet effluent limits at the point of discharge from each plant, but broadly applied it has directly affected the GRF. Consequently, SCWD violated the terms of the NPDES permit and is now being ordered to pay MMPs in the amount of $204,000.

As previously discussed, the plant cost $5.8 million to construct, and an acre foot of water costs approximately $900 per acre foot (or approximately $1,700 per acre foot, including capital costs) to produce at the GRF. SCWD can purchase an acre foot of water from MWD for approximately $700 per acre foot. In addition, SCWD spent more than $225,000 on implementing the remedy (redirecting the brine effluent to the sewer) that is both undesirable and unnecessary because it defeats the State Board's policy in favor of the development and use of recycled water, and has no effect on the quality of effluent at the outfall. SCWD does not receive any monetary gain from operating the GRF; to the contrary, it would be more economical for SCWD to purchase the water from MWD. To add another $204,000 in MMPs (and potentially more MMPs in the future) compromises the economic feasibility of operating and expanding the GRF which is an absurd result given the grave water shortage in the state.[2]

II. The Particular Effluent Limitations at Issue are Not Subject to MMPs.

Under the Clean Water Act, the term "effluent limitation" is defined quite broadly, as "any restriction . . . on quantities, discharge rates, and concentrations of pollutants which are discharged from point sources into waters of the United States, the waters of the contiguous zone, or the ocean." 40 CFR § 122.2. By the express terms of the California statute, however, MMPs apply only to a subset of effluent limitations. Water Code section 13385.1(c) limits the universe of effluent limits subject to MMPs to restrictions on pollutants that "may be discharged from an authorized location." The term "discharge" in the MMP statute has the same meaning as the term

[2] Application of MMPs to facilities that develop local water sources of potable water is unreasonable in general since many of the technologies are not well-established and violations during start-up are unpredictable and potentially unavoidable. Note that SOCWA and SCWD are not arguing that no penalties should apply for violations of the NPDES permit, they merely contend that MMPs should not apply.

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discharge has under the CWA. Water Code §13373. Federal regulations define "discharge" as "addition" of any pollutant *to* ***Waters of the United States*** from any point source. 40 C.F.R. §122.2.

Here, the "discharge" to waters of the United States occurs at the SOCWA outfall, ***not*** at the upstream monitoring point, i.e., the GRF, and therefore only effluent limitations that apply to the outfall are subject to MMPs. To be sure, all effluent limitations are subject to discretionary enforcement action by the Regional Board, but only those directly discharged to waters of the United States come within the scope of the MMP statute.

III. Application of MMPs in this Case Raises Due Process Issues

Although the Regional Board may impose reasonable penalties as a means of securing obedience to statutes, "oppressive" or "unreasonable" statutory penalties may be invalidated as violative of due process. *See Hale v. Morgan*, 22 Cal.3d 388, 398-99 (1978). Uniformly, courts "have looked with disfavor on evermounting penalties and have narrowly construed the statutes which either require them or permit them." *Id.* at 387.

In determining that the penalties in *Hale* were "arbitrary and oppressive" the court considered the following factors: (1) the duration of the penalties was potentially unlimited; (2) the trier of fact had no discretion in fixing the penalty; (3) the acts prohibited potentially encompass a broad range of culpable activity; and (4) the fixed penalties are imposed upon potential defendants who may vary greatly in sophistication and financial strength. *Id.* at 399.

In this case, SOCWA and SCWD contend that like the penalties in *Hale*, the MMPs assessed are oppressive and unreasonable because (1) the duration of the MMPs was potentially unlimited; (2) the Regional Board allegedly has no discretion in fixing the penalty; (3) the acts prohibited encompass a broad range of culpable activity (i.e., discharge of brine effluent is subject to the same MMPs as discharge of raw sewage); (4) fixed MMPs are imposed on dischargers which may receive varying amounts of financial benefit (in this case none).

Normally, in assessing any civil penalty pursuant to Water Code Section 13385, the Regional Board is generally required to take into account the nature and circumstances of the violation, the degree of harm, and any economic benefit derived by the violator. See Water Code

§ 13385(e). In this case, the nature and circumstance are the operation of a groundwater recovery facility which provides a local source of potable water. The discharge resulting in the violations is brine effluent containing iron and manganese, neither of which are regulated substances under the Ocean Plan. The source of this brine is the brackish groundwater being processed for potable use. As discussed above, the brine effluent does not impact the outfall, i.e., the outfall would remain in compliance with the Ocean Plan and the NPDES permit even if the brine effluent is discharged to the outfall. Furthermore, as discussed above, in the absence of the GRF the brine would reach the ocean naturally.

Moreover, for each sampling event, SCWD was assessed for an "instantaneous max," "average weekly," and "average monthly," violation. This in and of itself is unreasonable for a groundwater recovery facility that is treating groundwater that has a consistent naturally-occurring characteristic, i.e., mineral salt or brine. As discussed in more detail below, each sampling event should not result in three mandatory minimum penalties ($9,000), particularly under the circumstances where SCWD is operating a groundwater recovery facility as opposed to a POTW.

Finally, SCWD did not derive any economic benefit from violating the NPDES permit. As discussed above, it costs SCWD approximately $900 per acre foot (or $1,700, including capital costs) to produce water at the GRF rather than to purchase the water from MWD. Even with the $250 per acre foot subsidy from MWD, the cost to produce water at the GRF significantly exceeds the cost to simply purchase the water.

All of these factors suggests that the MMPs assessed in the amount of $204,000 are unreasonable under the circumstances and are violative of SCWD's due process rights.

IV. To the Extent the Regional Board Finds that MMPs Apply to the GRF, They Should be Reduced

To the extent the Regional Board finds that it has no discretion to avoid applying MMPs, SOCWA and SCWD contend that the MMPs were misapplied. First of all, each sampling event should not result in three mandatory minimum penalties ($9,000). SCWD was assessed an "instantaneous max," "average weekly," and "average monthly," violation for each single sample

taken for several months.[3]

Order Number R9-2006-0054 (August 16, 2006) (the "2006 NPDES Permit") requires a "monthly minimum sampling frequency" for TSS, turbidity, and settleable solids. *See* 2006 NPDES Permit at E-11 (Attachment C to SOCWA and SCWD's April 21, 2009 submittal). In other words, by the terms of the permit, SCWD was only required to take one sample per month, yet each sample resulted in three violations - "instantaneous max," "average weekly," and "average monthly."[4] The Administrative Civil Liability Complaint at issue (Complaint No. R9-2009-0028) cites to the permit effluent limitations which are a "cut and paste" of Table A of the 2005 California Ocean Plan.[5] Table A, however, merely sets forth parameters for a various violations among a broad class of dischargers.[6] Depending on the type of discharger and the predictability and toxicity of the discharge, these dischargers may be required to sample daily, weekly, biweekly, or monthly. ***Depending on the frequency of sampling, different parameters under the Ocean Plan would apply.*** For example, a discharger who is required to sample daily would clearly be required to comply with all applicable parameters (e.g., average monthly, average weekly, instantaneous max). However, a discharger who is required to sample only monthly should not be required to comply with all these parameters because presumably the discharger's effluent did not require more frequent monitoring. Note also that is impossible to determine average weekly and average monthly values based on one sample.[7]

[3] In addition, for each sample, SCWD was assessed violations for turbidity, TSS, and SS even though each of these violations was presumably caused by the same "solids" (i.e., iron and magnesium) in the water.

[4] Regional Board staff asserts that "SOCWA chose to use a single sample event to determine compliance with instantaneous, weekly, and monthly effluent limitations, but was under no obligation to do so." Memo dated May 6, 2009 from Jeremy Hass to Michael P. McCann. Staff appears to miss the point that given the GRF's operational issues, every sample would likely lead to an "instantaneous maximum" violation, thus, SCWD had no incentive to take more than one sample per month in compliance with the permit.

[5] The Ocean Plan can be found at http://www.swrcb.ca.gov/water_issues/programs/ocean/docs/oplans/oceanplan2005.pdf

[6] That is, "publicly owned treatment works and industrial discharges for which Effluent Limitations Guidelines have not been established pursuant to Sections 301, 302, 304, or 306 of the Federal Clean Water Act." *See* 2005 Ocean Plan at 12.

[7] Although the NPDES permit directs SOCWA and SCWD to use a single daily effluent value ("DEV") as the average monthly effluent value ("AMEV") or average weekly effluent value ("AWEV") if only a single DEV is obtained for a parameter during a calendar month or week, SOCWA and SCWD assert that this is merely boilerplate language and intended to cover the circumstance where for whatever reason, a discharger is unable to take all of its required samples. *See* 2006 NPDES Permit at 32. If the intent of the Regional Board staff was to have SCWD comply with a weekly and monthly average, then it should have required SCWD to sample more than once a month.

The GRF's brine effluent is fairly innocuous and consistent, and as such, the GRF is only required to sample only once a month. To assess three MMPs for each of these samples is unduly punitive, inconsistent with the Ocean Plan, elevates form over substance, and should not be sustained.

If each sample is to result in one violation for each parameter instead of three, 31 violations should be eliminated for a total of 37 violations instead of 68.[8] This is a conservative approach since all the average monthly violations for TSS (and some SS and turbidity) are intact even though SOCWA and SCWD maintain that an AMEV cannot be calculated based on one sample.

Furthermore, as SOCWA and SCWD presented at the hearing, the Regional Board could reduce the penalties to account for the GRF's start-up period. Although the MMP Statute provides immunity during the startup of a wastewater treatment plant, the statute is silent with respect to groundwater recovery facilities. However, given the spirit and intent of the start-up exemption (to allow a facility to work out start-up operational issues), there is no reason why the Legislature would not have intended the exemption to apply to groundwater recovery facilities. Unlike POTWs where the treatment technology is well established, groundwater recovery facilities are not supported by established technology. Each groundwater recovery facility deals with different issues caused by the variance in hydrology and water quality of each site. As such, it is not unusual for this type of facility to have a long start up period during which adjustments must be made to address operational issues.

Prior to March 5, 2008, the GRF was not fully in production. In December 2007, the total runtime of the plant was approximately 4.97 days (about 16% of the time for the month). The GRF was also shut down 13 days in December 2007. In January 2008, the GRF had a total runtime of approximately 4.75 days (about 15% of the time) and was shut down for 11 days. In February 2008, the GRF had a total runtime of approximately 3.48 days (about 12% of the time). After March 5, 2008, the plant went on line and began producing water full time. As such, we

[8] The violations to be eliminated would include 689220, 689237, 689282, 715322, 724234, 724241, 755317, 805281, 805283, 805286, 805288, 805330, 805795, 805803, 805842, 805844, 805827, 805838, 805836, 805835, 805832, 805822, 805828, 805829, 805831, 805815, 805817, 805808, 805805, 805796, and 805793.

believe that any violations should not have accrued until after March 5, 2008.

In addition, if SOCWA and SCWD could have entered into a time schedule order ("TSO"), they would have requested a retroactive compliance date of July 20, 2008, the date SCWD's Board approved implementation of the remedy. As SOCWA and SCWD have previously argued, neither the statute nor the policy concerning TSOs prohibits the compliance schedule to be retroactive. The Prosecution staff has argued that the language of the statute that MMPs will not apply to "a violation of an effluent limitation where the waste discharge is in compliance with a . . . TSO," ***necessarily*** means that a waste discharge cannot be in compliance with a TSO until that TSO has been issued. SOCWA and SCWD disagree. This language simply does not preclude a TSO which states that violations which occur during implementation of the remedy shall not be subject to MMPs, even if the TSO is issued after implementation of the remedy.

In drafting the statute, the Legislature most likely did not contemplate that the TSO process would last five months. SOCWA and SCWD simply should not be penalized by the Regional Board's lengthy administrative process. The total violations between March 5, 2008 and July 10, 2008 total 25 under the current penalty scheme. If the treble penalties for each sample are eliminated as described above, the total would be 14 penalties or $42,000 in MMPs.

V. Conclusion

For the foregoing reasons, SOCWA and SCWD respectfully request that the Regional Board exercise its discretion and avoid imposing MMPs.

Date: June 15, 2009

Respectfully submitted,

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