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September 9 2011

Via Electronic Mail and First Class U.S. Mail

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
P.O. Box 100
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commentletters@waterboards.ca.gov



Re: **Comments to SWRCB/OCC Files A-2144(a) and A-2144(b) –
September 19, 2011 Board Meeting**
Petitions of Sacramento Regional County Sanitation District and California
Sportfishing Protection Alliance (Waste Discharge Requirements Order
No. R5-2010-0114 [NPDES No. CA0077682] for the Sacramento Regional
County Sanitation District, Sacramento Regional Wastewater Treatment Plant,
Sacramento County), Central Valley Water Board

Dear Ms. Townsend:

This firm represents the Sacramento Regional County Sanitation District (District) in connection with the subject petitions for review of Central Valley Regional Water Quality Control Board (Regional Board) Order No. R5-2010-0114. The District is in receipt of an August 9, 2011 letter from Michael Lauffer and its enclosed, proposed order providing for State Water Resources Control Board (State Board) review of Order No. R5-2010-0114 on the State Board's own motion.

The District does not support delay in resolution of the issues presented by its petition for review. It recommends the State Board direct staff to complete the work necessary so that the State Board can consider and issue an order addressing Order No. R5-2010-0114 and the subject petitions on or before December 23, 2011. If, however, the State Board does adopt an order for "own motion" review, we recommend that the effect of such order be clarified and confirmed. We provide further discussion of these points below.

Delay in Disposition Would Affect the District Adversely

The Regional Board issued Order No. R5-2010-0114 (the Permit) on December 9, 2010. The Permit imposes new requirements for the Sacramento Regional Wastewater Treatment Plant that have major implications for the District, its ratepayers, and the region. The District timely filed its petition for review on January 10, 2011. By letter of March 28, 2011, the State Board provided notification that the petition was complete. This act triggered the applicability of the review period in section 2050.5(a) of Title 23 of the California Code of Regulations, which provides that the State Board shall act on a petition within 270 days of the mailing of such notification.

The proposed order is premised on the assumption that State Board review will not conclude within the 270-day period. Delay in resolution is to the disadvantage of the District. Compliance with the Permit requires the District to expend very considerable sums of public money. In general, the rate of expenditure will escalate with time through the peak of construction. If the District ultimately succeeds in its arguments, the costs and other impacts incurred up to that time cannot be recovered. The District did not, at the time of filing its petition, request a stay of the contested Permit provisions and associated time schedules pending State Board disposition. But the District also did not assume that State Board review would be untimely. If disposition of the District's petition is delayed, the benefit of the Permit appeal process diminishes and ultimately it does not provide opportunity for meaningful relief.

The District recognizes that there is a substantial administrative record. There are also issues still pending regarding the scope of the administrative record and other matters related to evidence that is or is not properly before the State Board. The District has done everything within its power to bring about prompt resolution of these issues. Regardless, the administrative appeal process recognizes that petitioners are entitled to timely consideration of their issues. The State Board's regulations impose challenging time-related burdens on petitioners in order to accomplish timely review. In this instance, the 270-day review period in the regulations is also challenging. But it is not an impossible challenge. The State Board regulation applicable here provides that the State Board "shall review and act within 270 days" of March 28, 2011. (Cal. Code Regs., tit. 23, § 2050.5(b).) The District urges compliance with this deadline.

From approximately this time last year until late last fall, the pace of regulatory activity concerning the Permit was quite brisk. Following Permit adoption, the District had but 30 days to prepare a petition and points and authorities in compliance with California Code of Regulations, title 23, section 2050.5(a). The pace decelerated thereafter. Based on the date of notification of a complete petition, the "270-day" period in fact will conclude nearly a full year after the petition was filed. The proposed order would defer any State Board disposition by an indefinite period. The District would clearly be the party most disadvantaged by these circumstances.

The District recommends the State Board direct staff to complete work necessary on the petitions in order that the State Board may act on an order on the merits no later than December 23, 2011. The District does not support the proposed order presented for consideration at this time.

If Adopted, Clarification of the Effect of the Proposed Order Would Be Appropriate

If, notwithstanding the District's position, the State Board adopts an order at this time providing that it will review the Permit on its own motion, the proposed order should be clarified.

As the proposed order reflects, if formal disposition of the petitions is not made by December 23, 2011, "the petition is deemed denied." (Cal. Code Regs., tit. 23, § 2050.5(b).) Thus, based on Water Code section 13330, as of December 23, 2011, the District, if it desires to ensure that its arguments are preserved, would be required either to file a petition for writ of mandate against the Regional Board in superior court; or to enter into a tolling agreement with the Regional Board allowing an action to be filed more than 30 days after expiration of the 270-day period. It is our understanding that the adoption of the proposed order would not change these circumstances, but this can be clarified. In this regard, we also note that the proposed order states that the State Board anticipates issuing an order addressing "some" of the issues raised in the petitions. The proposed order does not specify which issues. It is important that the District know for certain whether the proposed order's effect would be to dispose of unspecified issues or otherwise trigger the limitations period in Water Code section 13330. Stated differently, if the State Board generally supports the approach of the proposed order, it should be made clear that the 30-day period in Water Code section 13330 will not begin to run with respect to Regional Board or State Board action.

To address any potential ambiguity as to whether the proposed order could give rise to a right of review, the proposed order should be clarified to state specifically that it is not, itself, an action on a petition or a dismissal or other disposition of any issue raised in the subject petitions, and that the limitations period in Water Code section 13330 is not triggered by adoption of the order for "own motion" review. The State Board should also state that the order is not a final action in an adjudicative proceeding or an action subject to section 11352 of the Government Code. (See Wat. Code, § 13330(g).)

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Thank you for considering the District's comments.

Sincerely,

A handwritten signature in black ink that reads "Paul S. Simmons". The signature is written in a cursive style with a horizontal line extending to the right.

Paul S. Simmons

Encl.

cc (*via email only*): Michael A. M. Lauffer (mlauffer@waterboards.ca.gov)
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Attached service list

PSS:cr

SERVICE LIST
SWRCB/OCC File Nos. A-2144(a) and A-2144(b) (consolidated)

Petition of Sacramento Regional County Sanitation District
Petition of California Sportfishing Protection Alliance

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