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South San Luis Obispo County Sanitation District

BEFORE THE

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

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| In the Matter of the South San Luis Obispo County Sanitation District's Petition for Review of Action and Failure to Act by the California Regional Water Quality Control Board, Central Coast Region, in Adopting Administrative Civil Liability Order No. R3-2012-0041 | PETITION FOR REVIEW; PRELIMINARY POINTS AND AUTHORITIES IN SUPPORT OF PETITION (WATER CODE SECTION 13320) |

Petitioner South San Luis Obispo County Sanitation District ("District"), in accordance with section 13320 of the CaliforniaWater Code, hereby petitions the State Water Resources Control Board ("State Water Board") to review Order No. R3-2012-0041 of the California Regional Water Quality Control Board, Central Coast Region ("Regional Water Board") issuing a huge Administrative Civil Liability ("ACL") penalty of $1,109,812.80 for the first sewer spill incident that the District has had in over 25 years. This single spill event occurred in December of 2010 during an unprecedented localized flood event that resulted in evacuations and was declared a county and state emergency. The flooding was caused by a combination of heavy rain over 2 days and failed flap gates on the Arroyo Grande Creek that allowed water into the area, but would not allow flood waters to escape, causing a bathtub effect that overwhelmed the District's treatment plant and set in motion a series of unfortunate events that could not have been foreseen to occur all together, and none of which individually would have caused this incident. Instead of issuing this substantial penalty, the Regional Water Board should have recognized one of the District's National Pollutant Discharge Elimination System ("NPDES") Permit's defenses or should have

acknowledged the District's herculean efforts to keep the treatment plant running and meeting all effluent limitations during this event and to store as much effluent as possible to lessen the amount spilled from the surcharging collection system. Also, the District had voluntarily purchased a large diesel by-pass pump without which millions of gallons of sewage would have been spilled.

A copy of Order No. R3-2012-0041 is attached to this Petition as **Exhibit A**, and a copy of the ACL Complaint issued in June of 2012 is attached as **Exhibit B**. A copy of the Petition has been sent to the Regional Water Board. A summary of the background issues, and the factual and legal bases for the Petition follow, as supplemented by **Exhibit C**, which is incorporated herein by reference. At such time as the full administrative record is available and any other supplemental materials have been submitted and accepted for review, the District reserves the right to file a supplemental memorandum in support of the Petition or addressing any proposed State Water Board Order.[1]

### A. DISTRICT BACKGROUND

The San Luis Obispo County Board of Supervisors formed the District in 1963 for the purpose of providing wastewater treatment to its neighboring communities of Oceano, Grover Beach, and Arroyo Grande. (*See* Exhibit ("Ex.") 1 at 4,[2] Ex. 6 at 6-367.) In 1965, the District completed construction of the Wastewater Treatment Plant ("WWTP") on a 7.6 acre site between the Oceano Airport and the Arroyo Grande Creek channel on Aloha Place in Oceano. (Ex. 6 at 6-367; Ex. 98 at ¶4.) Today, the District operates the WWTP using a fixed film reactor for secondary treatment with a design capacity flow rate of 5 million gallons per day ("mgd") and a peak wet weather flow rate of approximately 9 mgd. (Ex. 98 at ¶4.) The WWTP is regulated under an NPDES permit, Order No. R3-2009-0046. (*See* Ex. 28.)

SSLOCSD also owns and operates a small portion of the collection system attached to the WWTP (WDID 3SSO10337), which includes 8.8 miles of gravity sewers between 9 and 36 inches

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[1] The State Water Resources Control Board's regulations require submission of a memorandum of points and authorities in support of a petition, and this document is intended to serve as a preliminary memorandum. 23 C.C.R. §2050(a).

[2] The Prosecution Team failed to bates label or otherwise number its exhibits for easy reference so the District has cited to and identified portions of those exhibits as best as possible.

in size and no District-owned force mains, or laterals in the spill area. (*See* Ex. 6 at 6-1020 and 6-1022, SSLOCSD Collection System Questionnaire; District Ex. 40 (trunk sewer map).) The District's WWTP provides sewer services to a population of approximately 37,000 people from three different satellite collection systems – Arroyo Grande (WDID 3SSO10255), Grover Beach (WDID 3SSO10249), and Oceano Community Services District ("OCSD") (WDID 3SSO10254). (*See* Ex. 6 at 6-1020 and 6-1023, Collection System Questionnaire; Ex. 1 at 4.)

Besides the sewer spills on December 19-20, 2010, at issue in this matter, **the District has not had any other sewer spills in twenty-five (25) years**. (Ex. 98 at ¶ 5; Ex. 93 [showing 4 alleged spills in Ex. 24 were not District spills], *see accord* Hearing Transcript ("HT") at 434:6 to 436:7; *see also* Ex. 1 at 20 ("a review of the California Integrated Water Quality System (CIWQS) Sanitary Sewer Overflow database shows that the Discharger had no history of sewage overflow violations in recent years").)

### B. SPILL EVENT BACKGROUND

A significant rain event on December 18th and continuing on the morning of December 19th occurred with over 5 inches of rain falling in the 41 hours between 1 a.m. on Saturday, December 18, 2010 and 6 p.m. on Sunday, December 19, 2011 at the OCSD yard located on 19th Street in Oceano. (Ex. 9 at 2.[3]) This substantial rain event over the entire watershed resulted in stormwater levels increasing in Meadow Creek and the Oceano lagoon in the lower watershed to the west of the WWTP as well as ponding in the WWTP itself. (*Id.; see also* Ex. 1 at 8 ("over six (6) inches fell on December 18-20, 2010, causing up to three feet deep of floodwater on roadways near the wastewater treatment plant"), Ex. 6-344 to 6-346, Ex. 98-3 (para. 7); HT at 463:16-466:2, 516:16 to 517:13, *see also* HT at 413:5 to 414:24.) As lagoon levels rose, stormwater flooded the adjacent neighborhood and began encroaching into the northern boundary of the WWTP. (Ex. 6 at

[3] The 157 square mile watershed tributary to the flooding area is very large and the rainfall was not uniform over the area. (Ex. 45; Ex. 6 at 6-333.) Another rainfall station at the intersection of Halcyon and Highway One – Station KDYCAOCE2 – measured approximately 4.7 inches for a 48-hour period. (Ex. 9 at 2; *see also* Prosecution Team brief at 11:2-4 (using 4.6 inches over 2 days, with no citation to authority).) Further, the data that the County Utilities Project Engineer stated in a May 24, 2011 staff report to the Board of Supervisors specified approximately 6 inches of rain over a 2-day period. (Ex. 6 at 6-332.) Thus, an exact rain measurement for the entire area surrounding and tributary to the Oceano lagoons is not possible.

6-1783 to 6-1799.) The overflowing lagoon and ponding flood water had nowhere to discharge since two County-controlled flood gates were closed downstream, but another flood gate was being held open upstream by a tree branch (Ex. 6-344 to 6-346, HT at 463-16 to 465-22), causing additional water to enter and increase the flooding of this area. This floodwater caused the area around the generator building to pond up to approximately one foot deep with stormwater. (Ex. 9; *see also* Ex. 6 to 6-341 to 6-354.)

A generator fail alarm, which is a common trouble alarm, was initiated at 07:11 a.m. on December 19th. (*Ibid.*) One of the plant operators immediately responded to this alarm and soon thereafter, around 7:30 a.m, called for another operator to join him. (Ex. 9 at 15; HT at 249:17 to 250:18.) The high rainfall amounts in the region and encroaching lagoon water resulted in a significant increase in Inflow and Infiltration (I&I) into the District's trunk sewer system and the Arroyo Grande, Grover Beach, and OCSD satellite collection systems due to standing water depths of up to 2-3 feet, as well as significant stormwater collected onsite and pumped to the WWTP headworks. (Ex. 9 at 2; Ex. 98 at ¶ 7.) The net result was very high influent flows hitting the WWTP on the morning of December 19th. (Ex. 9 at 2.) Although higher flows had been experienced at the WWTP previously (HT at 473:6-12), these flows were 50% higher than any flows experienced since I&I remediation work was completed several years before. (Ex. 9 at 2.) Typically, the WWTP experiences only between a 0.25 MGD and 0.50 MGD increase in influent flow during a normal rain event, while during a very heavy rain event, the plant could see a 2.0 MGD increase in flow from a normal flow of 2-3 MGD to a total flow of 4.5 to 5 MGD. (*Id.*) The substantial rain event on the 19th resulted in a measured influent flow in excess of 7.4 MGD. (*Id.*)

On the morning on December 19, 2010, the neighborhoods adjacent to the WWTP were evacuated by local officials. (Ex. 98 at ¶ 8.) In addition, treatment plant staff attempting to reach the WWTP were stopped by law enforcement and warned of a possible levee breach by Arroyo Grande Creek, and of the need to evacuate the treatment plant. (*Id.*) The WWTP staff did not leave, even though this event would ultimately be declared a local state of emergency. (Ex. 6 at 6-1804, 6-1807.)

Water entered relevant portions of the electrical system due to a construction contractor error where electrical seals, designed and meant to be installed in 1986, were discovered after this event to not have been installed. (Ex. 25; HT at 23:4-11, 34:16 to 35:17, 475:2-8.) The water caused an emergency shunt trip switch to trip, instantly stopping the electricity feeding all four influent pumps. (Ex. 9 at 2; HT at 35:3-9.) As a result, all four influent pumps stopped pumping at 10:26 a.m. (Ex. 9 at 2.) Because the District had the foresight to have its emergency diesel-powered influent pump set up and ready before the beginning of the wet season (Ex. 98-3, para. 10; HT at 539:24 to 540:8, 274:5-13), the on-site District staff were able to start the backup pump by approximately 10:35 a.m. (Ex. 9 at 16.) However, it was immediately discovered that a pump discharge valve located in the headworks was inadvertently closed and needed to be opened in order for the backup pump to work. (*Id.*; Ex. 1 at 11.) Due to rising water and the fact that the valve was physically located down in the headworks, staff was only able to open the valve to approximately 1/3 of fully open before rising water submerged the valve. (Ex. 9 at 2; Ex. 1 at 11.) The headworks was subsequently inundated to grade level with water from both the trunk system as well as stormwater runoff being returned from the site's drainage sumps. (Ex. 9 at 2; Ex. 98 at ¶ 6. )

As the trunk system backed up, sewage began to surcharge into the collection system and Sewer System Overflows ("SSOs") began to occur at a number of locations where the rim elevation of the manholes was less than 12.5 feet, beginning at approximately 11:00 a.m. (Ex. 9 at 2-3.) Additional spills areas occurred subsequently and District staff made the emergency notifications required by the Districts' Sewer System Management Plan ("SSMP"), between 11:30 and 12:30. (*Id.* at 3.) Also, the District contacted the City of Pismo Beach to obtain their portable diesel pump and an outside contractor to provide on site assistance. (*Id.*)

The headworks was pumped down with the District's other 1,300 gallon per minute (gpm) trash pump to the point that, at 2:30 p.m., the diesel pump discharge valve was accessible and was opened completely. (Ex. 9 at 3; Ex. 98 at ¶ 11.) At approximately 5:00 p.m., staff went out into the collection system and marked potential sewer overflow locations with traffic cones and attempted to gather information about the sewage overflows and to spread the word about the need for the public to avoid contact with floodwater in the area. (Ex. 9 at 3.) At approximately 6:00

p.m., the Pismo Beach diesel pump was running and pumping down the Grover Beach leg of the trunk sewer. (*Id.*) As the rain subsided, the emergency diesel influent pump and Pismo pump were able to gain on the influent flows and began pumping down the trunk system. (*Id.* at 3 and 17.)

By 6:40 p.m., the headworks had been pumped down completely and personnel entered the pump room to assess the situation and inspect all equipment. (Ex. 9 at 3.) The electrical conductors feeding the pumps were found to be in good condition. (*Id.*) The motors for Influent Pumps #1 and #2 were found to be damp while the Influent Pump #4 motor was found to have a short. (*Id.*) Influent Pump #3 was found to be in operating condition and by 8:20 p.m. was restarted. (*Id.*) Over this period of time, the collection and trunk system was restored to normal levels. (*Id.*) It is unknown exactly what time that all SSOs ceased. However, for purposes of calculating the SSO volume, the District assumed between 9:00 and 10:00 p.m., although a subsequent small spill was noted at 9:49 a.m. on December 20, 2010 that was due to the backup diesel pump shutting off for a brief period. (*Id.*) Based upon the District's analysis, the potential volume spilled on December 20th could be as much as 2,200 gallons, an amount that the parties appear to agree upon. (*Id.*)

Based upon an engineering analysis of the system hydraulics and physical data, the District estimated that SSOs occurred from a total of eight (8) manholes located within the District's trunk system, and approximately eleven (11) manholes located within the OCSD collection system. (Ex. 9 at 3). The District reported all of the SSOs, even those not occurring from its own collection system. (*See* Ex. 21, Ex. 46 at 46-9 (request from J. Fischer to individually report manholes).) In addition, for the sewage that was able to be pumped through the plant, all effluent limitations were met for the ocean discharge through the District's normal discharge outfall location.

On January 3, 2011, the District provided three different initial volume estimates using three different approaches, as well as a summary of proposed corrective actions, upgrades, repairs, and regulatory program improvements. (Ex. 9, at pgs. 5-13.) Of the spill volume estimates provided, the District believed that the third approach presented represented the most accurate estimate and most amenable to being input into the CIWQS electronic reporting system. (*Id.* at 8.) This amount, later refined and *revised upwards*, based on photographic evidence for the manholes and

detailed calculations based upon hydraulic grade line, was a final certified spill estimate of approximately **417,000 gallons**.[4] It should be noted that this amount accounted for less than 1% of the total flow to the plant that day and this amount was heavily diluted by stormwater (more than 138 to 1) when released with overflowing lagoon water to the ocean.

**1. NAME AND ADDRESS OF PETITIONER:**

South San Luis Obispo County Sanitation District
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**2. THE SPECIFIC ACTION OR INACTION OF THE REGIONAL BOARD WHICH THE STATE BOARD IS REQUESTED TO REVIEW:**

Petitioner seeks review of Regional Water Board Order No. R3-2012-0041, issuing an Administrative Civil Liability ("ACL") penalty of $1,109,812.80 for a single sewer spill incident in December of 2010. The specific issues which the State Water Board is requested to review include whether:

(A) The Regional Water Board failed to include adequate findings and support the findings made in Order No. R3-2012-0041 with evidence in the record.

(B) The Regional Water Board failed to recognize and apply valid defenses available under the District's NPDES Permit and federal regulations.

(C) The Regional Water Board's ACL Order goes beyond the regulatory reach of the applicable permits.

(D) The Regional Water Board's acceptance of the RMC spill estimate of 674,400 gallons ignored key facts and legal requirements for spill reporting.

(E) The Regional Water Board imposed a penalty that is inconsistent with other ACL orders in California and penalties nationwide.

(F) The Regional Water Board failed to adequately support its findings on Economic Benefit.

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[4] *See* Ex. 6 at 6-116, Table 1 from "Detailed Report for the Total Volume of Untreated Sewage Discharged During the December 19-20, 2010 Spill Event."; *see also id.*, 6-126 to 6-130, Figures 1-10; 6-131 to 6-134, Figures 1-6; 6-135 to 6-138, Figures 1-7; and 6-139 to 6-147, Figures 1-18; *see also* Ex. 1 at 11.

(G) The Regional Water Board awarded Staff Costs that were unsupported, unreasonable, and inconsistent with other ACLs.

(H) The Regional Water Board's penalty was unconstitutionally and unreasonably high for a single spill event.

(I) The Regional Water Board's failure to recognize that the District has no reasonable ability to immediately pay a penalty of this magnitude.

(J) The Regional Water Board's failure to comply with the law and denial to the District of adequate Due Process in the ACL hearing process.

The State Water Board is also requested to generally review the Regional Water Board's actions and failures to act in adopting ACL Order No. R3-2012-0041 for compliance with the U.S. and California Constitutions (e.g., due process and equal protection requirements), the California Government, Evidence, and Water Codes, and the California Administrative Procedures Act (APA) and implementing regulations.

**3. THE DATE ON WHICH THE REGIONAL BOARD ACTED, OR REFUSED TO ACT:**

The Regional Water Board initially held a hearing on this matter spanning approximately **17 hours** on September 7-8, 2012 (from approximately 8:30 a.m. on September 7th until approximately 1 a.m. on Saturday, September 8th), and then later adopted the ACL Order on October 3, 2012 in San Luis Obispo, California after deliberating in closed session for several hours.

**4. A STATEMENT OF THE REASONS THE ACTION WAS INAPPROPRIATE OR IMPROPER:**

The District's preliminary statement of points and authorities are set forth in Section 7 below. The District reserves the right to supplement this statement upon receipt and review of the complete and final administrative record, as supplemented by additional evidence, if any.

In Section 7, the District asserts *inter alia* that the findings and conclusions of Order No. R3-2012-0041 are inappropriate and improper as these findings and conclusions are inconsistent with the evidence presented in the case, inconsistent with the law, and otherwise inappropriate for various reasons, including: failure to comply with the Porter-Cologne Water Quality Control Act

(Cal. Water Code, section 13000 *et seq.*) and implementing regulations governing the Water Boards; failure to comply with the California Government and Evidence Codes (*e.g.*, Cal. Gov't Code, sections 11425.10(a)(6); §11425.50(a), §11425.50(b)(applicable through 23 C.C.R. §648(b)); Cal. Evid. Code sections 801-804; failure to comply with the Administrative Procedures Act (APA); 23 Cal. Code of Regs, section 648 *et seq.*; inconsistency with the State Water Board's Enforcement Policy (Ex. 34); inconsistency with the Clean Water Act (33 U.S.C. § 1251 *et seq.*) and its implementing regulations (*e.g.*, 40 C.F.R. Part 122); absence of specific and detailed findings supporting the provisions of the Order; inclusion of Regional Water Board findings that are not supported by the evidence; and other grounds that may be or have been asserted by the District herein.

**5. THE MANNER IN WHICH THE PETITIONER IS AGGRIEVED:**

The District is aggrieved in that it was issued a substantial penalty for its first spill event in 25 years notwithstanding applicable specified defenses contained in its NPDES Permit and federal regulations. The District is aggrieved because it lacks the ability to pay and continue to operate, maintain, and improve its wastewater treatment facility without proposing to raise sewer rates, which may not be successful after undergoing the required Proposition 218/26 processes. The District is also aggrieved since the penalty is inconsistent with other ACL penalties issued in California and nationwide under the same laws and policies, which violates Equal Protection rules. In addition, the District is aggrieved since it was denied Due Process in the many ways explained further in this Petition.

**6. THE SPECIFIC ACTION THE PETITIONER REQUESTS THAT THE STATE BOARD TAKE:**

The main issue for the State Water Board to decide is simple, whether it was fair and consistent with other similar sewer spill enforcement situations in California and nationwide for the Regional Water Board to fine the District more than a million dollars ($1,109,812.80) for a single, unintentional, and temporary sewer spill that occurred during a declared state of emergency when little to no evidence was presented of any actual harm to beneficial uses of waters of the state or United States. The record reflects that the spill resulted from a series of unfortunate events

occurring during a severe flood event compounded by inoperable County flood control gates, and that these events could not in the absence of hindsight have been predicted to occur simultaneously. Further, the evidence demonstrated that none of these events, happening alone, would have caused this spill. (Ex. 9, Ex. 6, Ex. 98; HT at 469:13 to 474:18.) The record also reflects that the District went to great lengths to stop the spill and to provide the State and Regional Water Board staff with extensive information about the spill and the District's corrective actions. (*See e.g.,* Ex. 9, Ex. 6, Ex. 24, Ex. 98; HT at 477:24 to 478:12.) Based on this record, this issue must now be decided by the State Water Board members, who will hopefully provide a more reasonable and reasoned result than that adopted by the Regional Water Board.

Petitioner seeks an Order by the State Water Board that will make modifications to or invalidate Order No. R3-2012-0041 due to:

A. The Regional Water Board's failures to include adequate findings and to support its findings with evidence in the record.

B. The Regional Water Board's failures to recognize and apply valid defenses available under the District's NPDES Permit and federal regulations.

C. The Regional Water Board's issuance of an ACL Order going beyond the regulatory reach of the applicable permits.

D. The Regional Water Board's failure to consider key facts before accepting the RMC spill estimate.

E. The Regional Water Board's imposition of a penalty inconsistent with other SSO penalties.

F. The Regional Water Board's failure to support its findings on Economic Benefit.

G. The Regional Water Board's awarding of Staff Costs that were unsupported, unreasonable, and inconsistent with other ACLs.

H. The Regional Water Board's penalty being unconstitutionally and unreasonably high for a single spill event.

I. The Regional Water Board's failure to recognize facts demonstrating that the District currently has no reasonable ability to immediately pay a penalty of this magnitude.

J. The Regional Water Board's failure to comply with the law and the denial of adequate due process in the ACL hearing and deliberations.

## 7. A STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF LEGAL ISSUES RAISED IN THE PETITION:

### A. The Regional Board Failed to Support Each and Every One of Its Findings in ACL Order No. R3-2012-0041 with Adequate Findings and Evidence in the Record.

A decision of a state agency such as the Regional Water Board must be in writing, be based on the record, and include a statement of the *factual and legal basis* for the decision. (Gov. Code, §11425.10(a)(6); §11425.50(a).) When an administrative agency makes a decision in an administrative proceeding, it is not enough to merely recite the statutory or legal requirements as findings. Rather, the agency must undertake a detailed analysis of the evidence in the record and the applicable legal factors or standards,[5] and must set forth its determinations in writing to make clear how it undertook its analysis and reached its final conclusions. (*Id.*) Thus, findings in an adjudicatory order must "bridge the analytical gap between the raw evidence and ultimate decision or order." (*Topanga Assn. for a Scenic Community v. County of Los Angeles,* 11 Cal.3d 506, 515 (1974).)

In reviewing the Regional Water Board's Order and actions, the State Water Board must ensure that the Regional Water Board adequately considered all relevant factors, and demonstrated a rational connection between those factors, the choices made, and the purposes of the enabling statutes. (*See California Hotel & Motel Ass'n v. Industrial Welfare Comm.*, 25 Cal.3d 200, 212

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[5] In addition to the requirements under the Government Code, the Water Code only authorizes the imposition of civil penalties for specified violations. (Wat. Code §13385.) However, all civil penalties under this statute are discretionary, except those deemed to be a "Mandatory Minimum Penalty" or "MMP" under Water Code section 13385(h) and (i). The proposed penalty in this action was not for MMPs; it was a discretionary penalty. Similarly, civil penalties may be discretionarily imposed for violations of WDRs. (Wat. Code §13350(a)(2).) However, whenever prescribing discretionary penalties, the Regional Board must consider several mandatory factors:

1) The nature, circumstances, extent, and gravity of the violation or violations;
2) Whether the violation is susceptible to cleanup or abatement;
3) The degree of toxicity of the discharge;
4) With respect to the discharger:
   a) the ability to pay,
   b) the effect on its ability to continue its business,
   c) any voluntary cleanup efforts undertaken,
   d) any prior history of violations,
   e) the degree of culpability,
   f) economic benefit or savings, if any, resulting from the violation, and
5) Other matters that justice may require. (Wat. Code §13385(e), §13327; *see accord Ojavan Investors, Inc. v. California Coastal Comm.* (1997) 54 Cal.App.4th 373, 395; *see also* Ex. 1-7, Ex. 56, SSO WDR at 8-9 (additional factors that must be considered for enforcement of the SSO WDR).)

(1979).) The level of detail that must be included in the Regional Water Board's consideration of the statutorily mandated factors is governed by a rule of reason. However, it must be reasonably clear that the Regional Board addressed each of the mandatory factors and traveled the "analytical route" contemplated under *Topanga*. (*See Department of Corrections v. State Personnel Board*, 59 Cal.App.4th 131, 151 (1997).)

It must be clear from the record that the Regional Water Board actually analyzed all of the evidence and statutory factors and that this analysis supported the agency's final conclusion. (*See City of Carmel-by- the-Sea v. Bd. of Supervisors*, 71 Cal.App.3d 84, 93 (1977) (held written findings of fact were insufficient as a matter of law because they were merely a recitation of the statutory language).) Further, specific requirements regarding the factual basis must be followed, including "a concise and explicit statement of the underlying facts of record that support the decision." (Gov't Code §11425.50(b); applicable through 23 C.C.R. §648(b).) Further, if the factual basis for the decision included a determination based substantially on the credibility of a witness (*e.g.*, any time the Hearing Transcript was cited in the Order), the Regional Water Board was required to identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supported the determination. (*Id.*) The Regional Water Board's Order failed to meet these requirements. Without the requisite analysis and a transparent view of the analytical route followed, the Regional Water Board violated the requirements needed for a valid final decision.

The level of detail that must be included in the Regional Board's consideration of the factors required by statute and under the Enforcement Policy must clearly demonstrate the "analytical route" traveled in making its ultimate decision. (*See Department of Corrections v. State Personnel Board* (1997) 59 Cal.App.4$^{th}$ 131, 151.) It was insufficient for the Regional Water Board to simply cite to unsubstantiated findings without proof demonstrated by a citation to evidence to support those findings. The Regional Water Board was required to make findings based on evidence in the record and may not claim compliance without supporting evidence. (*See City of Carmel-by-the-Sea v. Bd. of Supervisors* (1977) 71 Cal.App.3d 84, 93 (holding that the written findings of fact were insufficient as a matter of law because they merely recited the statutory language); *see also accord* Cal. Code Civ. Proc. §1094.5(b)(defining "abuse of

discretion" where "the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.").) As evidenced in greater detail by the arguments and objections contained in **Exhibit C** to this Petition, which are incorporated herein by reference, the Regional Water Board rarely supported its findings with evidence. Even where the Regional Water Board included a citation to an exhibit or the hearing transcript, that citation was to an exhibit not admitted as evidence[6] or was not specific as to the page or line cited, and oftentimes the citation did not support the finding. In other cases, evidence contrary to the findings existed that was apparently ignored by the Regional Water Board since not addressed or even acknowledged.

In addition, when the Regional Water Board cited to the hearing transcript, it made no findings as to the credibility of any witness. (*See* Order No. R3-2012-0041 at footnotes 1, 2, 8, and 9.) This failure violated Gov't Code §11425.50(b), which requires that "[i]f the factual basis for the decision includes a determination based substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination." The Order contained no findings on the demeanor or credibility of either Mr. Yonker or Mr. Appleton, the testimony of whom the Order cited.[7]

Such a failure to comply with the legal requirements and an absence of supporting evidence invalidates the Regional Water Board's findings and the totality of Order No. R3-2012-0041. (*See accord Topanga Assn., supra,* 11 Cal.3d at 515; *California Hotel & Motel Ass'n., supra*, 25 Cal.3d at 212.)

**B. The Regional Water Board Failed to Recognize and Apply Valid Defenses Available Under the District's NPDES Permit and Federal Regulations.**

1. <u>The District's Discharges were Covered by an NPDES Permit and that Permit's Upset Defense</u>.

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[6] For instance, the Order at page 6, footnote 5 cited to Exhibit 105, which was *excluded* as evidence and was to be used only as argument. *See* HT at 372:13 to 373:9. Thus, this exhibit was improperly cited as supporting evidence.

[7] This information on credibility was critical, particularly in relation to Mr. Appleton, who had previously been investigated by the Office of Enforcement and was issued a Letter of Reprimand. Ex. 42; HT at 269:5 to 271:10, *see also* 470:3-9, 485:1-22, 489:14-19, 514:2-19 (calling into question the veracity of some of Mr. Appleton's testimony).

The ACLC alleged the discharge of untreated sewage to waters of the United States violated the District's Permit, the Clean Water Act, the Water Code and the SSO WDR. (*See* ACLC at Para. 15 and 17.) These allegedly unlawful discharges of untreated sewage and storm water by the District were covered by the **upset defense** in the federal NPDES permit regulations at 40 C.F.R. section 122.41(n), and in the District's Permit, Ex. 28, at Attachment D, Standard Provision 1.H. (*See Sierra Club of Mississippi, Inc. v. City of Jackson*, 136 F. Supp. 2d. 620 (S.D. Miss. 2001).[8]) Although the CWA is a "strict liability" statute, several courts (including the 9th Circuit Court of Appeals where California sits) have ruled that an upset defense *must be provided* at the very least for any technology-based requirements, because technology is inherently fallible. (*See FMC Corp. v. Train*, 539 F.2d 973 (4th Cir.1976) and *Marathon Oil v. EPA*, 564 F.2d 1253 (9th Cir. 1977); EPA, Report to Congress: Impacts and Control of CSOs and SSOs, EPA Doc. 833-R-04-001 (Aug. 2004) at 8-1 ("Most technologies and operating practices are designed to reduce, not eliminate, the discharge of pollutants and attendant impacts because it is generally not feasible to eliminate all discharges.").)

The Regional Water Board attempts to avoid application of this defense by making the unsupported statement that "[t]he December 2010 Sewer Overflow violations were not violations of technology based effluent limitations. The violations were based on the discharge of untreated sewage from the Discharger's collection system." (Order No. R3-2012-0041 at 2, para. 8.) However, a "zero sewer spill" requirement represents a "technology based effluent limitation." An "effluent limitation" is *any restriction* imposed on quantities, discharge rates, and concentrations of pollutants discharged from point sources into waters of the United States. (CWA Section 502(11), 33 U.S.C. §1362(11); 40 C.F.R. §122.2; *see also* Cal. Wat. Code §13385.1(d)(may be expressed as a prohibition).) "The intent of a technology-based effluent limitation is to require a minimum level of treatment for industrial/ municipal point sources based on currently available treatment

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[8] In addition to the upset defense, which is most relevant to this case, there is also a bypass defense as described below, and even potentially a defense for impossibility of performance, which could be alleged due to the occurrence of the severe flood event and other simultaneous events. (*See Chesapeake Bay Foundation Inc. v. Bethlehem Steel Corp.*, 652 F.Supp. 620, 632-33 (D. Md., 1987)(allowing additional briefing on impossibility argument); *In the Matter of Shell Oil Co.,* 1987 W.L. 120997 (USEPA E.A.B., 1987).)

technologies while allowing the discharger to use any available control technique to meet the limitations." (EPA Permit Writer's Manual, Ch. 5 at 49; Wat. Code §13360(a).) Municipal wastewater is required to meet secondary treatment standards, which are technology-based standards. (EPA Permit Writer's Manual, Ch. 5 at 77; 33 U.S.C. §1311(b)(1)(B); 40 C.F.R. §133.102; EPA, Report to Congress: Impacts and Control of CSOs and SSOs, EPA Doc. 833-R-04-001 (Aug. 2004) at 4-11 ("With rare exception, treatment facilities serving [sanitary sewer systems] SSSs are only permitted to discharge wastewater that has received appropriate treatment. Discharges of untreated wastewater at treatment facilities serving SSSs are required to be reported to the NPDES authority within 24 hours of their occurrence."); SSO WDR, Ex. 56-4, para. 16.) The prohibition referenced in the ACL Order against "the discharge of untreated sewage" is a technology-based requirement because municipal wastewater discharges treated to secondary treatment standards are not prohibited. (Order No. R3-2012-0041 at 2, para. 8; Ex. 28-10 to 28-11 (Discharge Prohibitions and TBELs).)[9]

Thus, the District's sewer and stormwater spill was the result of an "upset" as defined by 40 C.F.R. §122.41(n) and in the District's Permit at Attachment D, Standard Provision 1.H, and as recognized in the SSO WDR, SWRCB Order No. 2006-0003-WQ, Ex. 56 at Provision D.6.iv ("The discharge was exceptional, unintentional, temporary, and caused by factors beyond the reasonable control of the Enrollee").

[9] *See also* EPA Request for "Stakeholder Input; National Pollutant Discharge Elimination System (NPDES) Permit Requirements for Municipal Sanitary Sewer Collection Systems, Municipal Satellite Collection Systems, Sanitary Sewer Overflows," 75 Fed. Reg. 30395 (June 1, 2010), at 30398 ("SSOs that reach waters of the United States are point source discharges and, like other point source discharges, are generally prohibited unless authorized by an NPDES permit. Sanitary sewers are part of the treatment works under the Clean Water Act and discharges from sanitary sewers have historically been viewed as required to achieve secondary treatment in order to be eligible to receive an NPDES permit."), and at 30400-01 ("Even municipal collection systems that are operated in an exemplary fashion may experience unauthorized discharges under exceptional circumstances. EPA requests input on the appropriate role of NPDES permits in addressing such exceptional events. The current NPDES standard permit conditions provide two provisions, the bypass provision at 40 CFR 122.41 (m) and the upset provision at 40 CFR 122.41 (n) that were designed to address violations that occur under exceptional circumstances. The bypass provision generally prohibits bypasses, but also provides criteria for when the NPDES authority may excuse a bypass by exercising enforcement discretion and not bring an enforcement action for a violation. The upset provision allows a permittee to raise an affirmative defense to a violation of a technology-based effluent limitation.") (emphasis added).

The federal regulations define "upset" as "an exceptional incident in which there is unintentional and temporary noncompliance with technology based[10] permit effluent limitations because of factors beyond the reasonable control of the Discharger." (*See* 40 C.F.R. §122.41(n)(1).) "Upsets may be caused by external events, such as power failures or storms, or by unpreventable failures of effluent treatment equipment." (*Natural Resources Defense Council, Inc. v. U.S.E.P.A.*, 859 F.2d 156, 205 (1988)(emphasis added).)

The District proved the existence of an "upset," through properly signed, contemporaneous operating logs and other evidence that: (a) an upset occurred due to an identifiable cause; (b) the permitted facility was being properly operated at the time of the upset; (c) notice of upset was timely submitted; and (d) remedial measures were implemented. (40 C.F.R. §122.41(n)(3)(i)-(iv); *see also* Exhibits 9, 6, and 24.) Specifically, in addition to a demonstration that the discharge was temporary[11] and unintentional,[12] the District demonstrated that it met each of the other required factors to prove upset, as follows:

a. The Upset Occurred Due to an Identifiable Cause(s).

Federal regulations at 40 C.F.R. section 122.41(n)(3)(i) and the equivalent terms of the District's Permit (Ex. 28, at D-3, Provision I.H.2.a.) require that the permittee must show that an

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[10] In 1982, EPA proposed to extend the upset defense to violations of water-quality-based limits. (47 Fed.Reg. at 52,089/1.) EPA's failure to do so resulted in a legal challenge. *See* District's Brief Opposing Imposition of Proposed Administrative Civil Liability Penalties at 9, footnote 6. The Court reviewing the industry challenge found that:

> Lacking infallibility, no pollution control technology works perfectly all of the time. Occasionally, through no fault of the operator, the technology will fail, and pollution levels in the effluent will correspondingly rise. Current EPA regulations provide that when permit effluent limitations based on technological capabilities are briefly exceeded as the result of such an incident, the offending plant will nevertheless be deemed to be in compliance with the Act. [40 C.FR. §122.41(n)] This is the so-called "upset defense." . . . because the technology used to satisfy water quality-based permit limitations is no more foolproof than that employed to meet technology-based permit limitations, industry petitioners contend that the rationale for the upset defense extends to water quality-based limitations as well.

(*Natural Resources Defense Council, Inc. v. U.S.E.P.A*, 859 F.2d at 206 (finding meritorious industry's claim that EPA acted arbitrarily when it declined to provide an upset defense to WQBELs)(emphasis added).) The Court ordered EPA to conduct further proceedings to determine whether to extend the upset defense to violations of water quality-based permit limitations. It is not clear that EPA has ever complied with this court order. Thus, under the *Marathon* case, an upset defense must be provided where technology fails and would otherwise cause a permit violation.

[11] Clearly, the evidence demonstrated that this spill event was of a temporary nature, corresponding to the severe flood event in the Oceano area and subsiding soon thereafter. (Ex. 6, County Report of May 24, 2011.) Moreover, this was the first spill by SSLOCSD in 25 years, demonstrating that this was not a recurring or regular event. (Ex. 98 at ¶ 5.)

[12] No evidence exists that this spill was an intentional act.

upset occurred and identify the cause(s) of the upset. The upset in this case was due to three significant and contemporaneous events. The **first event** was an extreme wet weather event and inoperative local flood gates that caused the overflowing of nearby lagoons and extraordinary flooding onto the wastewater treatment plant site. (Ex. 6, at 6-1902 to 6-1924, County Report of May 24, 2011; *also* 6-1882 to 6-1889, 6-1926 to 6-1931, Ex. 9, Jan 3, 2011 SSLOCSD Submittal to CCRWQCB at 2.) Several feet of standing water in the area was unable to drain until the sand berm to the ocean opened up. (*Id.*) The flooding was substantial enough to warrant a declaration of state and local disaster. (Ex. 6 at 6-1801 to 6-1807, at 12/27/2010 Proclamation and Declaration Memo Extending Emergency Declarations.)

The **second event** was a shunt trip breaker tripped, stopping all four influent pumps at 10:26 a.m., due to water entering into electrical boxes that had been designed to contain waterproof seals, but were not constructed correctly in 1986. (Ex. 9 at 2; Ex. 25 at ¶17, and ¶26; Ex. 39.) Even though onsite staff started up an emergency diesel pump within minutes of the main pumps stopping, this diesel pump was unable to consistently pump at the same capacity as the four normal influent pumps. (Ex. 98 at ¶ 10.) This was due in part to the **third event**, involving an inadvertently closed pump discharge valve that was submerged under water and unable to be opened fully, which further complicated getting flows through the treatment plant. (*Id.*; Ex. 9 at 2; Ex. 1 at 11.) Due to the high influent levels and the limited pumping ability, the trunk sewer system backed up and SSOs occurred at a number of manholes beginning at approximately 11:00 a.m. (Ex. 9 at 2-3; Ex. 90 at 90-1 (OES email indicating "mechanical failure du[e] to storm surge caused this release"), and at 90-3 (showing other impacts of the same storm).) Only eight (8) of the manholes that spilled were located in the SSLOCSD trunk sewer system. (Ex. 9 at 3.) The other manholes were located within the Oceano Community Services District (*ibid.*), a satellite collection system not owned or operated by District and not covered by the District's NPDES Permit.

b. The Permitted Facility was Being Properly Operated at the Time of the Upset.

Federal regulations at 40 C.F.R. section 122.41(n)(3)(ii) and the equivalent terms of the District's Permit (Ex. 28, at D-3, Provision I.H.2.b.) require that the permitted facilities were being

operated properly at the time of the upset. The plant and collection system were functioning normally and were generally compliant during every other day of the time periods preceding the spill. (Ex. 98 at ¶ 5.) In fact, as stated above, the District's plant or collection system had not experienced a sewer spill in 25 years before these events. (*Id.*)

Although the plant and collection system were being operated properly, even well operated plants can occasionally exceed effluent limitations or have spills and even well operated systems experience occasional malfunctions. (*See Weyerhaeuser Company v. Costle*, 590 F.2d. 1011, 1056 (D.C. Cir. 1978)("Waste treatment facilities occasionally release excess pollutants due to such unusual events as plant start-up and shut-down, equipment failures, human mistakes, and natural disasters."); *Marathon Oil v. EPA*, 564 F.2d 1253, 1273 (9th Cir. 1977)(emphasis added).) In the *Marathon Oil* case, the Ninth Circuit Court of Appeal concluded that a facility using proper technology operated in an exemplary fashion would not necessarily be able to comply one hundred percent of the time, and thus an upset defense in the permit was necessary.[13] Further, in the *Marathon Oil* case, the Ninth Circuit Court of Appeal concluded an upset defense in the permit was necessary and could be used to cover instances of equipment failure and human error, such as the instance in this case where the pumps failed and, due to high water, the operator was unable to fully open the pump discharge valve. These events, which could be characterized as either an act of God, human error, and/or technology failure, would be covered by the upset defense as set forth in *Marathon Oil*.

c. Notice of the Upset was Submitted as Required.

Federal regulations at 40 C.F.R. section 122.41(n)(3)(iii) and the equivalent terms of the District's Permit (Ex. 28, at D-3, Provision I.H.2.c.) require that the permittee submitted timely notice of the upset. (*See* 40 C.F.R. section 122.41(n)(3)(iii) (referencing paragraph 122.41(*l*)(6)(ii)(B) (24 hour notice); and Ex. 28, at D-3, Provision I.H.c.(referencing Ex. 28, at D-

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[13] *Id.* at 1273; *see also* proposed Secondary Treatment Rules, 38 Fed. Reg. 10642-3 (April 30, 1973) stating at Section 133.103: "Secondary treatment may occasionally be upset resulting in a temporary increase in the amounts of pollutants discharged in excess of effluent limitations based on secondary treatment. It is recognized that upsets may occur over which little or no control may be exercised. Such occurrences in well designed and well operated treatment works are recognized as representing the inherent imperfections of secondary treatment." (emphasis added).

7), Reporting V.E.2.b (24-hour reporting)).) The Regional Board was notified at 12:19 pm, within 2 hours after SSLOCSD having knowledge of the alleged noncompliance, and within an hour and a half of the initial spills from the collection system. (*See* Timeline (attached as Exhibits 9, 6); *see also* Exh. 90 (email from warning_center@oes.ca.gov to CCRWQCB at 12:13 p.m. indicating that incident time was 11:20 a.m.) This original notice was confirmed with a written report as required by the Regional Board. (*See* Ex. 9, SSLOCSD letter dated January 3, 2011 at 3.)[14] Thus, the District timely submitted the required notice.

In addition, the County was notified of the spill at approximately 11:47 am (Ex. 9 at 16), and the Office of Emergency Services/Cal EMA were notified soon thereafter (*id.; see also* Ex. 90 (Cal EMA Hazardous Materials Spill Report #10-7627, December 19, 2010), both within less than two hours after the incident occurred.[15] Thus, timely and proper notifications were made as required by both the federal regulations and the NPDES permit requirements. The findings in the ACL Order failed to recognize these uncontroverted facts.

d. Remedial Measures were Implemented as Required

Federal regulations at 40 C.F.R. section 122.41(n)(3)(iv) and the equivalent terms of the District's Permit (Ex. 28, Permit at D-3 to D-4, Standard Provision I.H.2.d) require that the permittee complied with any remedial measures. These sections reference requirements under paragraph (d) of 40 C.F.R. section 122.41 and Permit, Compliance I.C, respectively. The EPA regulations at section 122.41(d) and Ex. 28, Permit at D-1, Standard Provision I.C. provide the following:

> "The permittee shall take all reasonable steps to minimize or prevent any discharge or sludge use or disposal in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment."

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[14] An extension of the five-day reporting requirement was granted by RWQCB. (*See* Ex. 91 at 91-4 (email from Matt Keeling to J. Appleton (12/23/2010)(extending date for submission of written report until January 3, 2011)*; see accord* Ex. 28, Permit at D-7. Standard Provision V.E.3. ("The Central Coast Water Board may waive the above-required written report under this provision on a case-by case basis if an oral report has been received within 24 hours. [40 CFR §122.41(*l*)(6)(iii).]. )

[15] *See* Ex. 28, Permit at D-7, Standard Provision V.E.2.b.; 40 C.F.R. §122.41(*l*)(6)(ii)(B)(requiring 24 hour notice for upsets) as required by 40 C.F.R. §122.41(n)(3)(iii); Ex. 57, SSO WDR MRP, Order No. 2008-0002-EXEC at Attachment A (Notification, Section 1, requiring two (2) hour notice after becoming aware of a spill). The District also notified the Department of Fish and Game at 12:15 pm. (Ex. 9 at 3 and 16.)

(40 C.F.R. §122.41(d)(Duty to Mitigate); *see also* Ex. 28, Permit Provision I.C at D-1 (emphasis added).)

On January 3, 2011, the District submitted its written report of the spill events and set forth several pages of corrective actions, repairs, upgrades, and improvements planned to prevent similar spills from occurring in the future. (*See* Ex. 9 (1/3/11 Submittal); *see also* Ex. 23 (10/14/11 updated status of corrective actions).) These repairs and improvements have been made. (*See* Ex. 98 at ¶ 13; Ex. 23; Ex. 39.) These remedial activities were successful since no other spills have occurred since December 20, 2010. (*Ibid.*) Yet, these activities were not even mentioned in the ACL Order.

All of the above demonstrates that the incident experienced by the District was an "upset." Therefore, the District has established an ***affirmative defense*** against liability for this incident, and no penalty can be assessed for this upset condition.

The *Marathon Oil* decision cited above is very instructive in this case. In the *Marathon Oil* case, the Court determined that "it would be impossible and impracticable to set a standard that could be met 100 percent of the time" even assuming the treatment technology is "employed in an exemplary fashion." (*See Marathon Oil,* 564 F.2d at 1272.) The Court in *Marathon Oil,* therefore, required EPA to place an "upset" provision in the permit to deal with this event. (*Id.* at 1273.) Other case law holds similarly:

> "This court is of the opinion that EPA should provide an excursion provision .... Plant owners should not be subject to sanctions when they are operating a proper treatment facility. Such excursions are provided for ... under the Clean Air Act, ..., and this Court sees no reason why appropriate excursion provisions should not be incorporated in these water pollution regulations." (emphasis added)

*(FMC Corp v. Train*, 539 F.2d 973, 986 (4th Cir. 1976); *see also Portland Cement Ass'n v. Ruckleshaus*, 486 F.2d 375, 398-99, n. 91 (D.C.Cir. 1973) *cert. denied* 417 U.S. 921 (1974) (informal treatment of upsets is inadequate; "companies must be on notice as to what will constitute a violation").)

A very telling case that could be analogized to apply to sewer spills is the case of *Essex Chem. Corp. v. Ruckleshaus*, 486 F.2d 427, 432-433 (D.C.Cir. 1973) *cert. denied* 416 U.S. 969 (1974). In that case, the Court held that "variant provisions appear necessary to preserve the

reasonableness of the standards as a whole.... The record does not support the 'never to be exceeded' standard currently in force." *Id.* (emphasis added). The Regional Water Board apparently believes that a similar "never to occur" or zero discharge standard exists in the NPDES permit for sewer spills. Such a standard is technology-based because grounded in the fact that the discharge was "untreated" and, thus, is subject to the upset defense. Otherwise, the standards would not be reasonable as set forth in the *Essex* case, and as required under the California Water Code at sections 13000 and 13263.

e. The Upset Defense Exceptions Were Not Proven to Apply.

The ACL Order summarily concluded that these events "were not upset events." (Order No. R3-2012-0041 at 2, para. 8.) The Order then included the following conclusion that "[a]n upset does not include noncompliance to the extent caused by improperly designed treatment facilities, inadequate treatment facilities, lack of preventative maintenance, or careless or improper operation." (*Ibid.*; *see also* 40 C.F.R. §122.41(n)(1).)

The ACL Order at paragraph 8 first found that "The Discharger failed to protect the treatment plant from inundation from a 100-year frequency flood as required by Order No. R3-2009-0046, NPDES Permit No. CA0048003. The Discharger acknowledged [citing HT page 516] that the storm event was not a 100-year event. The key factor that caused the sewer overflow was the lack of protection from the storm event, a factor within the control of the Discharger."

This finding fails to recognize that the NPDES Permit is less than clear on what is required. The District's Permit contains a "Central Coast Standard Provision," which states "[a]ll facilities used for transport or treatment of wastes shall be adequately protected from inundation and washout as the result of a 100-year frequency flood," but does not define a 100-year frequency flood, "inundation and washout," and does not specify what duration applies, or what protections are required or adequate (e.g., protection from I/I from this size event, or from flooding at plant?).[16]

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[16] This lack of clarity opens this requirement up to being "void for vagueness." A regulation fails to comport with due process where it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." (*U.S. v. Williams* (2008) 553 U.S. 285, 128 S.Ct. 1830, 1843; *see also Kasler v. Lockyer* (2000) 23 Cal.4th 472, 498-499, 97 Cal.Rptr.2d 334, 2 P.3d 581 ("A law failing to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited violates due process under both the federal and California constitutions.").)

(Ex. 28-43, D-1, para. I.B.2; Ex. 16-1, Ex. 45-1; District's Opposition Brief at 20-21 (incorporated herein by reference).)

The Regional Water Board cited to no evidence to demonstrate that this rain event and the subsequent floodwaters constituted less than a 100-year flood, particularly because the flood was not caused solely by the amount of rain, but by the improperly operated flood control gates on Arroyo Grande Creek, which allowed water to pool in the lagoon in the Oceano area and back up into the WWTP. (HT at 463:16-466:2, 516:16 to 517:13, *see also* HT at 413:5 to 414:24; Ex. 98-3 (para. 7), Ex. 6-344 to 6-346; District's Opposition Brief at 20-21.) In fact, much of the evidence seems contrary to the Regional Water Board's findings. (*See e.g.,* Ex. 1-8 ("three feet deep of floodwater," "residents forced to evacuate"), Ex. 1-11 ("major storm event and localized flooding"), Ex. 96, Ex. 98-3 (para.8).)

The Regional Water Board's citation to the hearing transcript and the *alleged* acknowledgement by the District is not *proof* that this was less than a 100-year frequency flood. Since there was no pin-point citation, the District presumes the Order's citation to page 516 points to Mr. Yonker's testimony when asked if this rose to the level of a 100-year flood that "As far as I know, over that duration, I do not think that is a one-hundred-year flood." (HT at 516:13-14.) The fact that he didn't *think*, over that duration, that it was not a 100-year flood does not *prove* that it was not. The Prosecution Team had the burden of proof on that issue and failed to make that demonstration with evidence in the record,[17] and the Regional Water Board subsequently failed to

[17] Without any expert testimony or citations to evidence, the Prosecution Team stated that "a total of 4.6 inches" fell over the two days of December 18-19, 2010 (*see* Prosecution Team Brief at 11:4), and that "over six (6) inches fell on December 18-20, 2010, causing up to three feet deep of floodwater on roadways near the wastewater treatment plant" (Ex. 1 at 8.) The Prosecution Team argued, without support, in its brief that "the return period for this storm [4.6. inches over two days] ranges from 10 years for a one-day event to less than 25 years for at two-day event. This means that a storm this size is expected to occur every 10 to 25 years." (Prosecution Brief at 11:5-7.) The Prosecution Team cited and produced no evidence to support its storm size estimates, nor provided any citation to expert opinion to corroborate its argument that the storm size equated to a 10 to 25 year frequency. Without evidentiary support, the Prosecution Team failed to meet its burden of proof.

support a finding of "improperly designed" or "inadequate" treatment facilities with sufficient evidence. (40 C.F.R. §122.41(n)(1).) Therefore, this finding cannot be relied upon to disprove the existence of an upset.

Moreover, it is not clear that the upset defense would not apply to the regional 100-year flood protection requirement, which is also a technology-based requirement (e.g., must install technology and equipment to protect against flooding) and which is not required by any federal or state law. In addition, other testimony demonstrated that the treatment plant *had* been upgraded to provide 100-year flood protection. (HT at 282:23-283:4; Ex. 98-5 (para. 14), Ex. 98-30 (para 49).) The evidence also demonstrated that the treatment plant had been properly *designed* to include the necessary proper waterproof seals, but that, unbeknownst to the District, these seals were not installed during construction. Nevertheless, the lack of seals had not caused any problems previously despite large storms, and was finally corrected when it was conclusively determined that this was the true cause in October of 2011, not the lack of waterproof wiring. (HT at 23:4-11, 25-4 to 25-9, 32:8-19, 34:16 to 35:23, 73:20-74:2, 313:4-13, 553:12 to 554:18, 297:12-298:6, 575:3-12,; Ex. 25, Ex. 23, Ex. 39-12, Ex. 98-4 to 98-5 at paras. 13-14, Ex. 98-21(para. 11), Ex. 98-29, para. 45, Ex. 98-31, para. 51, Ex. 98-30, para. 48, Ex. 51, Ex. 71, Ex. 92.)

The ACL Order at paragraph 8 also sought to justify exclusion of the upset defense by stating that "[t]he Discharger failed to properly maintain the emergency pump by keeping the effluent valve closed. The operator's inability to fully open the effluent valve caused sewage to

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Further, the District's Permit provides no guidance beyond that language of "100-year frequency flood" – i.e., no identification of what duration storm (e.g., 5 minutes, 2 hours, 24 hours, 2 days, etc.) or what depth of water to which that flood frequency applies. (*See* Ex. 28.) The Prosecution Team only provided an unauthenticated NOAA "Point Precipitation Frequency Estimate" document (Ex. 16); however, no evidence or expert opinion was provided as to how to interpret that document, or how the water on the ground during the storm event of December 18-20, 2010 measured up to a 100-year frequency flood. The evidence shows that "a total rainfall accumulation of 5.14 inches of rain fell at the OCSD water yard located on 19th Street in Oceano between 1 am on Sat the 18th and 6 pm on Sun the 19th." (Ex. 6, Explanation of Incident – Timeline and Narrative.) This would equate to 5.14 inches in 41 hours, and would fall within the 100-year storm recurrence interval for 24-48 hour duration storms. (*See* Ex. 16 at intersection of 100-year recurrence and 24 and 48 hour durations (confidence intervals are 3.81-5.79 inches in 24 hours, and 4.95-7.53 inches in 48 hours).) Other evidence shows that the Oceano/Arroyo Grande areas near the WWTP received 7.1-7.6 inches of rain between December 18 and 22, 2010. (*See* Ex. 91, at 91-12; *see also* Ex. 6, at 6-1882, Summary of County Storm Events Presentation, April 30, 2011.) Again, comparing to the rain totals in Exhibit 16 shows that over 4 days, this rain amount falls within the confidence band of 6.62-10.1 inches for a 100-year storm recurrence. (Ex. 16.) If this rain event was at or near a 100-year storm occurrence frequency for some duration storm event, then the Permit prohibition was not violated. However, the Regional Water Board failed to cite any evidence to support this violation.

back up into the collection system and eventually overflow. The District has the ability to keep the valve open at all times and had done so for years [citing HT at 296], but changed its standard operating procedures advising staff to keep the valve closed [citing Ex. 99]." However, keeping a valve open or closed does not raise to the level of a failure to "*properly maintain*" that valve. (Ex. 1-11 (Prosecution Team admitted that the valve was "inadvertently in the 'closed' position"); HT at 296:12-22 ("human error").) The District's Standard Operating Procedures (SOP) both *before and after* the spill incident included the same procedure to start the emergency pump, which required first opening the valve *prior to* starting the bypass pump. (*See* Ex. 99 at pg. 2, Procedure 2.0, "A. To turn on: 1. Open all 12" valves." and pg. 3, Procedure 2.0, "A. To turn on: 1. Open all 12" valves.") The only thing that changed was that the procedure for turning *off* the emergency pump after its use. (Ex. 99, pg. 3, Procedure 2.0.B.4.) The evidence showed that maintaining the influent valve in the closed position was not an operational problem during normal plant operations. (Ex. 98-4:2-3; HT at 275:5-13, 474:11-18.) The only reason it became a problem was that the valve was inadvertently not opened earlier before the bypass pump was started when the operators had access to the lower levels of the headworks, and because of the later complication caused by flooding into the headworks where the valve was located. (HT at 126:21-24, 251:9 to 253:1, 254:24-256:5.)

Moreover, the State Water Board Office of Enforcement had a copy of the District's 2010 SOP and had undertaken inspections of the WWTP before the spill event and could have pointed out this problem if they had the foresight to know it would be a problem. (Ex. 14-2 and 14-10; HT at 171:2-172:20, 210:21 to 211:5.) For these reasons, the Regional Water Board failed to prove that the closed valve constituted a "lack of preventative maintenance."

f. The Regional Water Board Failed to Address Case Law Finding the Upset Defense Applicable to Sewer Spills.

Both the Ninth Circuit and the Fourth Circuit Courts of Appeal have held or at least alluded to the fact that a permit's "upset" defense should be utilized to offset these expected, but unintentional and temporary instances of non-compliance. (*See Marathon Oil,* 564 F2d. at 1274; *FMC Corp.*, 539 F.2d at 986.) The District encourages the State Water Board to overrule the

Regional Water Board and to recognize this affirmative defense and deem the December 19-20, 2010 spills to not be "violations" subject to the assessment of penalties. The State Water Board should utilize the "upset" defense to determine that the instances of alleged permit noncompliance do not constitute "violations" for enforcement purposes. If such a recognition is not provided, then the defense in the Permit and federal regulations are illusory and meaningless, which cannot be the case.[18]

In fact, two federal court cases have applied the upset defense to SSOs, disproving the Regional Water Board's conclusion of inapplicability of this defense. In the first case out of the Tenth Circuit, *Sierra Club v. Cty. of Colo. Springs*, No. 05–CV–01994–WDM–BNB, 2009 WL 2588696 (D. Colo. Aug. 20, 2009), the court found the discharger met the burden of proving upset in twenty-one (21) of the fifty-five (55) spill events at issue. (*Sierra Club*, 2009 WL 2599696, at *5.) The discharger met the requirement of an exceptional incident because the upsets were caused by, *inter alia*, winter storms, construction errors, and equipment malfunction. (*Id.*) Moreover, the discharger identified the causes of the upsets and provided timely notice to the Colorado Department of Public Health and the Environment ("CDPHE") and downstream users within twenty-four hours of being aware of the event. (*Id.* at *6.) In each of the twenty-one events, after notifying CDPHE, the discharger implemented steps to minimize spill and, when appropriate, set out long-term corrective actions. (*Id.*) The court also considered in the analysis that all the discharge events were found to constitute a "discharge of pollutants," but were not determined to be violations by the CDPHE. (*Id.* at *5.)

The second case was *Sierra Club of Miss., Inc. v. Cty. of Jackson, Miss.*, 136 F. Supp. 2d 620 (S.D. Miss. 2001), out of the Fifth Circuit. In *City of Jackson*, the court held that each of the thirty-two (32) sewer spills alleged was an upset. (136 F. Supp. at 629.) The court based its

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[18] "It is an accepted canon of statutory interpretation that we must interpret the statutory phrase as a whole, giving effect to each word and not interpreting the provision so as to make other provisions meaningless or superfluous." *U.S. v. 144,774 pounds of Blue King Crab*, 410 F.3d 1131, 1134 -1135 (9th Cir. 2005); *see also Northwest Environmental Advocates v. City of Portland*, 56 F.3d 979, 983 (9th Cir. 1995)(rejecting plaintiffs' proposed permit interpretation in part because "this reasoning would require the court to read [certain provisions] out of the permit altogether.")(emphasis added)).

holding on the finding that "at all relevant times," the wastewater treatment facility was being operated properly. (*Id.*) In addition, the discharger took proper remedial efforts by repairing, cleaning, and disinfecting each of the spill areas. (*Id.*) Most importantly, each of upsets were reported orally within twenty-four hours after the city had "notice of the upset." (*Id.*)

Given the facts, the District has demonstrated the existence of an upset, and the relevant case law makes it clear that sewer spills can be subject to the upset defense. The Regional Water Board failed to even acknowledge this case law contrary to its conclusion that an untreated sewage spill cannot constitute an upset. Therefore, the District asks that the State Water Board overrule the Regional Water Board and recognize an upset defense in this case.

2. Alternatively, the District's Discharges were Covered by the Bypass Defense.

The ACLC alleged in Paragraph 16 that "[t]he Discharger violated Discharge Prohibition [III.] G of Order No. R3-2009-0046 which states, 'The overflow or bypass of wastewater from the Discharger's collection, treatment, or disposal facilities and the subsequent discharge of untreated or partially treated wastewater, except as provided for in Attachment D, Standard Provision 1.G (Bypass), is prohibited.'" However, this prohibition did not apply because of the exception in Standard Provision 1.G. related to unanticipated bypass. The Regional Water Board did not address this permit requirement, but merely concluded without evidentiary support that the "December 2010 Sewer Overflow Event was not a bypass...."[19] (Order No. R3-2012-0041 at 3, para. 9.)

The Regional Water Board attempted to support its conclusion with the following statements: "A bypass is an intentional diversion of waste streams from any portion of a treatment systems. The Discharger did not intentionally divert waste streams around treatment systems. The Discharger experienced a sanitary sewer overflow caused by failure of influent pumps and failure of the emergency backup system to pump influent flows." (*Id.*) However, the conclusion that the

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[19] *But see contra* EPA Guidance Memo on "Addition of Chapter X to Enforcement Management System (EMS): Setting Priorities for Addressing Discharges from Separate Sanitary Sewers" (March 7, 1996) (hereinafter "EPA SSS Guidance Memo," *see* http://cfpub.epa.gov/npdes/cso/cpolicy_report2004.cfm at A-18)("The legal status of any of these discharges is specifically related to the permit language and the circumstances under which the discharge occurs. Many permits authorize these discharges when there are no feasible alternatives, such as when there are circumstances beyond the control of the municipality (similar to the concepts in the bypass regulation at 40 CFR Part 122.41 (m)).")

District did not intentionally divert waste streams around the headworks is disproved by the evidence presented at the hearing.

The evidence clearly showed that the District *did* intentionally divert waste streams around the treatment systems to protect the downstream portions of the plant. (HT at 271:15-24, 272:2-17; 273:4-12; 274:5-13, 517:14 to 518:1, 218:24 to 219:8; *see also accord* Ex. 1-13 (Prosecution Team recognized "Reported bypass volume"), Ex. 1-13, n. 5 ("total bypass flow").) In fact, one of the Regional Water Board's own findings in Step 4.b. acknowledged the "Discharger responded quickly by *diverting flows* to the plant." (Order No. R3-2012-0041 at 8 (emphasis added).) That diversion of flows constituted a bypass overruling the Permit's discharge prohibition in Discharge Prohibition [III.] G of Order No. R3-2009-0046.

The District also proved that it was entitled to the bypass defense in the federal NPDES permit regulations at 40 C.F.R. section 121.41(m) and in its Permit (Ex. 28, Standard Provision 1.G.), for the December 19-20, 2010 events. Under the bypass provisions, even though a bypass of the treatment process is prohibited, an enforcement action cannot be taken if:

a) Bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

b) There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime;[20] and

c) The permittee submitted notice to the Central Coast Water Board as required under the Standard Provisions, Permit Compliance I.G.5; 40 C.F.R. §122.41(m)(3)(ii).

(Ex. 28, at D-2 to D-3, Provision I.G; 40 C.F.R. §122.41(m).) For the reasons set forth herein, the District qualified for the unanticipated bypass defense and the Regional Water Board's conclusion

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[20] This subsection also states that "this condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass which occurred during normal periods of equipment downtime or preventative maintenance." (Ex. 28, at D-3, Provision I.G.3.b.; 40 C.F.R. §122.41(m)(4)(i)(B).) However, this exception is not applicable to the events at issue because the events at issue were not "during normal periods of equipment downtime or preventative maintenance." In this case, the District had voluntarily purchased a bypass pump as a precaution in the event of the failure of other pumps. (Ex. 98 at ¶ 10.) Had the District not done this, millions of gallons of sewage would have been spilled during this event.

to the contrary was incorrect and unsupported. In fact, the Regional Water Board never discussed any of the factors needed to demonstrate a bypass. (Order No. R3-2012-0041 at 3, para. 9.)

a) Bypass was unavoidable.

Although the Prosecution Team, using the benefit of 20/20 hindsight, argued that this event was avoidable,[21] once the events described on the morning of December 19, 2010 began, there was no way to avoid the bypass. (*See* Ex. 1 at 5 (acknowledging sewage "bypassed around the failed influent pump station.") When the influent pumps stopped working, there was no way to force the water through the treatment plant without alternate pumps. (Ex. 1 at 10.) The District staff could have just left the treatment plant because, when several of them arrived on-site in response to early alarms, the Sheriff and officials told them that they could not get to the WWTP because of flood waters and that the area was being evacuated. (Ex. 98 at ¶ 8.) However, the staff members ignored those warnings and came into the plant to try to avoid a worse bypass event from occurring, and then once it began, tried desperately to slow or stop the bypass. (*Id.; see also* Ex. 6, Ex. 9 and Ex. 98-4 (paras. 10-11); HT at 252:9-16. 260:20-261:2, 271:15-24.) Further, as explained in more detail below and in Exhibits 25 and 39, the rewiring work that the Prosecution Team argued would have prevented this event, would not have done so. (*See e.g.,* Ex. 39 at 39-1 (explaining the reconductoring electrical work on that area had been completed on 8/30/11 and the same shunt trip failure occurred subsequently on 10/4/11); Ex. 25 at 17 (shunt trip failure due to lack of seals designed to be present); Ex. 1 at 9.)

b) No feasible alternatives existed besides the ones that were used.

Using advanced planning for emergency events, the District had the foresight to have an emergency pump onsite prior to the events at issue. (Ex. 98 at ¶ 10.) In addition, during the height of the spill event, the District borrowed another large pump from the City of Pismo Beach to try to

[21] With the benefit of 20/20 hindsight, arguably all accidents could be avoided. A head-on car crash could be prevented if you knew before the accident that a drunk driver would be headed your way. However, without a demonstration of negligence or intent, this hindsight should be tempered by the actual facts of the case and the situation actually presented to the plant operators just before the SSOs occurred.

mitigate the amount of the spill and push more water through the treatment plant. (Ex. 9 at 3.) Had this not been done, the spill event would have been much larger. (Ex. 98 at ¶ 10.)

The District also used storage within the collection system and in its sludge lagoon and drying ponds to try to prevent additional spilling. (Ex. 98 at ¶ 11; Ex. 32.) This water was later pumped through the treatment plant for full treatment. (Ex. 98. at ¶ 11.) This storage prevented additional spilling and bypassing of the treatment plant. (*Id.*) However, there was no alternative to bypassing the headworks in order to protect the downstream processes, including the secondary treatment process, from washout. (Ex. 6-8 to 6-9; HT at 252:17 to 253:14 ("nowhere else for it to go"), 252:9-16, 260:20-261:2, 271:15-24.)

c) The District Complied With the Notice Requirements.

For unanticipated bypasses, such as the spill event at issue, the District's Permit and federal regulations require 24-hour notice. (*See* Ex. 28, D-3, Provision I.G.5; 40 C.F.R. §122.41(m)(3)(ii).) As set forth above, the District notified the Central Coast Water Board and other agencies within 2 hours (HT at 127:17-18, 276:5-8; Ex. 6-10, Ex. 9-3 and 9-16, Ex. 90-1 to 90-2, Ex. 91-1; *see also* 40 C.F.R. §122.41(m)(4)(A)-(C); Permit, Ex. 28-36 to 28-37), far ahead of the 24-hour notice requirements under the permit and the regulations. (Ex. 6, and Ex. 9 at 3.) Therefore, the District complied with the applicable notice requirements.

Thus, for the reasons set forth, the Regional Water Board failed to make findings supported by evidence to conclude that the spill event was not a bypass, and failed to acknowledge that the District had proven each of the factors to maintain a bypass defense. For these reasons, the State Water Board must overrule the Regional Water Board's findings related to bypass.

**C. The ACL Order Went Beyond the Regulatory Reach of the Applicable Permits.**

The ACL Order inappropriately holds the District liable for events in areas beyond the regulatory control of the applicable permits. The District's NPDES Permit describes the facility covered by the permit as "a wastewater collection, treatment, and disposal facility, which provides service to the Cities of Arroyo Grande and Grover Beach and the Oceano Community Services District. The Cities of Arroyo Grande and Grover Beach and the Oceano Community Services District retain ownership and direct responsibility for wastewater collection and transport systems

up to the point of discharge into interceptors owned and operated by the Discharger." (*See* Ex. 28, Order No. R3-2009-0046, Finding II.A.)

The Technical Report attached to the ACLC recognized that the member agencies (Arroyo Grande, Grover Beach and Oceano Community Services District) "retain ownership and direct responsibility for individually-owned collection system assets within their areas of responsibility" and states that the "Discharger's collection system is comprised of approximately nine (9) miles of gravity trunk sewers ranging from 15 to 30 inches[22] in diameter." (*See* Ex. 1 at 4.)

Similarly, the SSO WDR recognizes a legal distinction between an "Enrollee" ("A federal or state agency, municipality, county, district, and other public entity that owns or operates a sanitary sewer system, as defined in the general WDRs, and that has submitted a complete and approved application for coverage under this Order"), and a "Satellite Collection System" ("The portion, if any, of a sanitary sewer system owned or operated by a different public agency than the agency that owns and operates the wastewater treatment facility to which the sanitary sewer is tributary.") (Ex. 56, SSO WDR at 6; *see also* HT at 151:5-21.)

The District reported that SSOs occurred from a total of eight (8) manholes located within the District's trunk sewer system, and from approximately eleven (11) manholes located within the OCSD collection system. (Ex. 9 at 3). Thus, under the SSO WDR, the District should have only been held liable for the discharges from its own collection system, not from satellite collection systems. (*See* District Ex. 56 at 56-6.) Under a strict, technical reading of the law and permits, the satellite collection systems adjacent to the District would be legally responsible for discharges from their satellite system and would have had an upset (third party) defense for any spills from its system that were beyond their reasonable control.[23] Plus, OCSD, as a low income community,

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[22] More accurately and specifically, SSLOCSD has 3.5 miles of gravity sewers with pipes between 9-18 inches in diameter and 5.3 miles of gravity sewers with pipes between 19-36 inches in diameter, for a total of 8.8 miles of gravity sewers between 9-36 inches in diameter. (*See* Ex. 6, at 6-1020, SSLOCSD's Collection System Questionnaire at 5 of 24.) The District has few if any laterals, no pump stations, and no force mains. (*Id.*at 6-1020 and 6-1026-1028.)

[23] *See accord* EPA SSS Guidance Memo," http://cfpub.epa.gov/npdes/cso/cpolicy_report2004.cfm at A-19 ("For a person to be in violation of the Clean Water Act: 1) a person must own, operate, or have substantial control over the conveyance from which the discharge of pollutants occurs, 2) the discharge must be prohibited by a permit, be a violation of the permit language, or not be authorized by a permit, and 3) the discharge must reach waters of the United States.")(emphasis added).

could have put any penalty issued to it toward a Compliance Project. (*See* Enforcement Policy, Ex. 34-33 to 34-34; *see also* HT at 164:1 to 165:8.) The Regional Water Board exceeded their jurisdiction by penalizing the District for spills outside the jurisdictional reach of the applicable permits.

### D. The Regional Water Board's Acceptance of the RMC Spill Estimate Failed to Consider Key Facts.

While the District greatly appreciates that the Regional Water Board accepted a lower spill volume estimate than that set forth by the Prosecution Team or by the plant operator at the time of the spill, the Regional Water Board's decision to accept the spill estimate calculated by RMC failed to consider at least three key facts.

First, the RMC estimate of 674,400 gallons adopted by the Regional Water Board was not available at the time that the District had to file its initial report and certify a spill volume to CIWQS. In preparation for the ACL hearing, the District hired RMC to evaluate and rebut the spill estimate set forth by the Prosecution Team. The RMC estimate was not intended to replace the District's reported and certified spill volume, for which the Regional Water Board made no express findings of inadequacy. Therefore, the RMC estimate should not have been used as the final spill volume.[24]

Second, the RMC estimate utilized a methodology that made it difficult, if not impossible, to comply with the CIWQS and Water Board requirements to input each sewer spill location. Evidence was presented that the CIWQS form has specific reporting requirements (HT at 476:8-19, 552:9-22; Ex. 46-9, Ex. 68 (blank form showing location required), Ex. 98-22, para. 18, Ex. 98-24 (para. 26)), and although the State Water Board recently proposed to change those requirements to allow single event reporting, that change has not yet been made. (Ex. 59 (proposed Aug. 14, 2012); HT at 152:16-24.) In addition, evidence was presented that the Water Board requested that a

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[24] Instead, the Regional Water Board could have used the 661,000 gallon initial estimate made by the District using a similar methodology to RMC's as that estimate *was* available at the time that the spill needed to be reported and certified in CIWQS, and was similar to and very close to the District's alternative spill volume estimate. Ex. 9, pg. 6. This is particularly true since RMC stated that " there is a high probability that the spill volume estimate made using this method lies within a range of plus or minus 20 percent of the actual spill volume." Ex. 32-9.

manhole-by-manhole approach be taken to reporting this spill event. (HT at 149:25 to 150:12; Ex. 68 (blank form showing location required).) Thus, the District's initial estimate was the only justifiable approach for complying with those requirements. The Regional Water Board failed to address these legal and factual issues. (Gov't Code §11425.10(a)(6); §11425.50(a).)

Third, the Regional Water Board completely ignored the *other* third party review undertaken by CH2M Hill, which elicited the following opinions about the District's methodology:

a) The District's method was based on actual field observations, including field reconnaissance conducted after the storm event, manhole photos, and interviews with local residents, to estimate the flood elevations and to determine the hydraulic grade line (HGL). (Ex. 47 at 47-10 to 47-12 and 47-21.)
b) Observations of manhole lid conditions were used to document evidence of an actual spill through the manholes in the District and in OCSD. (*Id.* at 47-11.)
c) The District tracked the HGL over time to coincide with observed flood elevations. (*Id.*)
d) The District used methods recognized by the State Water Board for spill estimation. (*Id.* at 47-11 to 47-12; Ex. 66-1.)

Based on these opinions, CH2M Hill came to the conclusion that "the District spill estimate is reasonable and incorporated sound engineering practices." (Ex. 47 at 47-12.) In addition, CH2M Hill concluded that the District's "approach was rigorous and reasonable under the circumstances and provides a defensible spill volume estimate." (*Id.* at 47-21.) The Regional Water Board failed to even acknowledge this evidence contrary to its findings. Thus, for these reasons, the District's initial spill volume estimate should be accepted by the State Water Board and the proposed penalty, if any, should be modified accordingly to the District's initial spill volume estimate of approximately 417,000 gallons. (*See* Ex. 47 at 47-21 to 47-22 (regarding rounding of estimates).)

**E. The Imposed Penalty is Not Consistent with Other SSO Penalties.**

1. <u>The Amount of the Penalty is Inconsistent with Other Sewer Spill Enforcement Actions Statewide and Nationwide</u>.

The Regional Water Board failed to include any evidence that it considered other penalties when adopting this fine of over one million dollars for a single spill event. Further, the Regional Water Board failed to acknowledge that many ACL orders have been adopted for sewer spills under the 2010 Enforcement Policy where the per gallon penalty was *substantially less*. For example, a very recent ACL in Region 6 imposed a penalty of $700,000 for 5 separate spill events (including

one of 42.9 million gallons during storms in the same December 20, 2010 timeframe), totaling almost 43.3 million gallons (*see* Ex. 73, ACL No. R6V-2012-0048), with an initial proposed penalty of $912,819.87 and a settlement amount of $700,000 (including $429,140 for the largest incident = **less than 1 cent per gallon**).[25] In Region 2, the East Bay Municipal Utility District ACL (Ex. 74, Order No. R2-2011-0025) imposed a penalty of $209,851 (including economic benefit and staff costs) for 430,698 gallons of partially or not treated sewage – this penalty for a spill roughly the same size equated to **less than $0.29/gallon**. Other ACLs in Region 5 have been as low as $0.10-0.15 per gallon. (*See e.g.,* Ex. 82, Order No. R5-2011-0538 ($375,000 penalty for 3.834 million gallons discharged, which is approximately **$0.10/gallon**; however, $360,000 of that penalty was *suspended* if improvements were made so the actual fine was less than a penny a gallon); *see also* Ex. 83, Order No. R5-2012-0526 ($241,000 penalty for 1,783,950 gallons spilled or approximately **$0.14/gallon**).)[26] Thus, the Regional Water Board wholly failed to demonstrate its penalty of nearly $1.65 per gallon was consistent with other enforcement actions in California under the new 2010 Enforcement Policy on a per gallon basis. The proposed penalty for this single spill event is also wholly inconsistent with other administrative penalties nationwide. (*See* EPA, Report to Congress, *supra*, at Appendix K, K-19 to K-25 (describing generally much lower penalty amounts); *compare also* Proposed Consent Decree in *U.S. v. GSP Management Co.* (proposing $1.3 million for 4,700 violations of federal and state drinking water and sewage treatment laws at 73 mobile home parks in 3 states) found at http://www.justice.gov/usao/pae/News/2012/Sep/perano_consentdecree.pdf.) Thus, the imposed penalty is neither fair nor consistent with other recent enforcement actions under similar laws. Such differential treatment also raises the issue of equal protection under the law. If the law is the same in both places, but the District is being punished

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[25] For each of the spills, including the largest spill of 42.9 million gallons, the base liability was adjusted down to just $95,476, the calculated economic benefit of saving the treatment costs of $2200 per million gallons. (*See* Ex. 73, R6V-2012-0048 at 73-78.)

[26] *See also* Ex. 86, Order No. R9-2011-0010 ($353,200 penalty for 1.6 million gallons spilled (revised down from 2.39 million) or approximately **$0.22/gallon**); Ex. 27, Stipulated ACL No. R9-2011-0057 ($890,000 penalty for 2,293,000 gallons spilled or approximately **$0.39/gallon**); Ex. 77, Order No. R2-2010-0093 ($383,000 penalty (including economic benefit and staff costs) for 930,077 gallons spilled – this equates to approximately **$0.41/gallon**); Ex. 87, Complaint No. R9-2012-0036 ($1,572,850 penalty for 5,349,000 gallons spilled or approximately **$0.49/gallon**).)

more harshly without adequate justification, then constitutional equal protection requirements have been violated.

2. The Regional Water Board's Penalty Factor Determinations Were Unsupported and Also Inconsistent with Other Recent ACL Orders.

The Enforcement Policy requires that ACL penalties be fair and consistent. (Ex. 34 at 34-6, 34-7, 34-14, 34-15). Nevertheless, the Regional Water Board failed to demonstrate that that each of the penalty adjustment factors were fairly assigned by failing to adequately support its factor analysis with evidence. (*See* Exhibit C.) Although the Regional Water Board assigned a number to each of the factors set forth in the Enforcement Policy, there were little to no citations to evidence to adequately explain the basis for each of these numbers. (Order No. R3-2012-0041; *see also* Ex. 1 at pgs. 8-22.)

For example, the Regional Water Board deemed the District's December 19-20, 2010, spill event to warrant the maximum score of 5, or major impact and harm to beneficial uses. Yet, the Regional Water Board cited to absolutely no evidence to support this arbitrary determination. To the extent it relied on the Prosecution Team Technical Report, that report's "analysis" of this factor mostly related to spill volume, not potential harm. (Ex. 1 at 8-14.) The remainder did not support a "major" harm determination, including statements related to "undetermined harm" (Ex. 1 at 14), and reliance on the beach closure when evidence demonstrates that the beach was closed *prior to* the spill and there was minimal attendance at the beach due to dangerous high surf and storm conditions. (Ex. 1 at 15-16, Ex. 46, Ex. 97-3 (closed on 12/19/2010), Ex. 98-27 (para. 41), Ex. 98-28 (para. 42), Ex. 98-29 (para. 43), Ex. 52-2, Ex. 61; *see also See* HT at 478:13-479:4.)

Moreover, the assignment of a "5 Major" to this spill was inconsistent with other enforcement actions for sewer spills. (*See e.g.,* Ex. 101, Ex. 53, Ex. 73, Order No. R6V-2012-0048 at 73-71 to 73-72 (Harm score of 3 for a nearly 43 million gallon spill); Ex. 87, ACLC No. R9-2012-0036, at 87-4 (Harm score of 2 (moderate) for greater than 5 million gallon spill); Ex. 79, ACLC No. R2-2011-0006 at 79-7 to 79-8 (Harm score of 3 where lagoon closed to public for 14 days); Ex. 78, ACLC No. R2-2010-0102, Supporting Memo at 78-20 (Harm score of 1 for spill in wet weather when human use was minimal and sewage is diluted); Ex. 74, ACLC No. R2-2010-

0068, at 74-8 (Harm score of 3 because partially treated, no reports of fish mortality, and once in three year pollution events authorized with EPA criteria); Ex. 88, ACL Complaint No. R2-2012-0055, at 88-66 (Harm score of 2 or 1 due to diluted wet weather flows, posting due to stormwater runoff, limited recreation in wet weather).) For similar reasons, the Regional Water Board's final numbers on each of the factors suffer from severe evidentiary infirmities as well as statewide inconsistency, and must be adjusted to lower the penalty, if any, imposed upon the District.[27]

The State Water Board must keep in mind that, in disciplinary administrative proceedings, the burden of proof is upon the Regional Water Board and guilt must be established to a reasonable certainty and *cannot be based on surmise or conjecture, suspicion, theoretical conclusions*, or uncorroborated hearsay. (*See Cornell v. Reilly* (App. 1 Dist. 1954) 127 Cal.App.2d 178, 273 P.2d 572; *see also* Cal. Evid. Code §500 (stating "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim").) The State Water Board has also confirmed that "[i]t is up to the Regional Board staff to *affirmatively prove each element*...." (*See In the Matter of the Petition of Freedom County Sanitation District*, SWRCB Order No. WQ 87-2 (emphasis added).) The Regional Water Board failed to support its factor analysis with adequate findings and evidence, and also failed to meet its burden of proof to establish that its final factors are fair and consistent with other SSO enforcement actions as required by the Enforcement Policy (Ex. 34). For these reasons, the Regional Water Board's factors analysis are unlawful and must be overturned.

**F. The Regional Water Board Failed to Support Its Findings on Economic Benefit.**

The Regional Water Board found that the "primary economic benefit for the Discharger was the delay of upgrading its electrical wiring system and protecting in-ground utility boxes from potential floodwaters in 2004 for a total budget cost of $200,000." (Order No. R3-2012-0041 at 10, Para. 8.) However, the Prosecution Team failed to conclusively prove that the electrical rewiring project set forth in the District's earlier budgets (*see* Ex. 2 (2004-5 Budget Item 16 for $200,000)

[27] *See* Exhibit C. The District also provided a spreadsheet and a presentation demonstrating how modifications to the factors substantially affects the ultimate penalty amount. (*See* Ex. 61 and Ex. 52.)

and Ex. 18 (input $200,000 into EPA's BEN Model[28])) would have prevented this spill incident had that work been completed prior to December 2010. (*See* Ex. 1 at 20 (electrical work "*could have* prevented" overflow).) The project set forth in Exhibit 2 related to the replacement of wiring to the motors in the motor control center with waterproof wire. (Ex. 2, District 2004-05 Budget Item, Electrical System Update.) The lack of waterproof wiring was not the cause of this incident. (Ex. 25 at ¶5-25, Ex. 98-21 (para. 11), Ex. 98-31 (para. 51); HT at 56:9-16, 553:12 to 555:20, 30:11-24, 59:15-19.) Therefore, this electrical system upgrade project was not demonstrated to have conclusively addressed the issues related to this spill event. (Ex. 25 at ¶17-26; Ex. 39.)

The actual fix to the problem happened in October of 2011 after the shunt trip was conclusively determined to be the cause of the influent pumps' failure (because it tripped again, this time *without* a spill),[29] and the cost to fix the shunt trip and install the missing waterproof seal, which was not installed by the contractor as designed in 1986, was approximately $500 to $3,900.[30]

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[28] There are many criticisms of the BEN Model. *See e.g.,* Robert H.Fuhrman, *The Role of EPA's BEN Model in Establishing Civil Penalties,* 1991 Envtl L. Rep. (Envtl. L. Inst.) 10,246 (asserting that deficient methodologies heavily favor the regulatory agency/higher penalty); Philip Saunders Jr., *Civil Penalties and the Economic Benefits of Noncompliance: A Better Alternative for Attorney's Than EPA'S BEN Model,* 22 Envtl L. Rep. (Envtl. L. Inst.) 10,003 (Jan. 1992) (claiming that standardized assumptions result in significant miscalculations of the economic benefit). In addition, the BEN Model is not designed to be used in isolation. In fact, the User's Manual states "BEN can also develop testimony for trial or hearings, but an expert is necessary to explain its methodology and calculations." *See* Ex. 72, BEN User's Manual, Sept. 1999 at 72-7.) In this case, no one has provided any testimony to substantiate the inputs and choices made in creating the BEN Results in Ex. 18.

In addition, other inputs to the BEN model were suspect, including the Noncompliance Date of 6/1/2004, when the alleged non-compliance did not occur until December 19, 2010, which skews the data by 5 and a half years. (Ex. 18 at pg. 2.) Similarly, there is no justification for the input of 1/1/2013 as the Compliance Date, since there were no allegations in the ACLC that the WWTP and collection system are not currently in compliance. Thus, without good reason, the compliance date should have been December 21, 2010 when the collection system was back to regular operation and all SSOs had ceased (or at the latest October of 2011 when the shunt trip was determined to be the real cause (*see* Ex. 23, Ex. 25, Ex. 39)).

Finally, there was no evidence provided for: 1) the $5000 estimated cost for its included one-time, non-depreciable expenditure (HT at 72:2-11); 2) the allegation that the costs were tax deductible, 3) the average discount rate used, 4) the useful life estimate of 15 years, or 5) the probable payment date of 9/1/12 (since the hearing did not even occur by that date). (Ex. 18 at pg. 2.) These unexplained and unsupported inputs into the black box of the BEN Model made the adopted output of $177, 209 highly questionable (*compare* Ex. 84, ACL Complaint R5-2012-0537 at 84-13 to 84-14) and the economic benefit calculations equally suspect. Other sewer spill enforcement actions, including one recently adopted by the Central Coast region (Ex. 81, Order No. R3-2011-0212 at 81-17), determined no economic benefit. (*See also, e.g.,* Ex. 75, Order No. R1-2011-0109, Ex. 76, ACL No. R1-2010-0081, Ex. 80, Order No. R2-2011-0014 at 15.) For these reasons, the Regional Water Board improperly determined that the District enjoyed any economic benefit of non-compliance.

[29] *See* Ex. 23; *see also* Ex. 39, Ex. 25 at ¶25; Ex. 1 at 9.

[30] *See* Ex. 39 at 39-11. "The best evidence of what the violator should have done to prevent the violations is what it eventually did … to achieve compliance." Ex. 72, BEN Users Manual, at 72-27.

This subsequent event happened *after the rewiring* to that area was completed, so the rewiring project definitely would not have prevented this occurrence. (*See* Ex. 39 ("Woeste Electric completed the reconductoring of the influent pumps on around August 30, 2011."), Ex. 25 at ¶ 5-24, Ex. 51.)

Therefore, the Regional Water Board failed to conclusively demonstrate this spill event would have been prevented by the implementation of Budget Item 16 in the 2004-05 District Budget. In addition, the Regional Water Board failed to cite to any evidence to support its finding of economic benefit. For these reasons, the unsupported and inaccurate finding of economic benefit must be overturned.

### G. The Awarded Staff Costs were Unsupported, Unreasonable, and Inconsistent with Other ACLs.

Without any corroborating time sheets or other evidence to support the alleged staff time spent, the Prosecution Team initially claimed 449 hours (equivalent to more than 11 five-business-day weeks of 8-hour days) had been spent investigating and prosecuting this relatively straight-forward enforcement action. (Prosecution Team Brief at 11-12.) When billed at $150/hour, this equated to $67,350, which was substantially higher than the amount set forth in the ACLC of $50,000 (an amount also unsupported by any evidence).[31] (*Id.*)

The Regional Water Board *increased* this amount to $75,000 (Order No. R3-2012-0041 at 10, para. 7) without any findings as to reasonableness of these costs, without any supporting evidence, and without carefully considering that this amount was substantially higher than staff costs awarded in numerous other enforcement actions statewide. (*See e.g.,* Ex. 75, Order No. R1-2011-0109 (**$10,500** in staff costs), Ex.76, ACL No. R1-2010-0081 (**$15,525** in staff costs (using $135/hr)); Ex. 79, ACL No. R2-2011-0006 (**$9,750** in staff costs); Ex. 81, Order No. R3-2011-0212 (**$12,000** in staff costs); Ex. 82, Order No. R5-2011-0538 (**$19,500** in staff costs); Ex. 85, Order No. R8-2010-0073 (**$9,000** in staff costs); Ex. 87, R9-2012-0036 (**$19,500** in staff costs); Ex. 86,

[31] In addition, the Prosecution Team failed to demonstrate how the cost document provided with its case-in-chief applies since that document is titled "Site Cleanup Program," and this was not a site cleanup action. (*See* Ex. 17.) In addition, the Prosecution Team failed to demonstrate whether the 2009 cost explanation document is still valid given recent across-the-board salary *decreases* for state employees. (*See* Ex. 17.)

Order No. R9-2011-0010 (**$10,000** in staff costs); and Ex. 27, Order No. R9-2011-0057 (**$0 for staff costs since penalty was sufficient to cover costs**).)

In addition, the Regional Water Board failed to address whether it was reasonable for three (3) or more staff members to work on the tasks explained by the Prosecution Team. (Prosecution Team Brief at 11-12.)[32] Further, given the facts at issue, the Regional Water Board was *not required* to pass on these costs to the District because the District incurred substantial costs responding to numerous requests for documents and evidence by the Water Boards (*see e.g.,* Exs. 9 and 6), and because awarding these staff costs was clearly discretionary. (*See* 2010 SWRCB Enforcement Policy at 19-20 ("costs of investigation and enforcement … *should* be added to the liability amount"; "These costs *may* include the cost of investigating,…")(emphasis added); HT 220:3-16.) Because the Regional Water Board failed to consider the basis for and the reasonableness of the staff costs awarded, these costs must be overturned.

**H. Unconstitutionality of Unreasonably High Penalty for a Single Spill Event.**

Sometimes penalty provisions can "produce constitutionally excessive penalties." (*See Hale, supra*, 22 Cal.3d at 404 ("The exercise of a reasoned discretion is replaced by an adding machine." (emphasis added.)); *see also Kinney v. Vaccari* (1980) 27 Cal.3d 348, 352 ("We first noted that the Legislature may constitutionally impose *reasonable* penalties to secure obedience to statutes enacted under the police power, so long as those enactments are *procedurally fair* and reasonably related to a proper legislative goal.")(emphasis added).) The trier of fact must use its discretion as applied to the facts of the case or else the penalty could violate the process of law. (*Id.*; *Lungren v. City and County of San Francisco* (1996) 14 Cal.4th 294, 313 (stating that trier of fact should "take into account the good faith motivation of the offend[er].").)

Thus, the imposition of this excessive penalty (e.g., more than one million dollars for a single spill event) without adequate consideration of the statutory factors (Wat. Code, §13385(e),

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[32] It was also unclear why the Prosecution Team billed for Mr. Mark Bradley's time after he was no longer employed by the State Water Board. (Prosecution Team Brief at 12.) Also, the Prosecution Team spent an unreasonable amount of time by an unreasonable number of staff on this matter, including having four (4) people on the Prosecution Team travel from Sacramento and attend the deposition of Mr. Jeff Appleton in San Luis Obispo on August 14, 2012. (*See* Ex. 98 at ¶ 15.) None of these issues were addressed by the Regional Water Board.

§13327) and without adequate exercise of its discretion is unconstitutional by failing to provide the District with its constitutionally-guaranteed rights to due process, and by violating federal and state constitutional prohibitions against "excessive fines." (U.S. Const., 8th Amend; Cal. Const., art. I, §17; *see also infra* footnote 36.)

### I. The District Has No Reasonable Ability to Immediately Pay a Penalty of this Magnitude.

Relying solely on a more than two year old (FY 2009-10) financial audit, the Regional Water Board unreasonably determined that "[s]ufficient evidence was presented that the District could pay the proposed penalty." (*See* Order No. R3-2012-0041 at 10, Para. 6, *citing only* Ex. 114.) This determination was incorrect and unsupportable for many reasons.[33] First of all, because the only supporting evidence was more than two years old, that evidence is not representative of *current* cash flows. (HT at 64:24 to 65:12, 96:24 to 97:3; 98:1-3.)

The Regional Water Board also ignored the evidence that, even if all monies could be used, the proposed penalty would equate to over one-third (1/3) of the District's total fund balances of $3,774,194 for FY 2012-13. (*See* Ex. 98-31; *see also* Ex. 6 at 6-859 to 6-862.) In addition, after all budgeted revenues and expenditures for this fiscal year are incorporated into the budget, paying the proposed penalty would leave the District with a negative balance (-$260,794) as of July 1, 2013. (*See* Ex. 98-31 to 98-33.) Thus, the Regional Water Board ignored the fact that payment of the proposed penalty would result in a full depletion of the District's fund balances (jeopardizing the District's bond rating and current loan repayment ability[34]), the delay of some major budgeted items not being completed as planned (thereby placing the District in further jeopardy of non-

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[33] *See accord* Ex. 36-12 (2012-13 Budget - Accounting funds), Ex. 36-16 (operations fund negative), Ex. 36-38 (substantial decrease in Fund 20 since 2010), Ex. 36-46 (substantial decrease in Fund 26 since 2010), Ex. 36-52 (money earmarked for capitol projects/expenditures), Ex. 52-13, Ex. 94 and HT at 503:7-12 (evidence of large loan debt not addressed by Regional Board), Ex. 98-31to 98-33 (para. 52); Ex. 117 (showing decreased amount in LAIF Fund since 2010), Ex. 6-261 to 6-296, 6-556 to 6-663, 6-859 to 6-862, 6-1932 to 6-2795 (historic budgets); HT at 498:4-500:17 (District testimony regarding Ex. 117), 503:7-12.)

[34] In fact, the District has a large loan for approximately $483,519.00 for its Co-generation Facilities. *See* Ex. 94. Payment of a large penalty may adversely affect the District's ability to comply with this contractual agreement. This fact was ignored by the Regional Water Board.

compliance), or the need for a substantial rate increase just to cover the proposed expenses and to end with a zero fund balance, which would not be fiscally responsible. (Ex. 98-31 to 98-33.)

The Regional Water Board's decision thus ignored the legal and practical realities that rate increases cannot be made without ratepayer approvals under Proposition 218 and/or Proposition 26, which take time to prepare and must go to a vote. (*See* Cal. Const., art. XIII C, § 2 ["No local government may impose, extend, or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote."]; Ex. 52-13; District's Opposition Brief at 35-36, HT at 83:13-84:8, 89:15-90:3, *see also* 421:25-423:14, 423:20-425:10.).) Moreover, during this time of extended recession, rate protests have been more prevalent throughout the state, and several rate increases have been protested or litigated, including in the City of Colfax (*see accord* 9/4/08 Roseville EPT article at http://rosevillept.com/detail/92151.html) and in Paso Robles, a city in San Luis Obispo County (Tribune article, http://www.sanluisobispo.com/2012/09/04/2212530/lawsuit-challenging-paso-robles.html). Therefore, a rate increase is not a foregone conclusion and should not have been treated as such.

Finally, the Regional Water Board ignored the fact that much of the District's cash is tied up in restricted funds to be used for capital improvement projects, which were acknowledged by the Prosecution Team to be necessary for the proper operation and maintenance of the wastewater treatment plant. (HT at 107:17 to 108:13 (long term capital projects), 200:22 to 202:19 and 207:23 to 208:25 (District's current need for expensive upgrades), 216:5-9.) Most of the funds held by the District are not available for the purpose of paying a penalty. Where the funds originally came from capacity charges paid by new hook-ups (e.g., sewer connection fees), Government Code section 66013 sets forth substantial and mandatory limitations on the use of such funds. (*See accord* Gov't Code §66013(c)("A local agency receiving payment of a charge as specified in paragraph (3) of subdivision (b) shall deposit it in a separate capital facilities fund with other charges received, and account for the charges in a manner to avoid any commingling with other moneys of the local agency, except for investments, and shall expend those charges ***solely*** for the purposes for which the charges were collected....")(emphasis added).) Thus, all restricted funds, including the largest

fund (Fund 20),[35] should have been excluded from the ability to pay analysis as these funds cannot be used to pay the proposed penalty. For these reasons, a substantial downward adjustment in the penalty was warranted due to the Ability to Pay factor.

### J. The District Was Denied Adequate Due Process in the ACL Hearing Process.[36]

#### 1. The Regional Board's Decision to Conduct the Hearing in One Day Over Nearly Seventeen (17) Hours Violated Due Process.

The formal adjudicative hearing on the June 19, 2012 ACL Complaint filed by the Regional Board's Prosecution Team against the District, began at approximately 8:30 a.m. on September 7, 2012 and ended nearly ***seventeen hours*** later at approximately 1:00 a.m. on September 8, 2012. The only significant breaks in the proceedings were a lunch break for an hour at approximately 12:30 p.m. and a 45-minute dinner break at approximately 7:15 p.m. In some cases, District counsel and the court reporter had to beg for breaks. (*See* HT at 408:12-19; 461:4-7; 548:23-25.) Two of the District's main witnesses had to testify late in the evening, after the dinner break, and into the next morning. In fact, the District's primary witness, Aaron Yonker, did not begin his testimony until almost 9:00 p.m., more than twelve (12) hours after the hearing began and after everyone was already tired.[37] (HT at 447:2-4.) Clearly, this was neither a fair nor adequate adjudication procedure. (Stats. 2006, ch. 404 (S.B. 1733), §1.)

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[35] The Prosecution Team's technical report admitted that the revenue source for this fund is sewer connection fees. (Ex. 1 at 20-21; *see also* Ex 6 at 6-859.)

[36] In footnote 1 of the Regional Water Board's September 27, 2012 "Ruling on Objections to Conduct of Administrative Hearing, ACL Complaint No. R3-2012-0030, South San Luis Obispo County Sanitation District," (hereafter "9/27/12 Ruling") the Hearing Officer stated, *without any case law or legal support* that "as political subdivisions of the State, the South San Luis Obispo County Sanitation District is not a 'person' and therefore has no constitutional right to due process." This conclusion is inaccurate as the District *is* defined as a person under state and federal law. *See accord* CWA, 33 U.S.C.§1362(5)(the term "person" means municipality or political subdivision of a State); Wat. Code §13050(c)("person" includes any city, county, district). In addition, the 9/27/12 Ruling itself cited to law guaranteeing "fair and adequate adjudication procedures." *See* 9/27/12 Ruling at 2, fn 1 *citing* Stats. 2006, ch. 404 (S.B. 1733), §1. The 8/31/06 Senate Floor Analysis for that bill stated that language was added "to ensure that public agencies are properly afforded ***due process*** during state and regional waste board meeting…" (*See* http://www.leginfo.ca.gov/pub/05-06/bill/sen/sb_1701-1750/sb_1733_cfa_20060831_154434_sen_floor.html (emphasis added).) Thus, this ruling was contrary to law.

[37] The Hearing Officer's 9/27/12 Ruling on the District's objections stated that "the District chose the order of its [] witnesses." However, the suggestion that the District somehow made a strategic decision to have Mr. Yonker testify late at night is unsupported by any facts. The order of the hearing set by the Regional Water Board provided that the Prosecution Team would present its case first. Thus, the District could not put on the majority of its case-in-chief until after the Prosecution Team completed its case. Although the Regional Water Board made certain exceptions to that rule to accommodate the travel schedules of two of the District's witnesses (Mr. Thoma and Mr. Giguere), no similar

Before the dinner break and near the conclusion of the Prosecution Team's case-in-chief, counsel for the District requested that the hearing be continued such that the District would present its case-in-chief and the Regional Board would deliberate and make its decision on another date. (HT at 334:8-23.) The District's counsel stated that the reason for this request was that the continued conduct of the hearing into the evening would prejudice the District because it would require the District to present its case at nighttime after a very long day of testimony, when the Regional Board members, witnesses, and counsel were tired and unable to think as clearly and critically as they would ordinarily. However, the Regional Water Board elected not to continue the hearing at that point in the hope that the hearing could be completed in one day. (HT at 334:15-17 and 21:23.)

The Regional Water Board's decision not to continue the hearing to another date after the Prosecution Team completed its case-in-chief after business hours deprived the District of due process and a reasonable opportunity to be heard. The Regional Water Board's decision to require the District to present the majority of its case from approximately 6:30 p.m. until after midnight did not ensure that the District would have a fundamentally fair opportunity to present its position. When the District began its case-in-chief, the District's counsel and remaining witnesses along with the Regional Water Board members had already been through a full day of hearing starting at 8:30 a.m. with the Prosecution Team's case-in-chief. Furthermore, the District's counsel and witnesses were at a distinct disadvantage, having their case heard after dinner, in a warm, non-air-conditioned room, and in front of Regional Water Board members that were necessarily fatigued and less alert.

Adequate due process requires a reasonable opportunity to be heard. (*Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434, 1445; *see also Pinsker v. Pacific Coast Soc. of Orthodontists* (1974) 12 Cal.3d 541, 550 [providing that the procedures formulated to provide this notice and opportunity to be heard must ensure a fair opportunity for the party to present its position].)

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exception was made for any of the remaining District witnesses. Thus, the earliest time the District could begin presenting the majority of its case was after the Prosecution Team finished its case-in-chief, after the close of normal business hours.

Whether a hearing was fundamentally fair is a question of law. (*Rosenblit,* 231 Cal.App.3d at 1443.)

Under the California Constitution, the factors that must be considered include a requirement that the government treat the individual with dignity and respect, but are otherwise substantially identical to the federal test.[38] (*Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal.4th 371, 390-391 [listing four factors for determination of due process, including "the dignitary interest of informing individuals of the nature, grounds and consequences of the action and of enabling them to present their side of the story before a responsible governmental official"]; *Anderson v. Superior Court* (1989) 213 Cal.App.3d 1321, 1329-1330.)

Applying these factors to the circumstances of the hearing demonstrates that the Regional Water Board's decision to conduct this hearing in one long and grueling day was fundamentally unfair and did not treat the District and its representative witness, counsel and experts with dignity and respect.[39] Of particular concern was the fact that the District's designated representative, Aaron Yonker, was subjected to approximately two and a half hours of questioning regarding varied and complex issues between approximately 9:30 p.m. and midnight, after attending thirteen (13) previous hours of this hearing. Mr. Yonker was necessarily tired by that time and unable to give his best testimony, and counsel and the Regional Water Board members were also necessarily adversely affected by fatigue. Moreover, the air conditioning in the building shut off between 5:00 and 6:00 p.m., and the warm temperature in the hearing room also contributed to the fatigue of the witnesses, counsel, and the Regional Water Board member decision-makers.

By requiring the District's witnesses to testify and the District's counsel to perform under these circumstances (*see e.g.,* HT at 582:10-13 (closing argument after midnight)), the District was

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[38] Under federal law, a determination as to whether administrative procedures are constitutionally sufficient in specific circumstances generally requires consideration of three distinct factors: 1) the private interest that will be affected by the official action; 2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and 3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. (*Mathews v. Eldridge* (1976) 424 U.S. 319, 335.)

[39] The process was also unfair for the public, most of whom had to wait 12 hours to testify. *See e.g.,* HT at 415:24 to 416:1.

not afforded the dignity and respect required by the California Constitution and, therefore, the District's opportunity to adequately present its side of the story was unfairly compromised. The risk of erroneously penalizing the District (*i.e.*, the deprivation of property) under these circumstances was high. Simply put, people in general make more mistakes when they are tired, and this applies to the Regional Water Board members as well.

It would have been very simple for the Regional Water Board to continue the hearing to another date and time certain to allow the District to present its case during normal business hours, as the Prosecution Team was able to do. This minor modification would have been lawful and would not have significantly burdened the Regional Board. (*See* Govt. Code § 11128.5 [providing that any hearing may be adjourned "to a time and place specified in the order of adjournment"]; *ibid.* § 11129 [providing that any hearing "may by order or notice of continuance be continued or recontinued to any subsequent meeting of the state body," and contemplating that hearings may be "continued to a time less than 24 hours after the time specified in the order or notice of hearing"].) This simple step would have avoided the substantial risk of error or unfairness.

In fact, the Regional Board did continue the deliberation portion of the hearing to another date (October 3rd) precisely because they were too tired after midnight to properly deliberate (HT at 594:8-10, 598:17-22, 606:2-5), which shows that fatigue was affecting the Regional Water Board members. Thus, clearly, the hearing could have been continued earlier in the evening without imposing an unacceptable burden. (HT at 597:10-16.) The Regional Water Board's failure to continue this matter to allow the District to present its case, as the Prosecution Team did, during normal business hours violated principles of fundamental fairness and due process.

2. The District was Not Afforded an Adequate Time to Present its Entire Case.

The Regional Water Board initially proposed that each side (Prosecution Team and District) be allotted "60 minutes to testify, present evidence, and cross examine witnesses, and 5 minutes for closing statements." (*See* Proposed Hearing Procedures (June 19, 2012).) The District requested additional time in its June 22, 2012 objections to the proposed Hearing Procedures submitted to the Advisory Team. (Ex. 70.) That request was partially granted on June 29, 2012 when the Regional Water Board Advisory Team provided "time for both sides to testify, present evidence and cross-

examine witnesses has been extended to 90 minutes." (Ex. 69 at 69-1 (email from J. Jahr/final Hearing Procedures).) Subsequently, on July 27, 2012, the Prosecution Team provided its brief, witness list, and evidence, including 4 binders full of documents (Exs. 1-24.) This submission required the District to engage expert witnesses, compile extensive documentary evidence (Exhibits 25-98), and draft a complex factual and legal brief supported by the evidence. Because of the volume of information, the District requested at least an additional sixty (60) minutes to present its case in its Opposition Brief, with more time requested if the Prosecution Team called Mr. Jeff Appleton as a witness or attempted to include any portions of his deposition transcript into the record as evidence.

In the end, each side was given approximately 180 minutes (three (3) hours) to present its case and rebut the counter claims. (HT at 7:4-13.) However, this time allotment did not consider the fact that *two (2) additional witnesses* (Mr. Thoma and Dr. Horner) had been added to the testifying witness list just before the hearing. Thus, these additional witnesses took up time that was already allocated for the parties' other witnesses' testimony, creating a situation where the direct testimony and cross-examination of the original witnesses had to be unreasonably collapsed such that the District was not able to fully explain the purpose and meaning of all exhibits, or fully ask all pertinent and relevant questions of the witnesses. (*See e.g.,* HT at 496:22 to 498:1; *see also* HT at 528:16-18 (Board member comment about District's counsel "panicking about her time.")

Had this been a court trial, the testimony could have easily spanned more than a few court days. However, the testimony was unreasonably shortened, to the District's detriment, due to the unreasonable time limits placed on the parties. For this reason, the District was denied adequate due process.

3. <u>The Regional Water Board Improperly and Inappropriately Deliberated in Closed Session</u>.

Following the conclusion of the witness testimony at the hearing, counsel for the District objected to the Regional Water Board's stated intention to continue the hearing to a date in the future for the purposes of the Regional Water Board deliberations (HT at 596:24 to 597:9), and earlier in the day, District counsel had questioned the propriety of deliberating in closed session

rather than in a public, open session.[40] After a brief discussion by the Regional Water Board after closing the public meeting, and after approximately a half hour of discussion by the Regional Water Board in closed session, the Regional Water Board Chair stated that it was not possible to give due consideration to the case at that time given the late hour and that it would conduct its deliberations in closed session approximately a month later on October 3, 2012. (HT at 594:8-21 and 606:2-5.)

The Regional Water Board's conduct of deliberations on September 7th/8th, 2012 in closed session, and the Regional Board's conducting further deliberations in closed session on October 3, 2012, violated the Bagley Keene Act because such deliberations were not properly noticed for September 7th and 8th,[41] and were not permitted to be conducted in closed session. (*See* Govt. Code §11120 ["In enacting this article, the Legislature finds and declares that it is the intent of the law that actions of state agencies be taken openly and that their deliberation be conducted openly."]; *see also* Govt. Code § 11132 ["Except as expressly authorized by [the Bagley-Keene Act], no closed session may be held by any state body." (emphasis added)].)

The stated objectives of the Bagley-Keene Act are to assure that "actions of state agencies be taken openly *and that their deliberation be conducted openly*." (Govt. Code § 11120 [emphasis added]; *see North Pacifica LLC v. California Coastal Comm'n* (2008) 166 Cal.App.4th 1416, 1432, *review denied* [holding that the agency took "reasonably effective efforts to notify interested persons of a public meeting [in order to] serve the statutory objectives of ensuring that state actions taken and deliberations made at such meetings are open to the public"].)

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[40] District's counsel objected to the Advisory Team's counsel, Ms. Jahr, during a break at the hearing. At that time, Ms. Jahr provided the citation she was relying upon to justify having the deliberations in closed session to District's counsel. However, because any breaks provided barely allowed time to eat or use the restroom, the District was unable to fully research the applicability of the cited law. Therefore, the District provided its written objections on this issue in a timely manner after the close of the hearing.

[41] The Notice of Public Meeting for September 6 and 7, 2012, only agendized a closed session on September 6th (*see* page 3 of 10 of agenda), and failed to place another closed session on the agenda for September 7th or 8th. Thus, the District did not have notice of the Regional Board's intent to deliberate in closed session until after the hearing began on September 7th. The Bagley-Keene Act required the Regional Board to provide notice of its meetings, including "a brief general description of the items of business to be transacted or discussed in either open or closed session," and, for an item to be discussed in closed session, "a citation of the specific statutory authority under which a closed session is being held." (Govt. Code § 11125, subd. (b).) "No item shall be added to the agenda subsequent to the provision of this notice, unless otherwise permitted by this article." (*Ibid.*) Notice that does not comply with the Bagley-Keene Act is null and void unless the action was taken in substantial compliance with section 11125. (Govt. Code § 11130.3, subd. (b).)

The Bagley-Keene Act only permits closed session deliberations in very limited circumstances not applicable here. Specifically, closed session deliberations are only allowed in specific circumstances enumerated in Government Code section 11126, such as personnel matters,[42] discussions with counsel regarding pending litigation,[43] and on decisions to be reached after proceedings required to be conducted under Chapter 5 of the Government Code or another similar provision of law.[44] (Govt. Code § 11126, subd. (c)(3).) Chapter 5 of the Government Code (beginning at Government Code section 11500) sets forth the procedures for formal administrative adjudications *before an Administrative Law Judge* or the staff of the Office of Administrative Hearings, *a separate agency*, and expressly does not apply to this adjudicative hearing before the same agency prosecuting the matter, here the Regional Water Board. (23 C.C.R. § 648, subd. (c); *see also* Notice of Public Meeting, Central Coast Regional Water Quality Control Board, Thursday September 6 and Friday September 7, 2012 ("Notice of Meeting"), Conduct of Meeting and Hearing Procedures, ¶ J ["Hearings before the Central Coast Board are conducted pursuant to Government Code sections 11400 *et seq*. but not Government Code sections 11500 et seq."].) No equivalent or similar provision of law creates an additional exception to the stated Legislative purpose of the Bagley-Keene Act for deliberations conducted in connection with ACL complaints that are both filed and adjudicated by the Regional Water Board itself. Thus, the Bagley-Keene Act did not authorize the Regional Water Board to deliberate in closed session and no such closed sessions should have been held.

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[42] Gov't Code § 11126, subd. (a).

[43] Gov't Code § 11126, subd. (e).

[44] In its 9/27/12 Ruling at page 4, the Hearing Officer ruled that 23 C.C.R. §647 *et seq.* are similar provisions to those conducted under Chapter 5 of the Government Code. However, this ignores that these regulations state that "chapter 5 of the Administrative Procedures Act (commencing with section 11500 of the Government Code) does not apply to hearings before the State Board, any of the Regional Boards, or hearing officers or panels appointed by those Boards." 23 C.C.R. §648(c)(emphasis added). The 9/27/12 Ruling failed to explain how or provide any case law to prove that the Chapter 4.5 and 23 C.C.R. §648 *et seq*, procedures are "similar" to Chapter 5 procedures, since the procedures used by regional boards do not include administrative law judges, accusations, notices of defense, discovery procedures, motions to compel, deposition procedures, proposed decisions, reconsideration procedures, petitions for reduction of penalty, direct judicial review, or continuance procedures. *See* Gov't Code §11500 to §11524. Thus, this ruling was inaccurate.

4. The Regional Water Board's Interim Executive Officer Should Not Have Been Allowed to Question or Cross Examine Witnesses.

The Interim Executive Officer, Ken Harris, was belated designated as a member of the Advisory Team in this matter after the previous Executive Officer, Roger Briggs, retired. The District objected to Mr. Harris questioning and cross-examining witnesses at the hearing because, by doing so, the Interim Executive Officer was effectively acting in both an advisory and prosecutorial role in the same proceeding. Also, notably, Mr. Harris was the only one on the Advisory Team questioning witnesses, as the Advisory Team's legal counsel and other Advisory Team staff members did not ask any questions of witnesses.

Such questioning was also unnecessary as there were at least five (5) members of the Prosecution Team available to cross-examine witnesses about previous testimony, and five (5) Regional Water Board members willing and able to ask witnesses clarifying questions. Allowing a member of the Advisory Team to essentially act as an additional member of the Prosecution Team and ask questions seemingly trying to prove the Prosecution Team's case violated the guarantees of due process because, where an agency acts as both prosecutor and adjudicator, a strict separation of prosecutorial and advisory functions must be maintained. (*See Morongo Band of Mission Indians v. State Water Resources Control Board* (2009) 45 Cal.4th 731, 737-742[45]; *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1, 10 ["[p]rocedural fairness does not mandate the dissolution of unitary agencies, but it does require some internal separation between advocates and decision makers to preserve neutrality" (emphasis added)]; *see also Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810, 817, *disapproved on other grounds in Morongo Band of Mission Indians v. State Water Resources Control Board, supra* [holding that constitutional due process had been violated where the Deputy City Attorney had acted in both an advisory role to the state personnel board after acting in a prosecutorial role in the same matter, stating: "For the [personnel board] to allow its legal adviser to also act as an advocate

[45] In the Regional Water Board's 9/27/12 Ruling at page 3, it cited to 23 C.C.R. §648.5(a)(6) to justify Mr. Harris' actions. However, these regulations have not been modified after more recent case law, such as the *Morongo* case, related to the need to maintain a clear separation of functions.

before it creates a substantial risk that the [personnel board]'s judgment in the case before it will be skewed in favor of the prosecution."].)

Voting Regional Water Board members were permitted to and did ask ample questions of the witnesses during this adversarial hearing for the purpose of clarifying the witnesses' testimony. In addition, members of the Prosecution Team asked questions of witnesses during their direct and/or cross-examinations in order to elicit facts and admissions. Because this occupied the field of necessary questioning, no need existed for a member of the supposedly "neutral" Advisory Team, who was neither putting on nor advocating for the agency's case-in-chief nor deciding the resolution of the case, to question or cross-examine witnesses. By doing so, the Interim Executive Officer necessarily took on the role of an advocate rather than a neutral advisor, creating the appearance of bias in favor of the Prosecution Team[46] and against the District, and interjecting a substantial risk that the Regional Water Board's judgment in the case was similarly skewed in favor of the prosecution. Further, many of the questions asked by the Interim Executive Officer were of a highly legal nature, amounting to requests for legal conclusions or admissions, and were objectionable on other grounds.[47] "Procedural fairness … does require some internal separation between advocates and decision makers to preserve neutrality." (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1, 10.) Therefore, all questions to witnesses posed by the Interim Executive Officer, and the witnesses' answers to all such questions, should have be stricken from the record and not considered by the Regional Water

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[46] Bias by the Prosecution Team was enough. *See* http://www.newtimesslo.com/cover/8481/too-close-for-comfort/.

[47] *See e.g.,* HT at 229:23 to 230:9, 178:1-13, The District did not waive its objection to the Interim Executive Director's questioning of the District's witnesses by failing to object during the hearing because, at the time the questioning occurred, the hearing had been underway for more than twelve (12) hours and the continued conduct of the hearing itself violated due process for the reasons set forth above. (*See, e.g., Rosenblit v. Superior Court*, 231 Cal.App.3d at p. 1448 (holding that respondent did not waive objections by failing to object during hearing under circumstances that violated respondent's due process rights); *citing Hackethal v. California Medical Assn.* (1982) 138 Cal.App.3d 435, 443 ("The person whose rights are being determined should not be placed in a position of being required to object and thereby spur hostility or not object and thereby suffer waiver.").) The remedy for this due process violation was to strike this part of the hearing and redo the hearing during business hours when the witnesses and counsel are more able to reasonably think and react.

Board.[48] The Regional Water Board's failure to do so violated due process, and violated the requirement for a separation of duties. (Gov't Code §11425.10(a)(4).)

*5.* The District's Defense was Prejudiced Because the Prosecution Team was Not Required to Reveal All of its Evidence against the District, both Detrimental and Exculpatory.

As the Regional Water Board members were informed at the hearing (HT at 19:4 to 20:10 and 21:10-14), the District was severely handicapped going into the hearing because of the lack of any procedural rule requiring the Prosecution Team to make the results of its investigations available to the District in this penalty proceeding, and the Prosecution Team's refusal to turn over the results of its investigation against the District under either a Public Records Act ("PRA") request or a document subpoena. This compounded the fundamental unfairness to the District described above because it allowed the Prosecution Team to use the portions of its investigation that it found helpful to its position against the District and to unilaterally suppress any evidence that may have been helpful to the District.[49]

This uneven playing field that the District spoke of in its opening statement was fundamentally unfair and violated due process because it deprived the District of a fair and adequate opportunity to present its position and defend against the Prosecution Team's claims. (*See Rosenblit v. Superior Court*, 231 Cal.App.3d 1434, 1446-1447 (holding, in a medical license suspension proceeding, that the failure to provide the respondent with a copy of documentary evidence that formed the basis of charges against him violated due process: "Fair procedure would require disclosure of evidence forming the basis of the charges."); *quoting Hackethal v. California Medical Assn.* (1982) 138 Cal.App.3d 435, 444.)

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[48] The District also asked in its reply to its initial objections for an alternative narrower result, where just the questions asked by Mr. Harris requiring a legal conclusion and the answers thereto be stricken, since such conclusions were beyond the scope of the District's witnesses' direct testimony. (*See* Evid. Code §§ 761, 773, subd. (a), 775 [scope of cross-examination limited to matters raised on direct examination]; *see also Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582 (testimony relating to question of law properly excluded as inadmissible opinion testimony).) However, the Regional Water Board either never answered this request or, by inaction, denied the request.

[49] It is impossible to speculate what defense the District might have been able to offer if copies of the Prosecution Team's investigative files, including such things as the notes and other evidence related to the communications the Prosecution Team had with residents described in Exhibit 103, admitted as hearsay by the Regional Board, or the Prosecution Team's communications with Mr. Appleton, members of the public, or other public agencies, had been available for the District and its witnesses. (*See Rosenblit v. Superior Court*, 231 Cal.App.3d at 1447.)

The Prosecution Team's assertion that it complied with the PRA and the similar Hearing Officer's 9/27/12 Ruling did not address failure to comply with the document subpoena and are irrelevant to the fact that the final hearing procedures (Ex. 69) were fundamentally unfair to the District precisely because the Prosecution Team was not required to provide the District with a copy of its investigative files. The fact that the Prosecution Team had legal justification for withholding these documents under the PRA highlights the issue. Because the District could not compel the Prosecution Team to provide its investigative files under the PRA or the Regional Board's hearing procedures, the District was not afforded a fair and adequate opportunity to defend against the Prosecution Team's claims. (*See Rosenblit v. Superior Court,* 231 Cal.App.3d at 1446-1447.) Although the Prosecution Team claimed that its withheld documents would not have helped the District, it is impossible to speculate what defense the District might have been able to offer if copies of the Prosecution Team's investigative files had been available to the District and its experts. (*See Rosenblit v. Superior Court*, 231 Cal.App.3d at 1447.) To remedy this objection, the State Water Board should order the Prosecution Team to provide the District with its investigative files and allow the District to introduce any exculpatory evidence previously withheld as supplemental evidence. (*See* Section 10. below; Wat. Code §13320(b); 23 C.C.R §2050.6.)

8. **A STATEMENT THAT THE PETITION HAS BEEN SENT TO THE REGIONAL BOARD:**[50]

A true and correct copy of this Petition was mailed by First Class mail on November 1, 2012 to the Regional Water Board at the following address:

Kenneth A. Harris, Jr.
Interim Acting Executive Officer
Central Coast Regional Water Quality Control Board
895 Aerovista Place, Suite 101
San Luis Obispo, CA 93401

[50] The petition is being filed by the discharger.

## 9. A STATEMENT THAT THE SUBSTANTIVE ISSUES OR OBJECTIONS RAISED IN THE PETITION WERE RAISED BEFORE THE REGIONAL BOARD, OR AN EXPLANATION WHY NOT.

Nearly all of the substantive factual and legal issues and objections set forth in this Petition were presented to the Regional Water Board either before, during, or after the ACL Hearing on this matter. However, specific issues related to the findings made in and the evidence relied upon in the Regional Water Board's final Order were not raised since the final determination was unknown until after the Order was issued.

## 10. REQUEST FOR CONSIDERATION OF SUPPLEMENTAL EVIDENCE AND/OR SUPPLEMENTAL HEARING.

Pursuant to 23 Cal. Code of Regulations section 2050.6, the District requests that the State Water Board consider evidence not previously provided to the Regional Water Board to further demonstrate the District's inability to immediately pay a million dollar penalty. The requested supplemental evidence consists of more recent audited financial statements of the District (FY 10-11 and FY 11-12) and an explanation by the District's auditors of the District's current financial situation, various funds held by the District, and details of the audit reports. The newer audit reports could not have been submitted previously because these reports were not completed by the District's outside independent auditor by the time that the District had to submit its evidence, or by the time that the hearing was held on September 7-8, 2012. In addition, the explanation of the District's current financial situation, restricted funds, and the audits done thereto could not have been presented because the Prosecution Team's explanation of the District's Ability to Pay was not made known to the District until during the September 7th hearing,[51] and the District was unable to

[51] According to the Enforcement Policy, "If staff does not put any financial evidence into the record initially and the discharger later contests the issue, staff may then either choose to rebut any financial evidence submitted by the discharger, or submit some financial evidence and provide an opportunity for the discharger to submit its own rebuttal evidence. In some cases, ***this may necessitate a continuance of the proceeding*** to provide the discharger with a reasonable opportunity to rebut the staff's evidence." (Enforcement Policy, Ex. 34-24 (emphasis added); *see also* Exhibit C attached hereto on Ability to Pay factor.) Since Exhibit 114 was produced at the hearing along with testimony by Dr. Horner and there were little to no breaks provided in the 16-17 hour hearing, the District did not have an adequate opportunity to rebut the staff's evidence, and no continuance of the proceeding was provided to allow the District that reasonable opportunity. (HT at 83:13-23, 97:16-21.) Therefore, the District is requesting that additional evidence and/or testimony on this issue to be allowed into the record on review. (*See accord* Wat. Code §13320(b); 23 C.C.R. §2050.6.)

secure the auditors as rebuttal witnesses on such a short timeframe on the Friday afternoon or night that the hearing was held.

Alternatively, or supplementally, pursuant to 23 C.C.R. §2050.6(a)(3), the District requests that the State Water Board conduct a hearing on the issue of the District's ability to pay to allow for additional witness testimony and evidence by the District on this specific issue that were not available at the time of the hearing. This information is vitally important if the State Water Board determines that a substantial penalty against the District is justified notwithstanding the above arguments. In addition, to remedy some of the due process violations alleged, the District suggests that the portion of its case-in-chief that occurred after hours be stricken and that the District be allowed to redo and re-present that part of its case during normal business hours. This would then allow the District's case presentation to be on similar procedural footing with the Prosecution Team's case, which was predominantly completed during normal business hours.

Respectfully submitted,

DATED: November 1, 2012

DOWNEY BRAND LLP

By: _____

Melissa A. Thorme
Attorneys for
South San Luis Obispo County Sanitation District

DOWNEY BRAND LLP

# EXHIBIT A

October 5, 2012 Certified Mail No. 7008 3230 0000 4723 2168

Ms. Melissa Thorme, Special Counsel
South San Luis Obispo County Sanitation District
621 Capital Mall, 18th Floor
Sacramento, CA 95814

Dear Ms. Thorme:

**ADOPTION OF ADMINISTRATIVE CIVIL LIABILITY ORDER NUMBER R3-2012-0041 FOR THE SOUTH SAN LUIS OBISPO COUNTY SANITATION DISTRICT, SAN LUIS OBISPO COUNTY**

Enclosed is a signed copy of Administrative Civil Liability Order No. R3-2012-0041 adopted by the Central Coast Regional Water Quality Control Board (Central Coast Water Board) at their October 3, 2012, Board meeting.

Central Coast Water Board staff also posted a copy of the Order on our Website for other interested parties to view and print. The Order is available at the following:

**http://www.waterboards.ca.gov/centralcoast/board_decisions/adopted_orders/**

If you have any questions or comments concerning the Order, please contact **Ryan Lodge (805) 549-3506**, or by email at **rlodge@waterboards.ca.gov**, or John Robertson at (805) 542-4630.

Sincerely,

Kenneth A. Harris Jr.
Interim Acting Executive Officer

Attachment: Order No. R3-2012-0041

cc: See next page.

cc (without attachment): via email only

Mr. Michael Seitz
In-House Counsel
Shipsey & Seitz, Inc.
Mike@shipseyandseitz.com

Mr. John Wallace
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Ms. Julie Macedo
Senior Staff Counsel
Office of Enforcement
State Water Resources Control Board
Jmacedo@waterboards.ca.gov

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL COAST REGION
895 Aerovista Place, Suite 101
San Luis Obispo, California 93401

ORDER NO. R3-2012-0041

ADMINISTRATIVE CIVIL LIABILITY
IN THE MATTER OF THE
SOUTH SAN LUIS OBISPO COUNTY SANITATION DISTRICT
SAN LUIS OBISPO COUNTY

The California Regional Water Quality Control Board, Central Coast Region (Central Coast Water Board), having held a public hearing on September 7, 2012, and on October 3, 2012, to receive evidence and comments on the allegations contained in Administrative Civil Liability Complaint No. R3-2012-0030, dated June 19, 2012, having considered all the evidence and public comment received, and on the Prosecution's recommendation for administrative assessment of Civil Liability in the amount of $1,388,707.50, however finds that an assessed penalty of $1,109,812.80 is applicable as follows:

1. The Discharger's wastewater treatment facility, located adjacent to the Oceano County Airport and the Pacific Ocean in Oceano, California is subject to Waste Discharge Requirements Order No. R3-2009-0046, NPDES Permit No. CA0048003, adopted on October 23, 2009, by the Central Coast Water Board and the State Water Resources Control Board Order (State Water Board) No. 2006-0003-DWQ, "Statewide General Waste Discharge Requirements for Sanitary Sewer Systems."

2. On December 19, 2010, the Discharger's WWTP influent pump station automatically shut down after floodwater entered an electrical conduit leading into a pump motor control system in the WWTP influent pump station. The penetrating floodwater shorted a critical motor control component (shunt switch) which then resulted in tripping a large main circuit breaker that supplied power to all four influent pumps located in the pump station.

3. The resulting loss of power to all four influent pumps caused untreated sewage to surcharge upstream into the Discharger's collection system and overflow, discharging untreated sewage from the collection system into the environment. Additionally, the Discharger documented and certified six sewer backups where untreated sewage was discharged inside six residential homes through private sewer service lateral connections. The total discharge of sewage between December 19$^{th}$ and 20$^{th}$ is estimated at 674,400 gallons (December 2010 Sewer Overflow).

4. In response to the December 2010 Sewer Overflow, the Discharger submitted a spill report to the Central Coast Water Board on January 3, 2011. On March 7-8, 2011, State Water Board staff inspected the Discharger's WWTP and collection system facilities.

5. On April 18, 2011, the Central Coast Water Board issued a Notice of Violation and a 13267 Letter requiring the Discharger to submit a technical report concerning the December 19, 2010, discharge of untreated sewage from its collection system. In response, the Discharger submitted a technical report dated May 31, 2011, detailing the nature, circumstances, extent and gravity of the unauthorized discharge of untreated sewage.

6. The Discharger is required to properly maintain, operate and manage its sanitary sewer collection system in compliance with the Regional Water Board Order No. R3-2009-0046, NPDES Permit No. CA0048003 and the Sanitary Sewer Collection System Order, and is required by the Sanitary Sewer Collection System Order to provide adequate capacity to convey base flows and peaks flows, including flows related to wet weather.

7. The discharge of untreated sewage to waters of the United States is a violation of the requirements in R3-2009-0046, section 301 of the Clean Water Act, CWC section 13376, and the Sanitary Sewer Collection System Order. Violations of these requirements are the basis for assessing administrative civil liability pursuant to Water Code section 13385.

8. The events leading to the December 19, 2010, headworks failure and sanitary sewer overflow were not upset events. An upset is defined in 40 CFR Section 122.41(n) and in the Discharger's Waste Discharge Requirements Order No. R3-2009-0046, NPDES Permit No. CA0048003, Attachment D, Standard Provision H, as an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.

   The December 2010 Sewer Overflow violations were not violations of technology based effluent limitations. The violations were based on the discharge of untreated sewage from the Discharger's collection system.

   The Discharger failed to protect the treatment plant from inundation from a 100-year frequency flood as required by Order No. R3-2009-0046, NPDES Permit No. CA0048003. The Discharger acknowledged[1] that the storm event was not a 100-

[1] Hearing transcript page 516.

year event. The key factor that caused the sewer overflow was the lack of protection from the storm event, a factor within the control of the Discharger.

The Discharger failed to properly maintain the emergency pump by keeping the effluent valve closed. The operator's inability to fully open the effluent valve caused sewage to backup into the collection system and eventually overflow. The District had the ability to keep the valve open at all times and had done so for years[2], but changed its standard operating procedures advising staff to keep the valve closed[3].

9. The December 2010 Sewer Overflow Event was not a bypass as defined in 40 CFR Section 122.41(m) and in the Discharger's Waste Discharge Requirements Order No. R3-2009-0046, NPDES Permit No. CA0048003. A bypass is an intentional diversion of waste streams from any portion of a treatment facility. The Discharger did not intentionally divert waste streams around treatment systems. The Discharger experienced a sanitary sewer overflow caused by failure of influent pumps and failure of the emergency backup system to pump influent flows.

## MAXIMUM CIVIL PENALTY

10. California Water Code Section 13385 authorizes the Central Coast Water Board to administratively impose civil liability in an amount not to exceed $10,000 for each day in which any person violates an NPDES permit. Where there is a discharge, section 13385 authorizes the Central Coast Water Board to administratively impose additional liability of ten dollars per gallon. The maximum liability in this case is $6,754,000.

## PENALTY METHODOLOGY

11. Pursuant to California Water Code Section 13385(e), the Central Coast Water Board must consider the following factors in determining the amount of liability for the violations:

- Nature, circumstances, extent, and gravity of the violations,
- Whether the discharge is susceptible to cleanup or abatement,
- Degree of toxicity of the discharge,
- Discharger's ability to pay,
- Effect on the Discharger's ability to continue in business,
- Voluntary cleanup efforts undertaken by the Discharger,
- Discharger's prior history of violations,
- Discharger's degree of culpability,
- Economic benefit or savings, if any, resulting from the violation, and

[2] See Hearing transcript page 296.
[3] Exhibit 99.

- Other matters that justice may require.

12. On November 17, 2009, the State Water Board adopted Resolution No. 2009-0083 amending the Water Quality Enforcement Policy (Enforcement Policy). The Enforcement Policy was approved by the Office of Administrative Law and became effective on May 20, 2010. The Enforcement Policy establishes a methodology for assessing administrative civil liability. Use of the methodology addresses the factors in Water Code section 13327 and section 13385, subdivision (e). The staff report entitled *Technical Report for Noncompliance with Central Coast RWQCB Order No. R3-2009-0046 and State Water Resources Control Board Order No. 2006-0003-DWQ, "Statewide General Waste Discharge Requirements for Sanitary Sewer Systems", Unauthorized SSO occurring on December19-20, 2010*, dated June 2012, is included in Attachment 3 of the Staff Report and incorporated herein, and analyzes the violations under the Enforcement Policy's penalty calculation methodology. This methodology is set forth in detail below:

1. **Step 1 – Potential for Harm for Discharge Violations**

a. Factor 1: Harm or Potential for Harm to Beneficial Uses (5)

This score evaluates direct or indirect harm or potential for harm from the violation. The estimated discharge of 674,400 gallons of untreated sewage entered the Oceano Lagoon, Meadow Creek, Arroyo Grande Creek Estuary, and the Pacific Ocean. In addition, the sewage entered at least six private residences and potentially caused human health risks. San Luis Obispo County posted signs warning the public of the sewage spill and rain advisory on all main beach entrances and on all advisory boards for nine days. The REC-1 and REC-2 beneficial uses of the beaches were restricted for more than five days. Therefore, there was a high threat to beneficial uses and a score of 5 or "major" is appropriate.

b. Factor 2: Physical Chemical, Biological or Thermal Characteristics of the Discharge (4)

Raw sewage contains microbial pathogens known to be harmful public health including, but not limited to, the following:

- Bacteria: campylobacter, E. coli, vibrio cholera, salmonella, S.typhi, shigella, yersinia
- Parasites: cryptosporidium, entamoeba, giardia
- Viruses: adenovirus, astrovirus, noravirus, echovirus, enterovirus, reovirus, rotavirus

Raw sewage can cause illness including abdominal cramps, vomiting, diarrhea, high fever, and dehydration. Additionally, it can cause disease such as

gastroenteritis, salmonellosis, typhoid fever, pneumonia, shigellosis, cholera, bronchitis, hepatitis, aseptic meningitis, cryptosporidium, amoebic dysentery, giardiasis, and even death.

Raw sewage can also cause environmental impacts such as a loss of recreation and can be detrimental to aquatic life support, can result in organic enrichment, and can also result in exposure to floatable inorganic objects (e.g. condoms, tampons, medical items (syringes)).

The degree of toxicity in untreated sewage poses a significant threat to human and ecological receptors. Accordingly, a score of 4 is appropriate.

c. Factor 3: Susceptibility to Cleanup and Abatement (1)

Less than 50% of the discharge was susceptible to cleanup or abatement due to the rising floodwaters and multiple discharge points which made cleanup or recovery impossible. Therefore a score of 1 is assigned.

Based on the above determinations, the **Potential for Harm final score** for the violations is [10]

(5) + (4) + (1) = 10

= *Potential for Harm*

## 2. Step 2 – Assessment for Discharge Violations

Water Code section 13385, subdivision (c) states that civil liability may be imposed administratively by a regional board pursuant to Article 2.5 of Chapter 5 in an amount not to exceed the sum of ten thousand dollars ($10,000) for each day in which the violation occurs and $10 for each gallon discharged but not cleaned up that exceeds 1,000 gallons.

Per Gallon Assessment

Four overflow estimates were presented at the September 7, 2012, hearing including one from the Prosecution team (1,139,825 gallons) and three from the Discharger (Discharger's 417,298 gallons, RMC 674,400 gallons, Appleton 2,250,000 – 3,000,000 gallons.) The RMC estimate[4] is the most credible estimate. RMC was hired by the Discharger to evaluate the Prosecution's flow estimate and to provide an overflow estimate. RMC utilized wet weather hydrographs to model the flow rates for the overflow event. The Board recognizes that the RMC estimate may include inaccuracies, including failure to account for potential floodwater influent and

[4] Exhibit 32-9.

inflow, and relying on potentially inaccurate Discharger calculations[5] for overflows occurring after 6:00 pm on December 19, 2010. However, the RMC estimate utilized a detailed hydraulic analysis developed by engineer with over 30 years of sewer collection system experience utilizing flow data from similar wet weather events. The RMC estimate is consistent with a Discharger estimate of 661,000 gallons provided in the Discharger's Technical Report[6] using a similar method as RMC. The Board finds that the most accurate estimated overflow volume from the December 2010 Sewer Overflow is 674,400 gallons.

To calculate the initial liability amount on a per gallon basis, a **Per Gallon Factor** is determined from Table 1 of the Enforcement Policy (page 14) by using the **Potential for Harm score** (step 1) and the extent of **Deviation from Requirement** (minor, moderate, or major) of the violation. The Per Gallon Factor is then multiplied by the number of gallons subject to administrative civil liability multiplied by the maximum per gallon liability amount.

a. Deviation from Requirement (moderate)

Prohibition C.1 of Order No. 2006-0003-DWQ states that, "[a]ny SSO that results in a discharge of untreated or partially treated wastewater to waters of the United States is prohibited." While the Discharger demonstrated a general intent to comply with the discharge requirements, the Discharge knew of the risk of flooding and the issue of the underground utility boxes containing electrical cables. The Discharger did not implement the proposed improvement project that would have prevented the December 2010 Sewer Overflow, and thus partially compromised the above prohibition in their permit. Therefore the score of "moderate" is appropriate.

b. Per Gallon Factor (.6)

Using a Potential for Harm score of "10" and a "Moderate" Deviation from Requirement, a Per Gallon Factor of 0.6 is selected from Table 1 of the Enforcement Policy.

c. Maximum / Adjusted Maximum per gallon liability amount ($2.00/gal)

The maximum per gallon liability amount allowed under Water Code section 13385, subdivision (c) is $10 for each gallon discharged to waters of the United States but not cleaned up that exceeds 1,000 gallons. The Enforcement Policy recommends a maximum per gallon penalty amount of $2.00 per gallon for high volume sewage spill and storm-water discharges.

[5] Exhibit 105, page 8.
[6] Exhibit 6-118.

The Enforcement Policy also states, however, "[w]here reducing these maximum amounts results in an inappropriately small penalty, such as dry weather discharges or small volume discharges that impact beneficial uses, a higher amount, up to the maximum per gallon amount, may be used."

A $2.00 per gallon maximum for this sewage spill resulted in an appropriate penalty. Therefore, a $2.00 adjusted per gallon liability amount is used.

Using the information above, the **Initial Liability assessed per gallon is calculated to be $809,280.**

(Per Gallon Factor) x (Gallons subject to liability) x (Maximum per gallon liability amount)

= Initial Liability

= (.6) x (674,400) x (2.00 / gallons) = *$809,280 Initial Liability (Per Gallon Assessment)*

Per Day Assessment

To calculate the initial liability amount on a per day basis, a **Per Day Factor** is determined from Table 2 of the Enforcement Policy (page 15) by using the **Potential for Harm score** (step 1) and the extent of **Deviation from Requirements** (minor, moderate, or major) of the violation.

a. Deviation from Requirement (10)

The deviation from requirement is (Moderate).

b. Per Day Factor (.6)

A Per Day Factor of (0.6) is selected from Table 2 of the Enforcement Policy.

Using the information above, the **Initial Liability assessed per day is calculated to be $10,000**:

(Per Day Factor) x (Days subject to liability) x (Maximum per day liability amount)

= (.6) x (2 days) x ($10,000 / day)

= *$12,000 Initial Liability (Per Day Assessment)*

3. **Step 3 – Per Day Assessments for Non-Discharge Violations**

Not applicable.

## 4. Step 4 – Adjustment Factors

Staff considered certain Conduct Factors to calculate adjustments to the amount of the Initial Amount of the Administrative Civil Liability as follows:

a. Culpability (1.4)

The Enforcement Policy suggests an adjustment multiplier between 0.5 and 1.5 depending on whether the discharge was a result of an accident or the discharger's intentional/negligent behavior. The Discharger failed to provide adequate protection of its equipment from 100-year frequency floods as required under its Permit. The Discharger also failed to ensure implementation of proper standard operating procedures when the Discharger failed to ensure that the emergency bypass pump valve remained in the "open" position during standby mode. The Discharger failed to comply with the Sanitary Sewer Collection System Order to provide adequate sampling to determine the nature and impact of the release. The Discharger had prior knowledge of the potential risks associated with the electrical wires[7] and the failure to protect plant equipment from 100-year frequency flood[8] as required by its discharge permit. The Discharger failed to provide redundant pumping capabilities by having all four influent pumps connected to a single shunt trip. A single point of failure, the shunt trip, caused all four influent pumps to fail. The Discharger failed to provide a reliable emergency pump that could operate without repeatedly shutting down. The emergency pump had operational problems noted before the overflow event. Prior to the overflow event, treatment plant staff recommended sending the pump back to the manufacturer[9]. Therefore, this factor should be adjusted to a higher multiplier of 1.4 for negligent behavior.

b. Cleanup and Cooperation (1)

The Discharger responded quickly by diverting flows to the plant and secured additional pumps from other agencies and informed the public regarding the sewage spill. The Discharger also timely responded to the NOV and 13267 letter. Therefore, a multiplier of 1.0 is appropriate.

c. History of Violations (.9)

The Discharger had no history of sewage overflow violations in recent years. Therefore, a factor of .9 is appropriate.

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[7] Exhibit 2, Exhibit 71.
[8] Hearing transcript page 516.
[9] Hearing transcript page 286.

The initial base liability per gallon and initial base liability per day are multiplied by the above factors to determine **Revised Liability amount of $1,019,692.80.**

Revised Per Gallon Assessment

(Initial Liability) x (Culpability) x (Cleanup and Cooperation) x (History of Violations)

= *$$$$ Revised Liability Per Gallon Assessment*

(809,280) x (1.4) x (1) x (.9) = $1,019,692.80

Revised Per Day Assessment (Discharge Violations)

Discharge Violations:

(Initial Liability) x (Culpability) x (Cleanup and Cooperation) x (History of Violations)

= *$$$$ Revised Liability Day Assessment*

(12,000) x (1.4) x (1) x (.9) = $15,120

5. **Step 5 - Determination of Total Base Liability Amount**

The Total Base Liability amount is determined by adding the revised liability amounts per gallon and per day. The **Total Base Liability is $1,034,812.80**.

(Revised Liability Per Gallon Assessment) + (Revised Liability Per Day Assessment for Discharge Violations) + (Revised Liability Per Day Assessment for Non-Discharge Violations)

$1,019,692.80 + $15,120 = $1,034,812.80

6. **Step 6 – Ability to Pay and Ability to Continue in Business**

If there is sufficient financial information to assess the violator's ability to pay the Total Base Liability Amount or to assess the effect of the Total Base Liability Amount on the violator's ability to continue in business, the Total Base Liability Amount may be adjusted to address the ability to pay or to continue in business.

Sufficient evidence was presented that the Discharger could pay the proposed penalty[10]. The Discharger failed to demonstrate it does not have an ability to pay the recommended penalty. Accordingly, the Total Base Liability Amount was not adjusted.

**7. Step 7 – Other Factors as Justice May Require**

If the amount determined using the above factors is inappropriate, the amount may be adjusted under the provision for "other factors as justice may require," but only if express findings are made to justify this. In addition, the costs of investigation and enforcement are "other factors as justice may require," and should be added to the liability amount.

Staff costs incurred by the Central Coast Regional and State Water Resources Control Board are $75,000 and are added to the Total Base Liability Amount, bringing the liability adjusted Total Base Liability Amount to **$1,109,812**.

(Total Base Liability) + (Staff Costs) = *adjusted Total Base Liability*

$1,034,812.80 + $75,000 = $1,109,812.80

**8. Step 8 – Economic Benefit**

The Economic Benefit Amount is any savings or monetary gain derived from the act or omission that constitutes the violation. The Enforcement Policy states that the adjusted Total Base Liability Amount shall be at least 10 percent higher than the Economic Benefit Amount so that liabilities are not construed as the cost of doing business and that the assessed liability provides a meaningful deterrent to future violations.

The primary economic benefit for the Discharger was the delay of upgrading its electrical wiring system and protecting in-ground utility boxes from potential floodwaters as planned in 2004 for a total budget cost of $200,000. The economic benefit gained from this project delay is calculated at $177,209 based on US EPA's BEN model to calculate economic benefits for noncompliance with regulations.

**9. Step 9 – Maximum and Minimum Liability Amounts**

The **Minimum Liability Amount** is **$194,930.** As mentioned in Step 8, the Enforcement Policy states that when making monetary assessments, the adjusted Total Base Liability Amount shall be at least 10 percent higher than the Economic Benefit Amount. Further, Water Code section 13385, subdivision (e) requires the

[10] Exhibit 114.

Central Coast Water Board to recover any economic benefit or savings received by the violator.

The **Maximum Liability Amount** is **$6,754,000**. The maximum administrative civil liability that may be assessed pursuant to Water Code section 13385, subdivision (c) is the sum of ten thousand dollars ($10,000) for each day in which the violation occurs and $10 for each gallon discharged but not cleaned up that exceeds 1,000 gallons. The maximum administrative civil liability that may be assessed pursuant to Water Code section 13268, subdivision (b)(1) is $1,000 per day of violation.

**10. Step 10 – Final Liability Amount**

In accordance with the above methodology, the Central Coast Water Board finds that the **Final Liability Amount is $1,109,812.80.** This Final Liability Amount is within the statutory minimum and maximum amounts.

13. This Order on Complaint is effective and final upon issuance by the Regional Board. Payment must be received by the Regional Board no later than thirty days from the date on which this Order is issued.

14. In the event that District fails to comply with the requirements of this Order, the Executive Officer or his/her delegee is authorized to refer this matter to the Office of the Attorney General for enforcement.

15. Issuance of this Order is exempt from the provisions of the California Environmental Quality Act (Public Resources Code section 21000, et seq.) in accordance with the California Code of Regulations Title 14, Chapter 3, section 15321.

**IT IS HEREBY ORDERED**, pursuant to California Water Code section 13385 and 13268, that the South San Luis Obispo County Sanitation District is assessed administrative civil liability in the amount of $1,109,812.80.

The Discharger shall submit a check payable to State Water Resources Control Board in the amount of **$1,109,812.80** to *SWRCB Accounting, Attn: Enforcement, P.O. Box 100, Sacramento, California 95812-0100* by **November 5, 2012**. A copy of the check shall also be submitted to *Regional Water Quality Control Board, Attn: Harvey Packard, 895 Aerovista Place, Suite 101, San Luis Obispo, California 93401* by **November 5, 2012**. The check shall be made out to the *Clean Up and Abatement Account* and shall include the administrative liability Order No. R3-2012-0041.

Any person aggrieved by this action of the Central Coast Water Board may petition the State Water Board to review the action in accordance with Water Code section 13320 and California Code of Regulations, title 23, sections 2050 and following. The State Water Board must receive the petition by 5:00 p.m., 30 days after the date of the order, except that if the thirtieth day following the date of the order falls on a Saturday, Sunday, or state holiday, the petition must be received by 5:00 p.m. on the next business day. Copies of the law and regulations applicable to filing petitions may be found on the internet at http://www.waterboards.ca.gov/public_notices/petitions/water_quality or will be provided upon request.

**I, Kenneth A. Harris Jr., Interim Executive Officer,** do hereby certify that the foregoing is a full, true, and correct copy of an order adopted by the Central Coast Water Board on October 3, 2012.

Kenneth A. Harris Jr.
Interim Executive Officer

Attachment – Penalty Calculation Methodology Worksheet

**Penalty Calculation Methodology Worksheet - Version Date: 6/24/2010**
Password for Workbook Protection: **enforcement**

*Instructions*
1. Select Potential Harm for Discharge Violations
2. Select Characteristics of the Discharge
3. Select Susceptibility to Cleanup or Abatement
4. Select Deviation from Standard
5. Click "Determine Harm & per Gallon/Day..."
6. Enter Values into the Yellow Highlighted Fields

Select Item
Select Item
Select Item
Select Item

**Discharger Name/ID:**

| | | | Violation 1 | |
|---|---|---|---|---|
| Discharge Violations | Step 1 | Potential Harm Factor (Generated from Button) | | |
| | Step 2 | Per Gallon Factor (Generated from Button) | | |
| | | Gallons | 674,400 | |
| | | Statutory / Adjusted Max per Gallon ($) | 2.00 | |
| | | **Total** | | $ 809,280 |
| | | Per Day Factor (Generated from Button) | | |
| | | Days | 2 | |
| | | Statutory Max per Day | 10000.00 | |
| | | **Total** | | $ 12,000 |
| Non-Discharge Violations | Step 3 | Per Day Factor | | |
| | | Days | | |
| | | Statutory Max per Day | | |
| | | **Total** | | $ - |
| | | **Initial Amount of the ACL** | | $ 821,280.00 |
| Adj'l Factors | Step 4 | Culpability | 1.4 | $ 1,149,792.00 |
| | | Cleanup and Cooperation | 1 | $ 1,149,792.00 |
| | | History of Violations | 0.9 | $ 1,034,812.80 |
| | Step 5 | **Total Base Liability Amount** | | $ 1,034,812.80 |
| | Step 6 | Ability to Pay & to Continue in Business | 1 | $ 1,034,812.80 |
| | Step 7 | Other Factors as Justice May Require | 1 | $ 1,034,812.80 |
| | | Staff Costs | $ 75,000 | $ 1,109,812.80 |
| | Step 8 | Economic Benefit | $ 180,000 | $ 1,109,812.80 |
| | Step 9 | Minimum Liability Amount | 180,000 | |
| | | Maximum Liability Amount | $ 6,754,000 | |
| | Step 10 | **Final Liability Amount** | | $ 1,109,812.80 |

***Penalty Day Range Generator***

Start Date of Violation= 12/19/10
End Date of Violation= 12/20/10

Maximum Days Fined (Steps 2 & 3) = 2 Days
Minimum Days Fined (Steps 2 & 3) = 1 Days

# EXHIBIT B

CALIFORNIA
Water Boards

EDMUND G. BROWN JR.
GOVERNOR

MATTHEW RODRIQUEZ
SECRETARY FOR
ENVIRONMENTAL PROTECTION

**Central Coast Regional Water Quality Control Board**

June 19, 2012

**Certified Mail**
**No. 7004 1160 0002 0466 7347**

Ms. Melissa Thorme, Special Counsel
South San Luis Obispo County Sanitation District
621 Capitol Mall, 18th Floor
Sacramento, California 95814

Dear Ms. Thorme:

The Central Coast Regional Water Quality Control Board (Regional Water Board) is issuing an Administrative Civil Liability Complaint (Complaint) to your client, South San Luis Obispo County Sanitation District ("District"). The Complaint alleges that the District has violated California Water Code Sections 13268 and 13385(a)(2) by failing to comply with provisions of Section 301 of the Federal Water Pollution Control Act (33 U.S.C. § 1311) (Clean Water Act) and CWC 13376, Central Coast Water Board Order No. R3-2009-0046, NPDES Permit No. CA0048003, the Sanitary Sewer Collection System Order 2006-0003-DWQ, and Amended MRP 2008-0002-EXEC, for which a penalty may be imposed under the Water Code.

The Complaint recommends a penalty amount of $1,383,007.50. The Complaint is enclosed, along with a Waiver Form, an ACLC Fact Sheet, and a draft set of Hearing Procedures that sets forth important requirements and deadlines for participation in the hearing. The Fact Sheet describes the Complaint process and explains what you can expect and your obligations as the process proceeds. **Please read each document carefully. This Complaint may result in the issuance of an order by the Regional Water Board requiring that your client pay a penalty.**

If you have questions about the Complaint or the enclosed documents, please contact Senior Staff Counsel Julie Macedo, State Water Resources Control Board's Office of Enforcement, by telephone at (916) 323-6847, or by email at JMacedo@waterboards.ca.gov.

We look forward to resolving this matter in a fair and orderly process.

Sincerely,

Michael Thomas

Digitally signed by Michael Thomas
DN: cn=Michael Thomas, o=Central Coast Water Board, ou, email=mThomas@waterboards.ca.gov, c=US
Date: 2012.06.19 15:03:52 -07'00'

Michael Thomas
Assistant Executive Officer

cc: See next page.

cc: *(Via email only)*

Mr. Michael Seitz
In-House Counsel
Shipsey & Seitz, Inc.
Mike@shipseyandseitz.com

Mr. John Wallace
Wallace Group
johnw@wallacegroup.us

Ms. Julie Macedo
Senior Staff Counsel
Office of Enforcement
State Water Resources Control Board
JMacedo@waterboards.ca.gov

bcc: Julie Macedo, OE
OE Chron (Electronic & Hardcopy)

JM/rdm
June 19, 2012
*I:\OE_AttorneyFolder\Region 3\South SLO Sanitation District\SLO cover letter.doc*

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL COAST REGION

COMPLAINT NO. R3-2012-0030

ADMINISTRATIVE CIVIL LIABILITY
IN THE MATTER OF
SOUTH SAN LUIS OBISPO COUNTY SANITATION DISTRICT,
SAN LUIS OBISPO COUNTY

The Assistant Executive Officer of the California Regional Water Quality Control Board, Central Coast Region (Regional Water Board) hereby gives notice that:

1. The SOUTH SAN LUIS OBISPO COUNTY SANITATION DISTRICT (the Discharger) is alleged to have violated California Water Code (CWC) 13385(a)(2) for unauthorized wastewater discharges for which the Regional Water Board may impose civil liability pursuant to CWC sections 13323 and 13385(c). The Discharger also violated CWC 13268 by failing to certify six reports in the CIWQS SSO Online Database[1] within time frames required under Order No. 2006-0003-DWQ "Statewide Waste Discharge Requirements for Sanitary Sewer Systems" (hereafter, Sanitary Sewer Collection System Order). This Complaint seeks $1,383,007.50 in administrative civil liability.

2. The Discharger owns and operates a sanitary sewer collection system (hereafter collection system) and a wastewater treatment plant (WWTP), providing both conveyance and treatment services for an estimated population of 37,648 from member agencies located in the City of Arroyo Grande, City of Grover Beach, and the Oceano Community Services District. These member agencies retain ownership and direct responsibility for individually-owned collection system assets within the boundaries of these member agencies which then discharge raw sewage into the Discharger's gravity trunk sewer system and WWTP for proper treatment, conveyance and disposal.

3. This complaint alleges that the Discharger caused untreated wastewater discharges to surface waters of the United States on December 19 and 20, 2010. This sanitary sewer overflow (hereafter December 2010 sewer overflow), totaling 1,139,825 gallons reaching surface water, was unauthorized and caused by the Discharger's failure to maintain and operate its sanitary sewer collection system as required in the corresponding National Pollutant Discharge Elimination System (NPDES) Permit, and in the Sanitary Sewer Collection System Order.

4. Since the December 2010 sewer overflow, the Discharger has been represented by Wallace Group, a consulting firm, which provides engineering and management services for the District. The Wallace Group and the Water Board's Enforcement Team (members of the

[1] California Integrated Water Quality System (CIWQS), the State Water Board's SSO Online Database report, available at: https://ciwqs.waterboards.ca.gov/ciwqs/readOnly/PublicReportSSOServlet?reportAction=criteria&reportId=sso_main

Regional and State Boards involved with this matter) were unable to reach a mutually agreeable settlement for the Water Board's consideration.

5. The Discharger's collection system is comprised of approximately nine miles of gravity trunk sewers ranging from 15 to 30 inches in diameter that lead into the Discharger's Wastewater Treatment Plant (WWTP) located adjacent to the Oceano County Airport and the Pacific Ocean. The Discharger's WWTP consists of primary clarification, trickling filters, secondary clarification, chlorine disinfection, and a dechlorination system. The design capacity of the Discharger's WWTP is 5.0 million gallons per day (mgd). The Discharger's WWTP also accepts brine waste generated from public water softeners, which is mixed with the final treated wastewater prior to ocean discharge. In 2008, approximately 325,000 gallons of brine waste were discharged with the final effluent from the WWTP.

6. Treated wastewater exiting the Discharger's WWTP enters the Pacific Ocean at a depth of approximately 55 feet through a 4,400-foot outfall-diffuser system, jointly owned by the Discharger and City of Pismo Beach. The Discharger's final effluent is also mixed with approximately 1.9 mgd of treated wastewater effluent in the outfall diffuser system from the City of Pismo Beach (regulated under NPDES Permit No. CA00448151), prior to discharge into the Pacific Ocean.

7. Section 301 of the Federal Water Pollution Control Act (33 U.S.C. § 1311) (Clean Water Act) and CWC section 13376 prohibit the discharge of pollutants to surface waters of the United States except in compliance with an NPDES permit. The Discharger's wastewater treatment facility is regulated under the Regional Water Board's Order No. R3-2009-0046, NPDES Permit No. CA0048003, adopted on October 23, 2009. The Discharger's collection system is enrolled for coverage under the Sanitary Sewer Collection System Order, which applies to all federal and state agencies, municipalities, counties, district and other public entities that own or operate sanitary sewer systems greater than one mile in length that collect and/or convey untreated or partially treated wastewater to a publicly owned treatment facility in the State of California.

8. On December 19, 2010, the Discharger's WWTP influent pump station automatically shut down after floodwater entered an electrical conduit leading into a pump motor control system in the WWTP influent pump station. The penetrating floodwater shorted a critical motor control component (shunt switch) which then resulted in tripping a large main circuit breaker that supplied power to all four influent pumps located in the pump station.

9. The resulting loss of power to all four influent pumps caused untreated sewage to surcharge upstream into the Discharger's collection system and overflow which caused the December 2010 sewer overflow, discharging untreated sewage from the collection system into the environment. Additionally, the Discharger documented and certified six sewer backups where untreated sewage was discharged inside six residential homes through private sewer service lateral connections.

10. The Discharger initially reported overflow reports into the CIWQS SSO Online Database on December 22, 2010, totaling 898,600 gallons of sewage discharged into Arroyo Grande

Creek, Oceano Lagoon, and the Pacific Ocean. The Discharger then submitted a revised estimate of 384,200 gallons for the overflow volume in a report to the Central Coast Regional Water Board on January 3, 2011. On May 31, 2011, the Discharger further revised the overflow volume to 417,298 gallons. As of June 16, 2012, the publicly available CIWQS SSO Online Database report shows 418,842 gallons of sewage reaching surface waters as reported by the Discharger (See Appendix A of the Technical Report for more details).

11. In response to the December 2010 sewer overflow, the Discharger submitted a spill report to the Regional Water Board on January 3, 2011. On March 7-8, 2011, State Water Resources Control Board (State Water Board) staff inspected the Discharger's WWTP and collection system facilities.

12. On April 18, 2011, the Regional Water Board issued a Notice of Violation (NOV) and a 13267 Letter (CWC section 13267) requiring the Discharger to submit a technical report concerning the December 19, 2010 discharge of untreated sewage from its collection system. In response, the Discharger submitted a technical report dated May 31, 2011, detailing the nature, circumstances, extent and gravity of the unauthorized discharge of untreated sewage.

13. On September 23, 2011, the Discharger submitted supplemental information including but not limited to plant historical flow information, justification of calculation methodology and other plant hydraulic data.

14. The Discharger is required to properly maintain, operate and manage its sanitary sewer collection system in compliance with the Regional Water Board Order No. R3-2009-0046, NPDES Permit No. CA0048003 and the Sanitary Sewer Collection System Order, and is required by the Sanitary Sewer Collection System Order to provide adequate capacity to convey base flows and peaks flows, including flows related to wet weather.

15. The discharge of untreated sewage to waters of the United States is a violation of the requirements in R3-2009-0046, section 301 of the Clean Water Act, CWC section 13376, and the Sanitary Sewer Collection System Order. Violations of these requirements are the basis for assessing administrative civil liability pursuant to CWC section 13385.

16. The Discharger violated Discharge Prohibition G of Order No. R3-2009-0046 which states, "The overflow or bypass of wastewater from the Discharger's collection, treatment, or disposal facilities and the subsequent discharge of untreated or partially treated wastewater, except as provided for in Attachment D, Standard Provision 1.G (Bypass), is prohibited. This prohibition does not apply to brine discharges authorized herein."

17. The Discharger violated Provision VI.C.6 of Order No. R3-2009-0046 which states, "Stormwater flows from the wastewater treatment process areas are directed to the headworks and discharged with treated wastewater. These stormwater flows constitute all industrial stormwater at this facility and, consequently, this permit regulates all industrial stormwater discharges at this facility along with wastewater discharges." Portions of the untreated sewage were discharged from manholes located at the WWTP and mixed with stormwater which eventually reached the Pacific Ocean.

18. The Discharger violated the Standard Provisions (Attachment D-1.B.2) to Order No. R3-2009-0046, which states, "All facilities used for transport or treatment of wastes shall be adequately protected from inundation and washout as the result of a 100-year frequency flood." The underground utility boxes near the WWTP influent pump station that housed the electrical wiring/cables and conduits were not adequately protected from potential flooding. The migration of floodwater through the unsealed conduits shorted the shunt switch and influent pump motors.

19. The Discharger violated section 301 of the Clean Water Act, which prohibits the discharge of pollutants to waters of the United States except in compliance with an NPDES permit. The discharge of untreated sewage to the Pacific Ocean was not in compliance with the Discharger's NPDES permit.

20. The Discharger violated Prohibition C.1 of the Sanitary Sewer Collection System Order which states, "Any SSO that results in the discharge of untreated or partially treated wastewater to waters of the United States is prohibited."

21. The Discharger violated Prohibition C.2 of the Sanitary Sewer Collection System Order which states, "Any SSO that results in a discharge of untreated or partially treated wastewater that creates a nuisance as defined in CWC section 13050(m) is prohibited."

22. The Discharger violated Provision D.8 of the Sanitary Sewer Collection System Order which states in part, "The Enrollee shall properly manage, operate, and maintain all parts of the sanitary sewer system owned and operated by the enrollee…".

23. The Discharger violated Provision D.10 of the Sanitary Sewer Collection System Order which states, "The Enrollee shall provide adequate capacity to convey base flows and peak flows, including flows related to wet weather events."

24. The Discharger violated section A.6 of the Sanitary Sewer Collection System Order Amended Monitoring and Reporting Program, which states, "All SSOs that meet the above criteria for Category 2 SSOs must be reported to the Online SSO Database within 30 days after the end of the calendar month in which the SSO occurs."

25. Administrative civil liability (ACL) may be imposed pursuant to the procedures described in CWC sections 13323 and 13385. The complaint alleges that the act (or the failure to act) constitutes a violation of law, and describes the provisions of law authorizing civil liability to be imposed, and the proposed civil liability.

26. Pursuant to CWC section 13385(a), any person who violates CWC section 13376 or any requirements of section 301 of the Clean Water Act is subject to administrative civil liability pursuant to CWC section 13385(c), in an amount not to exceed the sum of both the following: (1) ten thousand dollars ($10,000) for each day in which the violation occurs; and (2) where there is a discharge, any portion of which is not susceptible to cleanup or is not cleaned up, and the volume discharged but not cleaned up exceeds 1,000 gallons, an

additional liability not to exceed ten dollars ($10) multiplied by the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons.

27. CWC sections 13327 and 13385(e) require the State Water Board and Regional Water Boards to consider several factors when determining the amount of civil liability to impose. These factors include: "...the nature, circumstances, extent, and gravity of the violation or violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on its ability to continue its business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and other matters as justice may require." Staff costs are sought under this complaint as described in the Technical Report, consistent with the CWC and all applicable case law. Staff costs are continuing and will continue through the Water Board hearing.

28. Additionally the State Water Board in November 2009 adopted a Water Quality Enforcement Policy (Enforcement Policy) which outlines a calculation methodology for ACL assessments. The Enforcement Policy was approved by the Office of Administrative Law on May 20, 2010. Section VI of the Enforcement Policy provides a calculation methodology to enable the State and Regional Water Board staff to fairly and consistently implement liability provisions of the CWC. The calculation methodology presented in the Enforcement Policy provides a consistent approach and analysis of factors to determine liability and complies with the applicable sections of the CWC. The Enforcement Team also considered the Section D.6 factors of the Sanitary Sewer Collection System Order.

29. The violations alleged herein and described in the Technical Report include both "discharge violations" to waters of the United States and "non-discharge violations" for purposes of considering section 13385 of the CWC and the Enforcement Policy's civil liability calculation methodology. The Technical Report provides a lengthy discussion of how the Enforcement Team arrived at its recommended administrative civil liability.

30. The staff report entitled *Technical Report for Noncompliance with Central Coast RWQCB Order No. R3-2009-0046 and State Water Resources Control Board Order No. 2006-0003-DWQ, "Statewide General Waste Discharge Requirements for Sanitary Sewer Systems", Unauthorized SSO occurring on December19-20, 2010*, dated June 2012, is attached and incorporated herein, as well as all accompanying appendices.

31. As a required minimum, the economic benefit of $177,209 plus 10% received by the Discharger must be recovered to comply with statutory requirements and deter future non-compliance, for a total of $194,930. However, based on the considerations of the factors listed in CWC sections 13327 and 13385(e) and the liability methodology contained in the Enforcement Policy, the Prosecution Team recommends a proposed administrative civil liability of $1,383,007.50 for violations of CWC section 13385(a)(2) and 13268.

32. This issuance of this Complaint is an enforcement action and is, therefore, exempt from the California Environmental Quality Act, pursuant to Title 14, California Code of Regulations, Section 15321.

Michael Thomas

Digitally signed by Michael Thomas
DN: cn=Michael Thomas, o=Central Coast Water Board, ou, email=mThomas@waterboards.ca.gov, c=US
Date: 2012.06.19 14:38:21 -07'00'

Michael Thomas
Assistant Executive Officer

Date

Attachments:

1. *Technical Report for Noncompliance with Central Coast RWQCB Order No. R3-2009-0046 and SWRCB Order No. 2006-0003-DWQ (Sanitary Sewer Collection System Order, Unauthorized SSO (sanitary sewer overflow) Occurring on December19-20, 2010*, dated June 2012, and accompanying appendices

STATE WATER RESOURCES CONTROL BOARD
and
CENTRAL COAST REGIONAL WATER QUALITY CONTROL BOARD

# TECHNICAL REPORT

Proposed Administrative Civil Liability Complaint (ACL complaint)
Contained in Complaint No. R3-2012-0030

South San Luis Obispo County Sanitation District
San Luis Obispo County

For Noncompliance with:

Central Coast Regional Water Quality Control Board Order No. R3-2009-0046 and
State Water Resources Control Board Order No. 2006-0003-DWQ,
"Statewide General Waste Discharge Requirements for Sanitary Sewer Systems"

Unauthorized Sanitary Sewer Overflow (SSO) occurring on December 19-20, 2010

Prepared By:

Leo Sarmiento, P.E.

REGISTERED PROFESSIONAL ENGINEER
LEONILO SAGARIO SARMIENTO
No. CH 6401
Exp. 6/30/12
CHEMICAL
STATE OF CALIFORNIA

Jim Fischer, P.E.

REGISTERED PROFESSIONAL ENGINEER
JAMES E. FISCHER, JR.
No. M 029780
Exp. 6/30/2014
MECHANICAL
STATE OF CALIFORNIA

Reviewed By:

Dr. Matthew Buffleben, P.E.

REGISTERED PROFESSIONAL ENGINEER
MATTHEW S. BUFFLEBEN
C65694
EXP. 9/30/13
CIVIL
STATE OF CALIFORNIA

(June 2012)

# Table of Contents

## A. INTRODUCTION

This Technical Report provides the factual and analytical evidence to support Administrative Civil Liability Complaint (ACL complaint) No. R3-2012-0030 in the amount of $1,383,007.50 against the South San Luis Obispo County Sanitation District (the Discharger) for violations of Central Coast Regional Water Quality Control Board (Regional Water Board) Order No. R3-2009-0046 [National Pollutant Discharge Elimination System Permit (NPDES) No. CA0048003] and the State Water Resources Control Board (State Water Board) Order No. 2006-0003-DWQ, "Statewide General Waste Discharge Requirements for Sanitary Sewer Systems" (Sanitary Sewer Collection System Order[1]).

This ACL complaint has been issued in response to a 1,139,825 gallon sanitary sewer overflow occurring on December 19 and 20, 2010 (hereafter, December 2010) from the Discharger's gravity trunk sanitary sewer collection system (collection system) discharged into the waters of the United States, including Oceano Lagoon, Meadow Creek, and the Pacific Ocean. The December 2010 sewer overflow was attributed to failure of the Discharger's wastewater treatment plant (WWTP) influent pump station at the Discharger's WWTP in Oceano, California.

To support the required investigative process, Regional Water Board staff requested assistance from the State Water Board, Office of Enforcement. The Technical Report and ACL complaint is fair, reasonable, and fulfills the State Water Board's Water Quality Enforcement Policy[2] to serve the best interest of the public and provide a deterrent for any future violators. All information contained herein has been reviewed by both the Regional Water Board and State Water Board staff (hereafter Water Board staff).

## B. SUMMARY OF LIABILITY FACTORS

The following table provides a summary of calculated liability factors applied as part of the steps used by staff to comply with the State Water Board's Enforcement Policy.

**Table 1 – Summary of Calculated Liability Factors**

| STEP | DESCRIPTION | RANGE | FINAL SCORE |
|---|---|---|---|
| 1 | Potential for Harm for Discharge Violation | 0 to 10 | 9.0 |
| 2a | Assessments for Discharge Violations (per gallon) | up to $10/gallon | $2/gallon |
| 2b | Assessments for Discharge Violations (per day) | up to $10,000/day | $10,000/day |
| 3 | Per Day Assessments: Non-discharge Violations | up to $1,000/day | $350/day |
| 4 | Adjustment Factors | 0.5 to 1.5 | 1.1 |
| 5 | Determination of Total Base Liability | Per Day or Per Gallon | Both used |
| 6 | Ability to Pay and Ability to Continue in Business | Yes | Yes |
| 7 | Other Factors As Justice May Require | Staff Costs | $50,000 (and continuing) |
| 8 | Economic Benefit | Avoided Costs or Savings | $73,019 |
| 9 | Maximum and Minimum Liability Amounts | Min. $80,321 | Max $11,388,250 |
| **10** | **Final Liability** | **See Step #10** | **$1,383,007.50** |

[1] Available at http://www.waterboards.ca.gov/water_issues/programs/sso/

[2] Available at: http://www.swrcb.ca.gov/water_issues/programs/enforcement/docs/enf_policy_final111709.pdf

**Facility Background**

The Discharger owns and operates both a collection system and a WWTP, providing both conveyance and treatment services for an estimated population of 37,648 from member agencies located in the City of Arroyo Grande, City of Grover Beach, and the Oceano Community Services District. These member agencies retain ownership and direct responsibility for individually-owned collection system assets within their areas of responsibility, who then discharge untreated sewage generated into the Discharger's collection system that conveys untreated sewage to the Discharger's WWTP for proper disposal. (See vicinity map, attached hereto as Appendix B).

The Discharger's collection system is comprised of approximately nine (9) miles of gravity trunk sewers ranging from 15 to 30 inches in diameter. The WWTP owned by the Discharger consists of primary clarification, trickling filters, secondary clarification, chlorine disinfection, and a dechlorination system with a capacity to treat up to 5.0 million gallons per day (mgd). The Discharger's WWTP also accepts brine waste generated from public water softeners, which is mixed with the final treated wastewater prior to ocean discharge. In 2008, approximately 325,000 gallons of brine waste were discharged with the final effluent from the Discharger's WWTP.

Treated wastewater exiting the Discharger's WWTP enters the Pacific Ocean at a depth of approximately 55 feet through a 4,400-foot in an outfall-diffuser system, jointly owned by the Discharger and City of Pismo Beach. The Discharger's final effluent is also mixed with approximately 1.9 mgd of treated wastewater effluent in the outfall diffuser system from the City of Pismo Beach (regulated under NPDES Permit No. CA00448151), prior to discharge into the Pacific Ocean.

**Regulatory Authority**

The Discharger's wastewater treatment facility is regulated under the Regional Water Board Order No. R3-2009-0046, NPDES Permit No. CA0048003 adopted on October 23, 2009. The Discharger's collection system is regulated under the Sanitary Sewer Collection System Order, adopted by the State Water Board on May 2, 2006.

**Discharge of Untreated Sewage**

According to the Discharger, on December 19, 2010, the Discharger's WWTP influent pump station automatically shut down after floodwater entered an electrical conduit leading to pump motor control circuitry within the influent WWTP pump station. The floodwater shorted a power "shunt switch" that tripped a large main circuit breaker switch supplying power to all four influent pumps inside the pump station. The resulting loss of power caused untreated sewage flowing into the WWTP to surcharge upstream in the Discharger's collection system and caused the December 2010 sewer overflow to begin. Additionally, as a result of the Discharger's failure described above, six (6) individual sewer backups occurred into private residential homes (totaling a cumulative of 1,200 gallons of untreated sewage discharged) and were reported and certified by the Discharger in the CIWQS SSO Online Database[3]. The Discharger originally estimated 898,600 gallons discharged into waters of the United States, including Oceano Lagoon, Meadow Creek and the Pacific Ocean. The Discharger revised this estimate on January

[3] California Integrated Water Quality System (CIWQS), the State Water Board's database of certified sanitary sewer overflows reported by Enrollees, publicly available at: https://ciwqs.waterboards.ca.gov/ciwqs/readOnly/PublicReportSSOServlet?reportAction=criteria&reportId=sso_main

3, 2011 to 384,200 gallons and on May 31, 2011 presented its final estimate to 417,298 gallons. (See Appendix A for additional information).

According to the Discharger, Table 2 below provides a timeline and lists the primary actions undertaken in response to the December 2010 sewer overflow.

**Table 2 – Timeline and Primary Actions Undertaken by Discharger**

| | |
|---|---|
| 12/29/2010 (10:30 est.) | *Shutdown of all four electric influent pump motors located in WWTP pump station; sewage immediately begins to surcharge upstream in collection system.* |
| 12/29/2010 (10:30 est.) | *Discharger staff started its diesel-powered emergency standby pump; however, the Discharger failed to implement standard operating procedures for the emergency standby pump when in "standby" mode, and the discharge valve was left closed by an operator. The discharge valve should have been left in the open position during "standby" mode to further expedite the emergency bypassing operations to re-route sewage around the failed influent pump station.* |
| 12/29/2010 (10:50 est.) | *Discharger staff were successful in partially opening the emergency standby pump discharge valve to the >1/3 open position, however, increasing rising floodwaters within the WWTP influent pump station prevented the emergency standby pump discharge valve from being fully opened.* |
| 12/29/2010 (11:00 est.) | *Start time of December 2010 sewer overflow as a result of influent pump station failure. According to information provided by the Discharger, there was assumed to be a 30 minute "lag time" to allow the collection system to fully surcharge before the December 2010 sewer overflow actually began.* |
| 12/29/2010 (14:30 est.) | *Discharger staff successfully opened the emergency standby pump discharge valve; however, the emergency standby pump was intermittently operational during part of the afternoon due to electrical control panel problems.* |
| 12/29/2010 (18:06) | *A supplemental portable pump borrowed from the City of Pismo Beach was started after rectifying a dead battery on the unit, which allowed additional sewage to be bypassed around the failed influent pump station.* |
| 12/29/2010 (20:20) | *Discharger staff were able to restart pump #3 inside the influent pump station.* |
| 12/29/2010 (22:00) | *Discharger determined that the December 2010 sewer overflow ended. The overflow lasted approximately 11 hours.* |
| 12/29/2010 (a.m.) | *Discharger reported an additional 2,200 gallon sewer overflow to waters of the United States, directly attributed to the WWTP influent pump station electrical failure occurring on December 19, 2010.* |

In response to the December 2010 sewer overflow, the Discharger submitted a technical report to the Regional Water Board on January 3, 2011. On March 7-8, 2011, State Water Board staff conducted an announced site visit to the facility to begin the investigation of the December 2010 sewer overflow, including evaluation of the Discharger's compliance with the Sewer System Order. On April 18, 2011, the Regional Water Board staff issued a Notice of Violation (NOV) and an investigation order (under California Water Code (CWC) section 13267) requiring the Discharger to submit a Technical Report about the December 2010 sewer overflow. In response, the Discharger submitted a Technical Report dated May 31, 2011, detailing its position regarding the nature, circumstances, extent and gravity of the unauthorized discharge of untreated sewage. On September 23, 2011, the Discharger submitted supplemental information (plant historical flow information, justification of calculation methodology and other plant hydraulic data) as a follow-up to the Water Board's NOV/13267 letter.

## C. VIOLATIONS SUBJECT TO THE COMPLAINT

The Discharger is required to maintain, operate and manage its collection system in compliance with requirements contained in the Sanitary Sewer Collection System Order. The Discharger is also required to maintain, operate and manage all parts of its WWTP in compliance with the Regional Water Board Order No. R3-2009-0046, NPDES Permit No. CA0048003.

The discharge of untreated sewage to waters of the United States is a violation of the following requirements. Violations of these requirements are the basis for assessing administrative civil liability pursuant to CWC section 13385.

1. Regional Water Board Order No. R3-2009-0046 (NPDES Permit No. CA0048003);

2. Section 301 of the Clean Water Act and CWC section 13376; and

3. Sanitary Sewer Collection System Order.

1. Regional Water Board Order No. R3-2009-0046

The Discharger violated Discharge Prohibition G which states, "The overflow or bypass of wastewater from the Discharger's collection, treatment, or disposal facilities and the subsequent discharge of untreated or partially treated wastewater, except as provided for in Attachment D, Standard Provision 1.G (Bypass), is prohibited. This prohibition does not apply to brine discharges authorized herein."

The Discharger violated Provision VI.C.6 which states, "Stormwater flows from the wastewater treatment process areas are directed to the WWTP and discharged with treated wastewater. These stormwater flows constitute all industrial stormwater at this facility and, consequently, this permit regulates all industrial stormwater discharges at this facility along with wastewater discharges." Portions of the untreated sewage were discharged from manholes located at the WWTP and mixed with stormwater which eventually reached the Pacific Ocean.

The Discharger violated the Standard Provisions (Attachment D-1.B.2), which state, "All facilities used for transport or treatment of wastes shall be adequately protected from inundation and washout as the result of a 100-year frequency flood." The underground utility boxes near the WWTP that housed the electrical wiring/cables and conduits were not adequately protected from potential flooding. The migration of floodwater through the unsealed conduits shorted the shunt switch and electric influent pump motors.

2. Clean Water Act (33 U.S.C. § 1311) and CWC section 13376

The Discharger violated section 301 of the Clean Water Act (33 U.S.C. § 1311) and CWC section 13376 which prohibit the discharge of pollutants to waters of the United States except in compliance with an NPDES permit. The discharge of untreated sewage to the Pacific Ocean is a violation of the Discharger's NPDES permit.

3. Sanitary Sewer Collection System Order:

The Discharger violated Prohibition C.1 of the Sanitary Sewer Collection System Order which states, "Any SSO that results in the discharge of untreated or partially treated wastewater to waters of the United States is prohibited."

The Discharger violated Prohibition C.2 of the Sanitary Sewer Collection System Order which states, "Any SSO that results in a discharge of untreated or partially treated wastewater that creates a nuisance as defined in CWC section 13050(m) is prohibited."

The Discharger violated Provision D.8 of the Sanitary Sewer Collection System Order which states in part, "The Enrollee shall properly manage, operate, and maintain all parts of the sanitary sewer system owned and operated by the enrollee…".

The Discharger violated Provision D.10 of the Sanitary Sewer Collection System Order which states, "The Enrollee shall provide adequate capacity to convey base flows and peak flows, including flows related to wet weather events."

The Discharger violated section A.6 of the Sanitary Sewer Collection System Order Amended Monitoring and Reporting Program, which states, "All SSOs that meet the above criteria for Category 2 SSOs must be reported to the Online SSO Database within 30 days after the end after the end of the calendar month in which the SSO occurs."

## D. DETERMINATION OF ADMINISTRATIVE CIVIL LIABILITY

An ACL complaint may be imposed pursuant to the procedures described in CWC section 13323. The ACL complaint alleges that the Discharger's act (or the failure to act) constitutes a violation of law, and describes the provisions of law authorizing civil liability to be imposed, and the proposed civil liability.

Pursuant to CWC section 13385(a), any person who violates CWC section 13376 or any requirements of section 301 of the Clean Water Act is subject to administrative civil liability pursuant to CWC section 13385(c), in an amount not to exceed the sum of both the following: (1) ten thousand dollars ($10,000) for each day in which the violation occurs; and (2) where there is a discharge, any portion of which is not susceptible to cleanup or is not cleaned up, and the volume discharged but not cleaned up exceeds 1,000 gallons, an additional liability not to exceed ten dollars ($10) multiplied by the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons.

CWC section 13385(e) require the State Water Board and Regional Water Boards to consider several factors when determining the amount of civil liability to impose. These factors include in part: "…the nature, circumstances, extent, and gravity of the violation or violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on ability to continue its business, any voluntary cleanup efforts

undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and other matters as justice may require."

Additionally the State Water Board in November 2009 adopted a Water Quality Enforcement Policy outlines a calculation methodology for ACL assessments. Section VI of the Enforcement Policy provides a calculation methodology to enable Water Board staff to fairly and consistently implement liability provisions of the CWC. The calculation methodology presented below also provides a consistent approach and analysis of factors to determine liability and complies with the applicable sections of the CWC.

**Step #1: Potential For Harm of Untreated Sewage Discharge**

Pursuant to the Enforcement Policy, Water Board staff shall calculate actual or threatened impacts to beneficial uses using a three-factor scoring system to determine a final score for harm potential. The three factors include: (1) the potential for harm to beneficial uses; (2) the degree of toxicity of the discharge; and (3) the discharge's susceptibility to cleanup or abatement for any violation or group of violations. The sum of these factors comprise the final score for potential for harm.

Based on the recommended range of scores for harm to the environment, risk to potential receptors and susceptibility to cleanup, a score of 9.0 (nine) was assigned to Step #1 of the civil liability calculation as summarized below:

**Table 3 – Summary Liability Factors (Step #1)**

| | | |
|---|---|---|
| Factor #1 | Potential Harm to Beneficial Uses | Score of 5.0 |
| Factor #2 | Characteristics of Discharge | Score of 3.0 |
| Factor #3 | Susceptibility to Cleanup or Abatement | Score of 1.0 |
| | Total Score | 9.0 |

The following provides details on how Water Board staff arrived at the final score in Step #1.

Factor #1 - Harm and Nature, Circumstances, and Gravity of Violations

The evaluation of the potential harm to beneficial uses factor considers the harm that may result from exposure to the pollutants or contaminants in the illegal discharge, in light of the statutory factors of the nature, circumstances, extent and gravity of the violation or violations. A score between 0 and 5 is assigned based on a determination of whether the harm or potential for harm is negligible (0), minor (1), below moderate (2), moderate (3), above moderate (4), or major (5).

The Discharger reported that storm events prior to December 19, 2010, had saturated the upper watershed of Arroyo Grande and Meadow Creek areas and resulted in severe flooding in and around the wastewater treatment plant. Over six (6) inches of rain fell on December 18-20, 2010, causing up to three feet deep of floodwater on roadways near the wastewater treatment plant. Some residential homes adjacent to the wastewater treatment plant were inundated by floodwaters and residents were forced to evacuate for health and safety reasons.

On Sunday morning of December 19, 2010, the weekend standby plant operator responded to a generator alarm and arrived at the wastewater treatment plant site around 7:30 a.m. The responding plant operator

observed rising floodwaters around the plant from the adjacent Meadow Creek and called additional operators to help address flooding issues at the plant.

At around 10:30 a.m. on December 19, 2010, the rising floodwater had inundated the plant's underground utility boxes at the influent pump station and migrated into electrical conduits that shorted the power supply to the influent pump motors. Initially, the Discharger reported that the floodwater shorted the motor of influent pump #4 and tripped its circuit breaker, which also tripped the main circuit breaker of the influent pump motors. Later investigation by the Discharger found that the floodwaters in electrical conduits may have also tripped the "shunt" switch of the influent pumps at the WWTP.

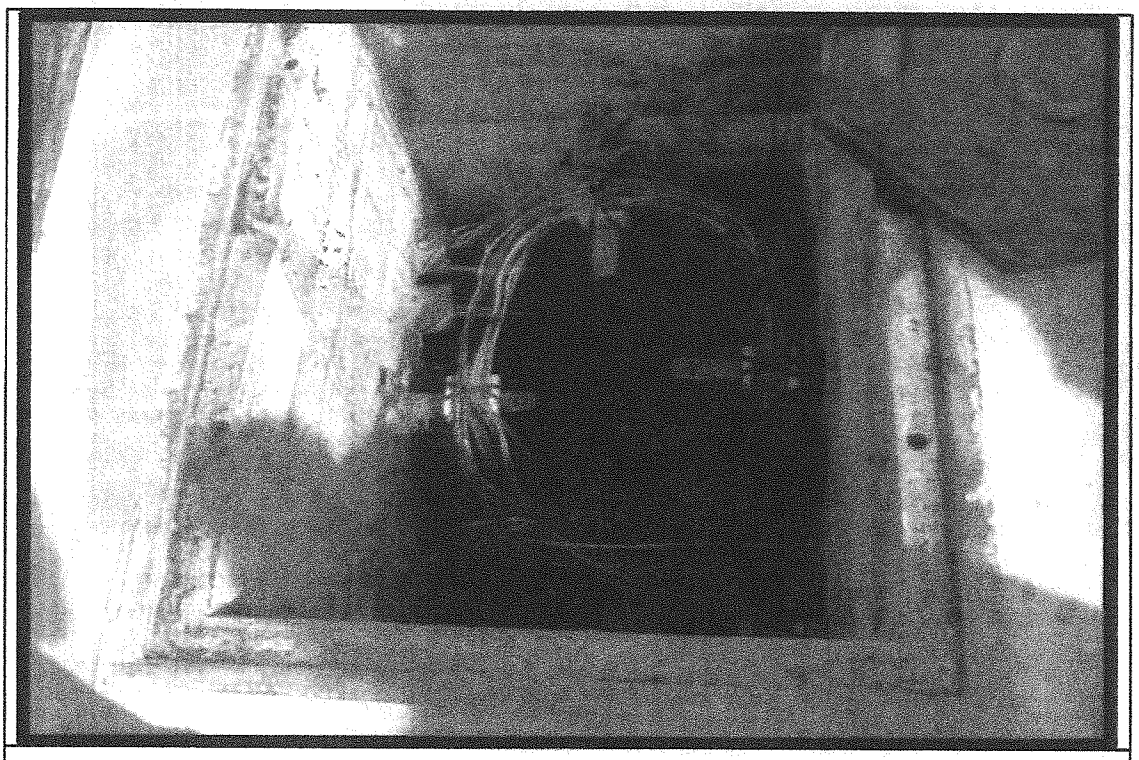

**PHOTO 1:** *View of underground utility box which was inundated with floodwater. After entering the utility box, the floodwater then proceeded into the WWTP influent pump station through electrical conduits, causing the electrical failure and resulting sewer overflow.*

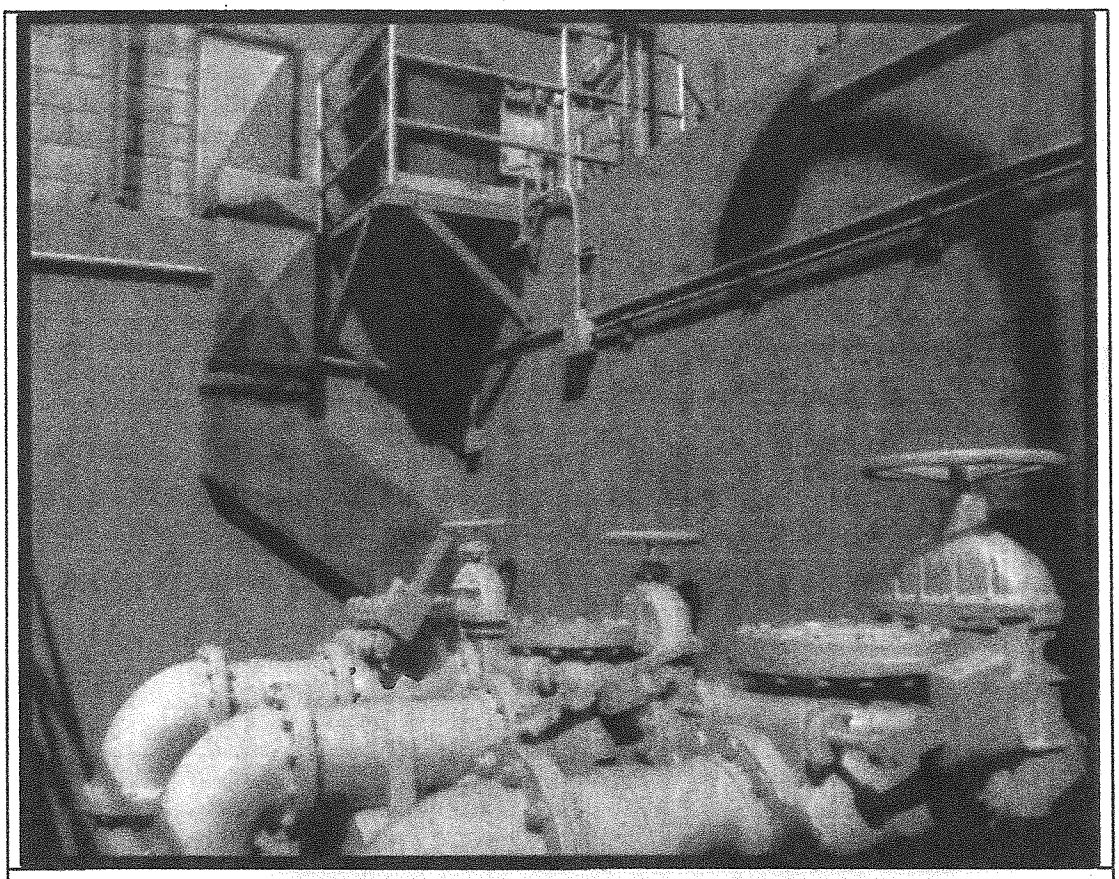

**PHOTO 2:** *View of Discharger's WWTP influent pump station where electrical-powered pumps are located. The failure of these pumps caused the sewer overflow.*

Additionally, the Discharger reported that the WWTP influent pump station main circuit breaker was incorrectly set by its electrical contractor during previous maintenance servicing. According to the Discharger, an investigation conducted by Thoma Electric concluded that the instantaneous trip of the main circuit breaker inside the WWTP influent pump station was set to trip before an additional circuit breaker leading to the primary logic controller pump #4. In addition, Thoma Electric completed a breaker coordination study in June, 2011 to identify other potential electrical problems to prevent any future recurrence of "incorrect settings" to occur in the WWTP influent pump station.

The simultaneous shutdown of all four influent pumps in the WWTP influent pump station caused by the electrical failure resulted in rapid backup of sewage inside the WWTP influent pump station, causing the influent sewage flow to surcharge upstream in the collection system. Based on the Discharger's reported HGL Methodology[4], the collection system surcharging began at approximately 11:00 a.m. on December 19, 2010.

[4] Hydraulic Grade Line (HGL) methodology used by Discharger in estimating the December 2010 sewer overflow volume, which relies on with field observations and generic "example" procedures and information in "Best Practices for Sanitary Sewer Overflow Prevention and Response Plan," published by CWEA http://www.cwea.org/members/publications/SSORP-CWEA.pdf

While the Discharger attempted to use its emergency standby pump to bypass sewage around the failed influent pump station, the Discharger failed to implement standard operating procedures for the emergency standby pump during "standby" mode. The pump's bypass valve was inadvertently in the "closed" position, which initially restricted the discharge flow bypassing the WWTP influent pump station. Unfortunately, WWTP operators were only able to open the valve to approximately the "1/3 open" position before rising floodwaters entering the WWTP influent pump station required evacuation. Later in the day, the WWTP operators were able to fully open the valve. During the bypassing operations, WWTP plant operators also reported that the emergency standby pump was intermittently operational during part of the afternoon on December 19, 2010 due to electrical control panel problems with the pump. In addition, the Discharger estimated that the diesel pump was only running at 1,500 revolutions per minute (rpm) instead of its maximum rated 1,835 rpm at a theoretical flow rate of 9.4 mgd. Additionally, the portable pump borrowed from the City of Pismo Beach was not immediately operational due to a dead battery.

Due to the major storm event and localized flooding on December 19, 2010, the Discharger reported that it assumed that the untreated sewage overflow had been washed away by stormwater runoff and ended up in the Pacific Ocean via Oceano Lagoon and Meadow Creek.

*Determination of Estimated Volume Discharged*

The Discharger presented and compared three separate calculation methodologies in determining the estimated volume discharged for the December 2010 sewer overflow:

1. HGL Methodology, assuming only sewage overflow points visually inspected during localized flooding and then visually inspected after the December 2010 sewer overflow were the only possible overflow locations where sewage was discharged;

2. Flow analysis using WWTP historical data based on historic diurnal curves; and,

3. Calculation performed by the WWTP Plant Superintendent at the time of the December 2010 sewer overflow (Mr. Jeff Appleton, Chief Plant Operator).

The following table summarizes the calculated discharge volume for each methodology reported by the Discharger in response to the NOV/13267 letter:

**Table 4 – Summary of Discharger's Methods and Estimates of Sewer Overflow Volume**

| CALCULATION METHODOLOGY | CALCULATED SEWER OVERFLOW VOLUME |
|---|---|
| #1 reported HGL | 417,298 gallons* |
| #2 Influent Flow Data | 661,000 gallons |
| #3 Chief Plant Operator's Report | 2,250,000 to 3,000,000 gallons |

*Final sewer overflow volume reported by Discharger (response to NOV and 13267 Letter dated May 31, 2011)

In estimating the final volume of the sewage spill, the Discharger utilized method #1. According to the Discharger, the reported HGL Methodology utilized the observed height of water column from one of the plant's manholes during the December 2010 sewer overflow event, and then was used to calculate the volume of sewage discharged upstream from observed manholes based on site conditions (manhole cover,

number of pick holes in cover, etc.) using the CWEA publication mentioned above, resulting in its final volume estimation for the December 2010 sewer overflow of 417,298 gallons discharged into the environment.

Initially, the Discharger used the historical influent flow data (method #2) in reporting spill volumes into the CIWQS SSO Online Database. However, the Discharger contends that the reported HGL Methodology is the most reliable method in calculating spill volumes for each discharge point (manhole) because the reported HGL Methodology takes into account field observations by eyewitnesses and photographs taken during and after the December 2010 sewer overflow event, assuming these were the only locations throughout the entire collection system where overflows were experienced. The following table shows varying spill volumes reported by the Discharger after the December 2010 sewer overflow event.

**Table 5 – Summary of Discharger's Estimates of Sewer Overflow Volume**

| DATE OF REPORT | DESCRIPTION | SEWER OVERFLOW VOLUME (gallons) |
|---|---|---|
| December 22, 2010 – | Reported drafts submitted online to CIWQS SSO Online Database | 898,600 |
| January 3, 2011 – | Report submitted to Regional Water Board | 384,200 |
| May 31, 2011 – | Response to NOV/13267 Letter dated 4-18-11 | 417,298 |

Following meetings, telephone conferences and review of documents submitted by the Discharger, Water Board staff concluded that in this case, the reported HGL Methodology used by the Discharger in calculating December 2010 sewer overflow volume is inappropriate. While the Discharger presented a discharge calculation methodology that could reasonably support a single discharge event (i.e., one involving a discharge with a single manhole location and if no flow data were available), it is inappropriate for the December 2010 sewer overflow since multiple discharge locations were involved. Secondly, the Discharger's collection system is considered an "open" system (gravity flow) because of multiple holes/vents in manholes, sewer cleanouts, installed backflow prevention devices designed to allow sewage to escape the collection system under certain conditions, and private laterals where overflows could likely occur but are unaccounted for in the Discharger's reported HGL Methodology. The Discharger reported six (6) sewer overflows resulting in sewer backups into residential homes as a result of the collection system surcharging from service laterals connected to the Discharger's collection system, providing additional evidence to support that not all overflow locations were accounted for using the reported HGL Methodology. Lastly, the Discharger recognized that some discharge locations were not visually inspected because of health and safety issues due to localized flooding (immediate evacuation was required in some areas).

Further, the Discharger in using its reported HGL Methodology ignored the recommendations specified in the publication to "establish and utilize your agency's approved standardized templates, tables, and or pictures to estimate SSO volume." Instead, the Discharger applied the generic "example" information included in the publication, further rendering the reported HGL Methodology estimates inaccurate and unreliable, since many different factors (e.g., manhole cover geometry, weight, slope) will affect the discharge rate.

Since this particular SSO event occurred at the plant's influent pump station with recorded influent and effluent flow data, Water Board staff used historical plant flow data in calculating the total spill volume for the following reasons:

1. The influent pump station at the WWTP is equipped with a "Parshall flume" flow meter, which provided historical influent flow monitoring data for and reporting purposes. Additionally, the plant has an effluent flow meter that monitors effluent flows.

2. Plant staff performed regular maintenance and calibration of the flow meters, thus ensuring accuracy of measured flow data.

3. Records of influent and effluent flows provide measured flow data and minimize potential errors inherent in individual observations and/or assumptions.

4. Historical flow data and Inflow/Infiltration characterization study provide overall influent and effluent flow characteristics of the treatment plant.

5. Discharger's sewer system is an "open" system where inflow/infiltration can freely occur in unknown sections throughout the collection rendering the Discharger's reported HGL Methodology unreliable for estimating the December 2010 untreated sewage discharge volume.

*Calculation Methodology (see detailed description in Appendix A)*

In calculating the appropriate December 2010 sewer overflow discharge volume[5] to waters of the United States, Water Board staff evaluated the following information submitted by the Discharger:

1. Measured influent flow data for December (2008-2010);

2. Measured effluent flow data (2008-2010);

3. Measured Influent flow data before and after the December 2010 sewer overflow incident;

4. Recent inflow/infiltration study report by the Discharger;

5. Reported bypass volume (bypassing influent pump station during December 2010 sewer overflow incident and stored onsite/pipelines); and,

6. Plant throughput residence time (amount of time it took for water to travel through the plant).

Based on the monitored flow data above, Water Board staff created a graphical presentation of hourly diurnal flow variations that subject the plant's unit operations. Diurnal flow variations for both dry and wet weather events showed similar downward pattern from peak flows around 11:00 a.m. through midnight (see graphs in Appendix A). Since the plant lost its monitored influent flow data during the December 2010 sewer overflow event, Water Board staff used the hourly diurnal flow data for both

[5] Estimated discharge volume (December 2010 Sewer Overflow) = influent/effluent flow - total bypass flow of influent pump station.

influent and effluent flows to estimate the December 2010 sewer overflow discharge volume. In calculating the discharge volume, Water Board staff used a conservative start and end times. The table below summarizes the calculation results for the total December 2010 sewer overflow discharge volumes (bolded text):

**Table 6 – Summary of Water Board's Estimate of Sewer Overflow Volume**

| Volume (gallons) | Influent Flow* (gallons) | Effluent Flow** (gallons) |
|---|---|---|
| Total volume entering the plant if pump station hadn't failed (sewage and inflow/infiltration). | 3,095,573 | 3,262,701 |
| Volume that bypassed the failed pump station and entered into treatment plant (based on effluent meter) | 1,945,076 | 1,945,076 |
| Total volume that bypassed the failed pump station and entered into treatment plant (effluent Flow + 180,000 to sludge storage) | 2,125,076 | 2,125,076 |
| Total Sewer Overflow Discharge Volume (including 2,200 gals. SSO on Dec. 20, 2010) | **972,697** | **1,139,825** |

* based on 11 hours SSO (11:00 a.m. to 10:00 p.m.)
** based on 10 hours SSO (12:00 a.m. to 10:00 p.m.) due to assumed plant residence time (1 hr)

In determining the appropriate methodology in estimating the December 2010 sewer overflow volume, Water Board staff used the effluent flow estimation process because it provides the most reliable and accurate approach with the following reasons:

1. Unlike the influent flow meter, the effluent flow meter was fully functional throughout the December 2010 sewer overflow event;

2. The influent flow meter stopped recording flow rates at approximately 7.4 mgd due to wet well flooding. However, the effluent flow continued to record flow data which showed increasing flow rates as high as 8.44 mgd (at 10:26 AM). This provides evidence that the actual influent flow was higher than recorded by the influent meter; and,

3. The effluent flow data provide further evidence that the collection system and the WWTP sustained heavy inflow and infiltration flows throughout the December 2010 sewer overflow event.

Therefore, the estimated December 2010 sewer overflow volume discharged was 1,139,825 gallons.

*Environmental Monitoring after the Sewer Overflow Event*

The discharge of 1,139,825 gallons of untreated sewage resulted in undetermined harm to the water quality and beneficial uses of Oceano Lagoon, Meadow Creek, Arroyo Grande Creek Estuary downstream and upstream of Arroyo Grande Creek and the Pacific Ocean (Pt. San Luis to Pt. Sal). (See attached vicinity map of sewer overflow locations reported by the Discharger, attached hereto as Appendix B).

The Discharger did not conduct water quality sampling and monitoring activities immediately following the untreated sewage overflow incident. According to the Discharger, this was mainly due to the flood advisory warning issued by the San Luis Obispo (SLO) County. Instead, the Discharger utilized the SLO County Environmental Health Department (EHD) water quality monitoring samples taken on December 28, 2010, more than one week after the untreated sewage overflow incident.

According to the Discharger's report (of May 31, 2011), the SLO County posted signs warning the public of the sewage spill and rain advisory at all main beach entrances and on all advisory boards. The Discharger reported that the SLO County EHD collected monitoring samples on December 28, 2010, and after reviewing the analytical results, lifted the beach advisory warning on December 29, 2010.

*Beneficial Uses of Affected Waters*

The Water Quality Control Plan for the Central Coast Region (Basin Plan[6]) is the Regional Water Board's master water quality control planning document. It designates beneficial uses and water quality objectives for waters of the State, including surface waters and groundwater. It also includes programs of implementation to achieve water quality objectives.

Establishing the beneficial uses to be protected in the Central Coastal Basin is a cornerstone of this comprehensive plan. Once uses are recognized, compatible water quality standards can be established as well as the level of treatment necessary to maintain the standards and ensure the continuance of the beneficial uses.

Beneficial uses are presented for inland surface waters by 13 sub-basins in Table 2-1 (see Basin Plan). Beneficial uses for inland surface waters are arranged by hydrologic unit. Beneficial uses are regarded as existing whether the water body is perennial or ephemeral, or the flow is intermittent or continuous. Beneficial uses of coastal waters are shown in Table 2.2 of the Basin Plan.

The Basin Plan has designated the existing beneficial uses of surface waters in Oceano Lagoon, Meadow Creek, downstream and upstream of Arroyo Grande and Pacific Ocean (Pt. San Luis to Pt. Sal) to include water uses for municipal (MUN), agricultural supply (AGR), industrial process supply (IND), groundwater recharge (GWR), contact water recreation (REC-1), non-contact water recreation (REC-2), wildlife habitat (WILD), warm freshwater habitat (WARM), cold freshwater habitat (COLD), migration of aquatic organisms (MIGR), spawning, reproduction and/or early development (SPWN), preservation of biological habitats of special significance (BIOL), rare, threatened or endangered species (RARE), estuarine habitat (EST), freshwater replenishment (FRSH), commercial and sport fishing (COMM) and shellfish harvesting (SHELL).

The discharge of untreated sewage had direct and negative impacts on the beneficial uses of Oceano Lagoon, Meadow Creek, upstream and downstream of Arroyo Grande Creek, Arroyo Grande Creek Estuary and the Pacific Ocean (Pt. San Luis to Pt. Sal) and the affected residential communities with the following impacts:

1. San Luis Obispo County Public Health (SLO CPH) advisory (beach was closed for public use more than five days);

[6] http://www.waterboards.ca.gov/centralcoast/publications_forms/publications/basin_plan/index.shtml

2. The Discharger did not do any sampling and/or monitoring of impacted surface water bodies, but relied on SLO CPH's monitoring efforts. However, the Discharger did conduct personal interviews of residents affected by floodwaters and sewage and reported no health impacts to people and unknown impacts to aquatic life;

3. Multiple beneficial uses were adversely affected for a prolonged period of time; however, chronic effects resulting from this violation were unlikely; and,

4. Some people/residents trying to protect their homes from rising floodwaters were potentially exposed by contact with sewage contaminated floodwaters, including sewage discharged from six (6) sewer backups, totaling 1,200 gallons reported by the Discharger. During the investigation, the Discharger indicated it did not report any health issues or complaints from affected residents resulting from the discharge of untreated sewage in and around residential properties.

Since the untreated sewage discharge resulted in the restriction of beneficial uses for more than five days, this violation falls under "major" harm or potential for harm to beneficial uses as defined in the Enforcement Policy:

> Major - high threat to beneficial uses (i.e., significant impacts to aquatic life or human health, long term restrictions on beneficial uses (e.g., more than five days), high potential for chronic effects to human or ecological health).

Therefore, a score of 5 was assigned to Factor #1.

Factor #2 - Physical, Chemical, Biological/Thermal Characteristics of Discharge

Untreated sewage is composed of, but not limited to, high concentrations of pathogenic bacteria, biochemical oxygen demand due to organic and inorganic materials, nutrients, ammonia, heavy metals, emulsions and other toxins. These pollutants adversely affect the quality of water needed to support and sustain the beneficial uses of the impacted surface waters. Specifically, the untreated sewage discharge may impact the quality of fresh water and seawater aquatic life beneficial uses and limit contact and non-contact recreation.

The characteristics of the discharged material posed an above-moderate risk or threat to potential receptors. The Enforcement Policy defines above-moderate as:

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

The degree of toxicity in untreated sewage poses a direct threat to human and ecological receptors. Accordingly, a score of 3 was assigned to Factor #2.

Factor #3 - Susceptibility to Cleanup or Abatement

Pursuant to the Enforcement Policy, a score of 0 is assigned to this factor if 50 percent or more of the discharge is susceptible to cleanup or abatement. A score of 1 is assigned for this factor if less than 50 percent of the discharge is susceptible to cleanup or abatement.

According to the Discharger, cleanup or recovery of discharged sewage was not possible because of rising floodwaters and multiple discharge points located in close proximity to Oceano Lagoon, Meadow Creek, Arroyo Grande Creek Estuary and the Pacific Ocean. Since the untreated sewage discharge was mixed with floodwaters and less than 50 percent may have been susceptible to cleanup or abatement, a score of 1 was assigned to the penalty calculation methodology.

**Step #2: Assessment for Discharge Violations**

The Enforcement Policy requires establishing a base liability for calculating the mandatory penalty required under CWC section 13385(h) and (i). In this case, this step considers both per gallon and per day assessments because of the large nature of the spill or release.

The initial liability amount is calculated on a per gallon basis using the scores for harm potential as discussed above and the extent of Deviation from Requirement of the violation. The Deviation from Requirement reflects the extent to which the violation deviates from applicable discharge requirements. The following definition describes how Water Board staff determine the score for Deviation from Requirement:

Minor - the intended effectiveness of the requirement remains generally intact (e.g., while the requirement was not met, there is a general intent by the Discharger to follow the requirement).

Moderate - the intended effectiveness of the requirement has been partially compromised (e.g., the requirement was not met, and the effectiveness of the requirement is partially achieved).

Major - the requirement has been rendered ineffective (e.g., the Discharger disregards the requirement, and/or the requirement is rendered ineffective in its essential functions).

While the Discharger demonstrated a general intent to comply with discharge requirements, Water Board staff also discovered that since 2004 the Discharger already recognized the issues of flooding and fire related issues of underground utility boxes containing electrical cables (see Appendix E -Main Budget Item #16). The NPDES discharge permit specifically requires the Discharger to protect the wastewater control systems from 100-year frequency flood (Attachment D-1.B.2 of NPDES permit). However, the Discharger did not implement the proposed improvement project that would have prevented the December 2010 sewer overflow. As defined by the Enforcement Policy, this failure to prevent the December 2010 sewer overflow resulted in partially compromising the intended effectiveness of the requirement. Therefore the category that best fit the Deviation Requirement would be considered "Moderate."

Based on the potential harm score of 9 (nine) and a "Moderate" Deviation from Requirement (see Table 1 of the Enforcement Policy, page 14), the score for Step #2 was 0.5. The Enforcement Policy requires the Water Boards to apply the "per gallon factor" to the maximum per gallon amounts allowed under statute. Since this violation involves a high volume discharge of sewage, a maximum of $2.00/gallon was assessed. Therefore, the initial liability amount on a per gallon basis is $1,138,825.

**Step #3: Per Day Assessment For Non-Discharge Violations**

The Enforcement Policy requires per day assessments for non-discharge violations, considering potential for harm and the extent of deviation from applicable requirements. These violations include, but are not limited to, the failure to conduct routine monitoring and reporting, the failure to provide required information, and the failure to prepare required plans. While these violations may not directly or

immediately impact beneficial uses, they prevent the water boards from having accurate data to be able to respond quickly and meaningfully to address water quality impacts and therefore undermine the objectives of the CWC and the State Water Board's Sanitary Sewer Overflow Reduction Program (SSORP)[7]. The Water Boards must use the matrix set forth in Table 3 of the Enforcement Policy on page 16 to determine the initial liability factor for each violation. The per day assessment and appropriate per day factor is multiplied by the maximum penalty amount per day allowed under CWC section 13268.

The Sanitary Sewer Collection System Order has a Monitoring and Reporting Program (MRP). The MRP includes specific SSO notification, reporting and record-keeping requirements to replace other mandatory routine written reports for SSOs and facilitate compliance monitoring and enforcement for violations. The State Water Board Executive Officer on February 20, 2008 revised the original 2006 adopted MRP (Amended MRP, WQ 2008-0002-EXEC) to rectify early notification deficiencies to ensure that first responders are notified in a timely manner for SSOs discharged to waters of the state.

While the Discharger demonstrated a general intent to comply with the Sanitary Sewer Collection System Order, during the investigative process, Water Board staff discovered that the Discharger failed to certify and comply with the Amended MRP requirements for six (6) sewer backups into residential structures resulting from the December 2010 Sewer Overflow. As required under the Amended MRP (section A.6), the Discharger failed to certify each of the six (6) individual sewer backup reports in the CIWQS SSO Online database within 30 days after the end of the calendar month in which the SSO event occurred (certification was due on January 30, 2010 and not certified by the Discharger in the SSO Online Database until March 6, 2012, 766 days late per each sewer backup report).

The following factors were applied for non-discharge violations (see Table 3 of the Enforcement Policy, page 15). A potential harm of "minor" was selected since the reported sewer backups did not reportedly reach waters of the United States as certified by the Discharger. A "major" deviation from requirement was selected since the Discharger did not report and certify the sewer backups in the CIWQS SSO Online Database on time, 766 days late for each required report. The resulting score for Step #2 was selected as 0.35, which is the mid-range in Table 3. Therefore, the initial liability amount is $350 per day per violation. However, in consideration of the Discharger's overall demonstrated compliance with the Amended MRP for initial December 2010 sewer overflow reporting, Water Board staff reduced the maximum applicable number of violation days for each of the six (6) sewer backups to 30 days for each violation.

[7] Information for the SSORP is available http://www.waterboards.ca.gov/water_issues/programs/sso/

**Table 7 – Summary of Non-Discharge Violations**

| SSO Event ID # | SSO Start Date Time | SSO Volume Certified in CIWQS (3.6.2012) | Date Due | Original Certification Date | # of days of violation |
|---|---|---|---|---|---|
| 778422 | 2010.12.19 00.00.00 | 50 | 1/30/2010 | 3/6/2012 | 766 |
| 778302 | 2010.12.19 11.05.00 | 100 | 1/30/2010 | 3/6/2012 | 766 |
| 778300 | 2010.12.19 11.01.00 | 100 | 1/30/2010 | 3/6/2012 | 766 |
| 778297 | 2010.12.19 11.08.00 | 100 | 1/30/2010 | 3/6/2012 | 766 |
| 778294 | 2010.12.19 11.07.00 | 800 | 1/30/2010 | 3/6/2012 | 766 |
| 778290 | 2010.12.19 11.08.00 | 50 | 1/30/2010 | 3/6/2012 | 766 |

**Step #4: Adjustment Factors**

The Enforcement Policy describes three factors related to the violator's conduct that should be considered for modification of the amount of the initial liability. The three factors are: the violator's culpability, the violator's efforts to clean up or cooperate with regulatory authorities after the violation, and the violator's compliance history. After each of these factors is considered for the violations involved, the applicable factor should be multiplied by the proposed amount for each violation to determine the revised amount for that violation.

Adjustment for Culpability

For culpability, the Enforcement Policy suggests an adjustment resulting in a multiplier between 0.5 to 1.5, with the lower multiplier for accidental incidents, and the higher multiplier for intentional or negligent behavior. In this case, a culpability multiplier of 1.1 has been selected for the following reasons:

1. Failure of the Discharger to provide adequate protection of its WWTP equipment from a 100-year frequency flood as required in the Attachment D-1.B.2 of the Discharger's NPDES permit;

2. Failure of the Discharger to comply with Provision D.10 of the Sanitary Sewer Collection System Order which states, "The Enrollee shall provide adequate capacity to convey base flows and peak flows, including flows related to wet weather events;"

3. Failure of the Discharger to implement its required legal authority to prevent illicit discharges into its collection system including inflow and infiltration [subsection D.13(iii)(a) of the Sanitary Sewer Collection System Order and also specified in the Discharger's certified Sewer System Management Plan];

4. Failure of the Discharger to comply with its NPDES permit requirements (Standard Provisions) to ensure implementation of standard operating procedures. In this case, the Discharger failed to ensure that the emergency bypass pump valve remains in the "open" position during standby mode; and

5. Failure of the Discharger to comply with the Provision D.7(v) of the Sanitary Sewer Collection System Order to provide adequate sampling to determine the nature and impact of the release.

In 2004, the Discharger considered a $200,000 Main Budget Item #16 to replace all wirings on various motors and lighting in the plant with waterproof wires rated for the respective type of service. According to the Discharger's staff report, the electrical wires installed in 1964-66 were not designed to be submerged in groundwater and had deteriorated over time, which in several instances caused electrical fire and/or loss of power. In 2010-2011 fiscal year budget, the Discharger indicated that Main Budget Item #16 was 90 percent complete with the specifications and would be ready to bid early in the fiscal year with an expected new budget cost of $500,000.

This particular project could have replaced the subject electrical utility vault with water resistant wiring and sealed electrical conduits that could have prevented and/or reduced the December 2010 sewer overflow.

Based on the information above, Water Board staff have reason to believe that the Discharger had prior knowledge of potential risks associated with the deteriorating electrical wires and the failure to protect plant equipment from 100-year frequency flood as required by its NPDES discharge permit.

Accordingly, Water Board staff find the Discharger culpable for not implementing its proposed project (Main Budget Item #16) since 2004 and other flood protection projects to protect the plant facilities from 100-year frequency flood as required by its discharge permit. Therefore, this factor should be adjusted to a higher multiplier of 1.1 for negligent behavior.

Adjustment for Cleanup and Cooperation

For cleanup and cooperation, the Enforcement Policy suggests an adjustment should result in a multiplier between 0.75 to 1.5, with the lower multiplier where there is a high degree of cleanup and cooperation. While the Discharger reported different discharge volumes, Water Board staff find its response and cooperation timely and satisfactory.

Upon detecting the spill, the Discharger responded quickly by diverting flows to the plant's clarifiers, drying beds and sludge lagoons. Additionally the Discharger secured additional pumps from other agencies and informed the public regarding the sewage spill.

The Discharger was timely in its response to the April 18, 2011 NOV and 13267 letter issued by the Regional Water Board and provided additional information accordingly.

In this case a Cleanup and Cooperation multiplier of 1.0 has been selected due to the Discharger's efforts to manage a difficult situation while coordinating response work with various resource agencies.

Adjustment for History of Violations

The Enforcement Policy suggests that where there is a history of repeat violations, a minimum multiplier of 1.1 should be used for this factor. In this case, a multiplier of 1.0 was selected because a review of the California Integrated Water Quality System (CIWQS) Sanitary Sewer Overflow database shows that the Discharger had no history of sewage overflow violations in recent years. It should be noted that the methodology considers history of violations and culpability as separate factors, as set forth in this Technical Report. The selection of the lowest multiplier for the absence of prior violations in the history of violations category does not require nor suggest that a low multiplier is appropriate in the culpability category.

**Step #5: Determination of Total Base Liability Amount**

The Total Base Liability amount of $1,333,007.50 is determined by adding the amounts for each violation and adjusted for multiple day violations. Accordingly, the Total Base Liability amount for the violations is calculated by multiplying the initial amount by the adjustment factors:

(Initial Liability) x (Culpability) x (History of Violations) x (Cleanup) = ($1,211,825) x (1.1) x (1) x (1) = $1,333,007.50

**Step #6: Ability to Pay and Ability to Continue in Business**

The Enforcement Policy states that if the State and/or Regional Water Board have sufficient financial information to assess the Discharger's ability to pay the Total Base Liability or to assess the effect of the Total Base Liability on the Discharger's ability to continue in business, then the Total Base Liability amount may be adjusted downward. Conversely, if the Discharger's ability to pay is greater than similarly-situated Dischargers, it may justify an increase in the proposed amount to provide a sufficient deterrent effect.

It is anticipated that the Discharger would be able to pay the proposed liability. The Discharger's adopted Budget for fiscal year 2010-2011 is divided into three Accounting Funds: (1) Operating Fund (Fund 19), (2) Expansion Fund (Fund 20) and, (3) Replacement/Improvement Fund (Fund 26).

The following table shows the estimated balance as of July 1, 2010 for all three accounting funds:

**Table 7 – Summary of Discharger Estimated Fund Balances (as 7/1/2010)**

| Accounting Fund | Estimated Balance as of July 1, 2010 |
|---|---|
| Operating Fund (Fund 19) | $(591,984) [negative balance] |
| Expansion Fund (Fund 20) | $5,230,172 |
| Replacement/Improvement Fund (Fund 26) | $867,832 |

According to the Discharger's Budget report for fiscal year 2010-2011, the sources of revenues for Fund 19 come from service charges and sales/reimbursements, for Fund 20 revenues come from sewer connection fees, and for Fund 26 revenues come from Fund 19 transfers.

Accordingly, the penalty factor in this step is neutral, and does not weigh either for or against the adjustment of the Total Base Liability. The Discharger may provide additional information in response to the Complaint to demonstrate that a downward adjustment is warranted.

**Step #7: Other Factors as Justice May Require**

The Enforcement Policy requires that if the Central Coast Regional Water Board believes that the amount determined using the above factors is inappropriate, the liability amount may be adjusted under the provision for "other factors as justice may require," but only if express findings are made to justify a reason for modifying the administrative civil liability.

In addition, the costs of investigation should be added to any final liability amount according to the Enforcement Policy. The current cost of Water Board staff investigation is $50,000, and this figure will

increase through hearing. Currently, the liability amount has been adjusted upward by $50,000 to reflect staff costs bringing the total proposed liability to $1,383,007.50.

No other factors are being considered in the determination of the proposed liability amount.

**Step #8: Economic Benefit**

The Enforcement Policy requires that State and/or Regional Water Boards determine any economic benefit of the violations based on the best available information, and suggests that the amount of the civil liability should exceed this amount whether or not economic benefit is a statutory minimum.

The Discharger gained economic benefit from the delay of upgrading its electrical wiring system and protecting in-ground utility boxes from potential floodwaters as planned in 2004 for a total budget cost of $200,000. The economic benefit gained from this project delay is calculated at $177,209 based on US EPA's BEN model to calculate economic benefits for noncompliance with regulations. The CWC encourages an administrative liability of at least this amount to recover competitive advantages obtained by the Discharger by failing to comply with statutory requirements and deter future non-compliance.

**Step #9: Maximum and Minimum Liability Amounts**

The maximum liability that the Regional Water Board may assess pursuant to CWC section 13350(e) is ten dollars ($10) per gallon discharged. Therefore the maximum liability that the Regional Water Board may assess is $11,388,250.

CWC section 13350(e) does not set a minimum liability when utilizing the per gallon option. The Enforcement Policy requires that:

> *"The adjusted Total Base Liability shall be at least 10 percent higher than the Economic Benefit amount so that liabilities are not construed as the cost of doing business and that the assessed liability provides a meaningful deterrent to future violations."*

Therefore, the minimum liability amount the Regional Water Board may assess is $194,930 (see economic benefit computation above). The recommended liability falls within the allowable statutory range for minimum and maximum amounts.

**Step #10: Final Liability Amount**

The total proposed civil liability in this matter is $1,383,007.50, which corresponds to $1.21 per gallon of untreated sewage discharged.

The proposed amount of civil liability attributed to the discharge of 1,138,825 gallons [1,139,825 gallons less 1,000 gallons pursuant to Section 13385.(c)(2) of CWC] of untreated sewage was determined by taking into consideration the factors required in CWC sections 13327 and 13385(e), and the penalty calculation methodology described in the Enforcement Policy. The following table summarizes the penalty calculation:

**Table 8 – Summary of Enforcement Policy Penalty Matrix Calculations**

| Discharger Name/ID: | South San Luis Obispo County Sanitary District | | |
|---|---|---|---|
| | | | Violation 1 |
| Discharge Violations | Step 1 Potential Harm Factor (Generated from Button) | 1 | |
| | Step 2 Per Gallon Factor (Generated from Button) | 0.8 | |
| | Gallons | 1,138,825 | |
| | Statutory / Adjusted Max per Gallon ($) | 2.00 | |
| | **Total** | | $ 1,138,825 |
| | Per Day Factor (Generated from Button) | 1 | |
| | Days | 2 | |
| | Statutory Max per Day | 10000.00 | |
| | **Total** | | $ 10,000 |
| Non-Discharge Violations | Step 3 Per Day Factor | 0.35 | |
| | Days | 180 | |
| | Statutory Max per Day | $ 1,000 | |
| | **Total** | | $ 63,000.00 |
| | **Initial Amount of the ACL** | | $ 1,211,825.00 |
| Adjustment Factors | Step 4 Culpability | 1.1 | $ 1,333,007.50 |
| | Cleanup and Cooperation | 1 | $ 1,333,007.50 |
| | History of Violations | 1 | $ 1,333,007.50 |
| | **Step 5 Total Base Liability Amount** | | $ 1,333,007.50 |
| | **Step 6** Ability to Pay & to Continue in Business | 1 | $ 1,333,007.50 |
| | **Step 7** Other Factors as Justice May Require | 1 | $ 1,333,007.50 |
| | Staff Costs | $ 50,000 | $ 1,383,007.50 |
| | **Step 8** Economic Benefit | $ 177,209 | $ 1,383,007.50 |
| | **Step 9** Minimum Liability Amount | 194,930 | |
| | Maximum Liability Amount | $ 11,388,250 | |
| | **Step 10 Final Liability Amount** | | $ 1,383,007.50 |

The proposed civil liability is appropriate for this untreated sewage discharge based on the following reasons:

- The discharge of large amounts of untreated sewage into waters of the United States adversely impacted the beneficial uses of Oceano Lagoon, Meadow Creek and the Pacific Ocean;
- The degree of toxicity in untreated sewage posed a threat to the beneficial uses of the above surface waters;
- The Discharger failed to implement upgrades and/or protection from floodwaters or 100-year frequency flood;
- The proposed civil liability amount is sufficient to recover costs incurred by staff of the Water Board, and serves as a deterrent for future violations; and,

- The determination of the proposed civil liability is consistent with the requirements of the State Water Board's Enforcement Policy.

# EXHIBIT C

# Exhibit C
## to SSLOCSD's Petition for Review

| Order No. R3-2012-0041<br>Finding or Conclusion | Objection/Contrary Evidence |
|---|---|
| The California Regional Water Quality Control Board, Central Coast Region (Central Coast Water Board), having held a public hearing on September 7, 2012 and on October 3, 2012, to receive evidence and comments on the allegations contained in Administrative Civil Liability Complaint No. R3-2012-0030, dated June 19, 2012, having considered all the evidence and public comment received, and on the Prosecution's recommendation for administrative assessment of Civil Liability in the amount of $1,388,707.50, however finds that an assessed penalty of $1,109,812.80 is applicable as follows: | There are at least two inaccuracies in this finding. First, the public hearing was on September 8th in addition to September 7, 2012 since the hearing lasted over 16 hours. In addition, the Administrative Civil Liability Complaint No. R3-2012-0030, dated June 19, 2012 sought $1,383,007.50 in administrative civil liability, not "the amount of $1,388,707.50" stated in this finding. (*See* ACLC at para. 1; Ex. 1-22.) This finding is off by $5,700. This is also different from the figure stated at the hearing of $1,408.007.50, or the last value requested by the Prosecution Team of $1,338,707.50. (Hearing Transcript ("HT") at 6:7-12, 15:20-24; 206:15 to 207:7; Ex. 116-1, Ex. 118-31 to 118-32.[1]) |
| 1. The Discharger's wastewater treatment facility, located adjacent to the Oceano County Airport and the Pacific Ocean in Oceano, California is subject to Waste Discharge Requirements Order No. R3-2009-0046, NPDES Permit No. CA0048003, adopted on October 23, 2009, by the Central Coast Water Board and the State Water Resources Control Board Order (State Water Board) No. 2006-0003-DWQ, "Statewide General Waste Discharge Requirements for Sanitary Sewer Systems." | The Regional Board provided no citation to any evidence to support these findings or conclusions. Therefore, portions of this Finding 1 are inaccurate and contrary to uncontroverted evidence. For example, the wastewater treatment facility/plant (WWTP) is not directly adjacent to the Pacific Ocean. (*See* Ex. 40-1.) In addition, the WWTP itself is not regulated by Order No. 2006-0003-DWQ, only the 8.8 miles of the District's collection system. (Ex. 1-4,[1] Ex.5-3 (para. 2), Ex. 6-1020, Ex.56, Ex. 65.) |
| 2. On December 19, 2010, the Discharger's WWTP influent pump station automatically shut down after floodwater entered an electrical conduit leading into a pump motor control system in the WWTP influent pump station. The penetrating floodwater shorted a critical motor control component (shunt switch) which then resulted in tripping a large main circuit breaker that supplied power to all four influent pumps located in the pump station. | The Regional Board provided no citation to any evidence to support these findings or conclusions. Therefore, portions of this Finding 2 are inaccurate and contrary to the evidence presented by the District's expert, Bill Thoma. (*See* Ex. 25; HT at 22:20 to 62:11.) The power was not "automatically" shut down, power was halted when a shunt trip "safety off" switch tripped. (Ex. 25 (para. 14); HT at 34:16 to 36:5.) "The breaker was not tripping due to a short circuit or overload, it was being 'controlled' off by the shunt trip switch." (Ex. 25-5, lines 16-17.)<br><br>This finding also ignores the unrebutted evidence in Exhibit 25, particularly paragraphs 11 and 17 and Exhibit 98, paragraph 13. Typical rain events had not caused this type of problem in 26 years |

[1] The hearing transcript is cited with page:line numbers indicated (e.g., 1:3-12), whereas exhibits are cited with exhibit number and page number (e.g. 1-4).

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| | since this part of the WWTP was constructed in 1986 (HT at 272:21-273:3, 279:4-11, 288:14 to 289:1, 463:12-15, 472:4-473:12; Ex. 98-3 (para. 9)), and would not cause this event given the facts that existed on that date unless there was a large enough head of standing floodwater. (Ex. 25-26, lines 16-23; HT at 53:22 to 54:25, 59:15-59:19, 463:12-15, 473:13-474:10.) The Prosecution Team never proved and the Regional Board included no findings that this amount of standing floodwater at the WWTP was less than a "100 year frequency flood." (Ex. 28-43, D-1, para. I.B.2.) |
| 3. The resulting loss of power to all four influent pumps caused untreated sewage to surcharge upstream into the Discharger's collection system and overflow, discharging untreated sewage from the collection system into the environment. Additionally, the Discharger documented and certified six sewer backups where untreated sewage was discharged inside six residential homes through private sewer service lateral connections. The total discharge of sewage between December 19th and 20th is estimated at 674,400 gallons (December 2010 Sewer Overflow). | The Regional Board provided no citation to any evidence to support these findings or conclusions. In addition, portions of this Finding 3 are incomplete, inaccurate, and contrary to the evidence presented. The loss of power was not the singular reason for the surcharging, since that event happened without a spill event. (Ex. 24; HT at 471:17-472:9.) In addition, the influent gates had been intentionally closed to protect the downstream parts of the treatment plant and stormwater was being pumped back to the plant from on-sites sumps, thereby creating additional excess flow to the plant. (HT at 252:9-253:7, 271:15-24; Ex. 98-3 (para. 6).) Also, it was not just "untreated sewage" that surcharged, it was mixed with stormwater flows. (HT at 188:17-18; Ex. 98-29, Ex. 52-4, Ex. 61, Ex. 63, Ex. 98-3 (paras. 6-7).) Further, the overflows were not just from the District's collection system, it was also the collection system of Oceano Community Services District ("OCSD"). (Ex. 1-4, Ex. 29-34, Ex. 49-1.) The six sewer backups certified by the District were not documenting "discharges" inside those homes, just backups into toilets and bathtubs on the first floor due to the fact that these homes were not demonstrated to have sewer backflow prevention devices required by the Plumbing Code and local ordinances. (HT at 159:13 to 162:5; Ex. 1-4, Ex. 7 (CIWQS reports stated "The system backed up into toilets and bathtubs."), Ex. 29-44, Ex. 40-1, Ex. 60.) The estimated gallonage in this paragraph was not an initial or certified estimate by the District (*see* Ex. 9-5 to 9-8; Ex. 1-11), that was a calculated gallonage by the District's expert for use at the hearing in this matter to demonstrate the inaccuracy of the Prosecution Team's spill estimate of more than 1.1 million gallons. (*See* Ex. 32.) |

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| 4. In response to the December 2010 Sewer Overflow, the Discharger submitted a spill report to the Central Coast Water Board on January 3, 2011. On March 7-8, 2011, State Water Board staff inspected the Discharger's WWTP and collection system facilities. | The Regional Board provided no citation to any evidence to support these findings or conclusions. In addition, portions of this Finding 4 are incomplete. For example, the first sentence ignores that the District complied with the 2-hour reporting requirement in the Sanitary Sewer Collection System Order (HT at 276:5-8; Ex. 9-3 and 9-16, Ex. 90-1 to 90-2, Ex. 91-1), and that the January 3, 2011 complied with the requirement for a follow-up five day report. Similarly, the second sentence ignores that the March 7-8, 2011 inspection found no violations that were prosecuted during this enforcement action. (Ex. 98-4:20-22.) |
| 5. On April 18, 2011, the Central Coast Water Board issued a Notice of Violation and a 13267 Letter requiring the Discharger to submit a technical report concerning the December 19, 2010, discharge of untreated sewage from its collection system. In response, the Discharger submitted a technical report dated May 31, 2011, detailing the nature, circumstances, extent and gravity of the unauthorized discharge of untreated sewage. | The Regional Board provided no citation to any evidence to support these findings or conclusions. The documents supporting these facts were exhibits in this matter and should have been cited. |
| 6. The Discharger is required to properly maintain, operate and manage its sanitary sewer collection system in compliance with the Regional Water Board Order No. R3-2009-0046, NPDES Permit No. CA0048003 and the Sanitary Sewer Collection System Order to provide adequate capacity to convey base flows and peak flows, including flows related to wet weather. | This is not a finding, but a statement of law. See *City of Carmel-by-the-Sea v. Bd. of Supervisors*, 71 Cal.App.3d 84, 93 (1977) (held written findings of fact insufficient as a matter of law because merely a recitation of the statutory language). There is no evidence cited to support this finding, and there is no evidence in the record to demonstrate that the District's collection system lacked the capacity to convey base and peak flows, including flows related to wet weather. (*But see* Ex. 26 (Capacity Study); Ex. 37 (I&I Study); Ex. 98-20, paras. 6 and 7.) |
| 7. The discharge of untreated sewage to waters of the United States is a violation of the requirements in R3-2009-0046, section 301 of the Clean Water Act, CWC section 13376, and the Sanitary Sewer Collection System Order. Violations of these requirements are the basis for assessing administrative civil liability pursuant to Water Code section 13385. | It is unclear whether this is a finding or merely a statement of law. If meant to be a finding of violation, then there are no specific allegations of specific actions that caused a violation or specific sections of the NPDES permit, Clean Water Act section 301, CWC 13376, or the Sanitary Sewer Collection System Order that were violated. In addition, there was no evidence cited to support this finding. |
| 8. The events leading up to the December 19, 2010, headworks failure and sanitary sewer overflow were not upset events. An upset is defined in 40 CFR Section 122.41(n) and in the Discharger's Waste Discharge Requirements Order | The Regional Board provided no citation to any evidence to support these findings or conclusions. In addition, the Regional Board failed to include a legal basis for the conclusion that this was not an upset event (Gov't Code §11425.10(a)(6) and |

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| No. R3-2009-0046, NPDES Permit No. CA0048003, Attachment D, Standard Provision H, as an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by improperly designed treatment facilities, inadequate treatment facilities, lack of preventative maintenance, or careless or improper operation. | §11425.50(a)) and to acknowledge that the District had met each of the specific factors required by the affirmative defense of upset, namely demonstrating through properly signed, contemporaneous operating logs or other relevant evidence that: 1) an upset occurred and the permittee identified the cause(s) of the upset (Ex. 9, Ex. 6, Ex. 25, Ex. 23; HT at 296:12-22, 469:13 to 472:9; 2) the permitted facility was at the time being properly operated (Ex. 52-9, Ex. 61, Ex.98-2 (para. 5).); 3) the permittee submitted notice of the upset within 24 hours (HT at 276:5-8; Ex. 6-10, Ex. 9-3 and 9-16, Ex. 90-1 to 90-2, Ex. 91-1); and 4) the permitted complied with the remedial measures required (HT 477:24 to 478:12; Ex. 9-9 to 9-14, Ex. 23-2 to 23-8; *see also* 40 C.F.R. §122.41(n)(3)(i)-(iv); Permit, Ex. 28-36 to 28-37.) In fact, the evidence showed that the upset defense is never recognized, despite clear regulatory and permit language allowing such a defense. (HT at 140:13-20, 212:10-13.) |
| 8.(a.) The December 2010 Sewer Overflow violations were not violations of technology based effluent limitations. The violations were based on the discharge of untreated sewage from the Discharger's collection system. | The Regional Board provided no citation to any evidence to support these findings or conclusions. The Regional Board failed to include a legal basis for its conclusion or to demonstrate that the "violations were not violations of technology based effluent limitations." An "effluent limitation" is "any restriction established by the State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources…" (CWA Section 502(11), 33 U.S.C. §1362(11); 40 C.F.R. §122.2; *see also* Cal. Wat. Code §13385.1(d)(may be expressed as a prohibition).) "The intent of a technology-based effluent limitation is to require a minimum level of treatment for industrial/ municipal point sources based on currently available treatment technologies while allowing the discharger to use any available control technique to meet the limitations." (EPA Permit Writer's Manual, Ch. 5 at 49.) Municipal wastewater is required to meet secondary treatment standards, which are technology-based standards. (*Id.* at 77, 33 U.S.C. §1311(b)(1)(B); 40 C.F.R. §133.102; SSS WDR, Ex. 56-4, para. 16.) The prohibition against discharging "untreated" waste is a technology-based requirement because POTW discharges treated to secondary treatment standards are not prohibited. (Ex. 28-10 to 28-11 (Discharge |

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| | Prohibitions and TBELs).)<br><br>In addition, this finding ignores contrary case law where sanitary sewer overflows were found by federal courts to be upsets. (*Sierra Club v. Cty. of Colo. Springs*, No. 05–CV–01994–WDM–BNB, 2009 WL 2588696 at *5 (D. Colo. Aug. 20, 2009); *Sierra Club of Miss., Inc. v. Cty. of Jackson, Miss.*, 136 F. Supp. 2d 620, 629 (S.D. Miss. 2001).) This finding also ignores Ninth Circuit precedent that an upset defense must be provided because 100% compliance cannot be achieved because technology is fallible. (*Marathon Oil v. EPA*, 564 F.2d 1253, 1272-3 (9th Cir. 1977).) |
| 8.(b.) The Discharger failed to protect the treatment plant from inundation from a 100-year frequency flood as required by Order No. R3-2009-0046, NPDES Permit No. CA0048003. The Discharger acknowledged [citing HT page 516] that the storm event was not a 100-year event. The key factor that caused the sewer overflow was the lack of protection from the storm event, a factor within the control of the Discharger. | Although one general citation to a page in the hearing transcript was provided, the Regional Board provided no *specific* citations and, in other cases, failed to provide any evidence to support each of the other findings or conclusions in this paragraph. In addition, the Regional Board included no required information on the credibility of any witness for which the hearing transcript was cited in this Order. (Gov't Code §11425.50(b).)<br><br>The District's permit does not define a 100-year frequency flood, what duration applied, or what protections are required (e.g., protection from I/I from this size event, or protection from flooding at plant).[2] (Ex. 28-43, D-1, para. I.B.2; Ex. 16-1, Ex. 45-1; District's Opposition Brief at 20-21.) The Regional Board cited to no evidence to demonstrate that this rain event constituted less than a 100-year flood frequency, particularly because the flood was not caused by the amount of rain, but by the improperly operated flood control gates on Arroyo Grande Creek, which allowed water to pool in the lagoon in the Oceano area and back up into the WWTP. (HT at 463:16-466:2, 516:16 to 517:13, *see also* HT at 413:5 to 414:24; Ex. 98-3 (para. 7), Ex. 6-344 to 6-346; District's Opposition Brief at 20-21.) In fact, much of the evidence is to the contrary the Regional Board's findings. (*See e.g.*, |

[2] This lack of clarity opens this requirement up to being "void for vagueness." A regulation fails to comport with due process where it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." (*U.S. v. Williams* (2008) 553 U.S. 285, 128 S.Ct. 1830, 1843; *see also Kasler v. Lockyer* (2000) 23 Cal.4th 472, 498-499, 97 Cal.Rptr.2d 334, 2 P.3d 581 ("A law failing to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited violates due process under both the federal and California constitutions.").)

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| | Ex. 1-8 ("three feet deep of floodwater," "residents forced to evacuate"), Ex. 1-11 ("major storm event and localized flooding"), Ex. 96, Ex. 98-3 (para.8).)<br><br>The Regional Board's citation to the hearing transcript and the alleged acknowledgement by the District is not *proof* that this was less than a 100-year frequency flood. The uncorrected transcript at pages 515-518 stated as follows:<br><br>515<br>16 **Do you know what the permit requirements**<br>17 **requires the storm level to be protected against?**<br>18 A I believe it's a hundred years --<br>19 THE REPORTER: I'm sorry, you need to repeat --<br>20 THE WITNESS: It's a one-hundred-year-storm<br>21 event.<br>22 BY MS. MACEDO:<br>23 **Q Okay. And do you know what -- based on**<br>24 **these rainfall totals, do you have an approximation of**<br>25 **what this worked out to be?**<br>516<br>1 A I have heard various statements. I can't<br>2 look at those numbers and say there are tables,<br>3 which -- but they're both durational based, as well as<br>4 volume based. So a 24-hour duration in terms of that<br>5 2.7, you know, that 2.7 might have peaked at 2:00 in<br>6 the afternoon, and then been excessive until 3:00.<br>7 That would be a 24-hour period that would need to be<br>8 considered for that analysis, and I can't talk about<br>9 these numbers here.<br>10 **Q Okay. Do you agree that the five or so**<br>11 **inches does not rise to the level of one-hundred-year**<br>12 **flood?**<br>13 A As far as I know, over that duration, I<br>14 do not think that is a one-hundred-year flood.<br>15 **Q Okay. And yet on your penalty**<br>16 **calculation factor slides, you described this as an act**<br>17 **of God event. Do you know where you got that**<br>18 **terminology?**<br>19 A Well, act of God -- in many ways. The<br>20 tree getting stuck in the flap gate. Washing its way<br>21 down to the headworks. Intruding the headworks and<br>22 shorting out of the pumps. The flood event that came<br>23 up, I would probably say a lot of these community<br>24 members would call this potentially an act of God<br>25 event. This was a significant event is maybe<br>517<br>1 mischaracterizing that term.<br>2 **Q Okay. So you're describing it similar to**<br>3 **any rainfall being an act of God, the way you're using**<br>4 **the term?**<br>5 A I would not say so because this was a<br>6 very unique situation. As I mentioned previously in my<br>7 testimony, this was a large watershed. It rained the<br>8 day prior. It just made its way down to the lagoon<br>9 while the new rain fell on top of it, and<br>10 increased the situation -- the confluence there with<br>11 the two together, it did not work right. There was<br>12 substantial flooding. That was a situation more than a<br>13 normal rainy Saturday.<br><br>Since there was no pin-point citation, the District presumes the Order's citation to page 516 points to Mr. Yonker's testimony when asked if this rose to the level of a 100-year flood that "As far as I know, |

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| | over that duration, I do not think that is a one-hundred-year flood." (HT at 516:13-14.) The fact that he didn't think, over that duration, that it was not a 100-year flood does not prove that it was not. The Prosecution Team had the burden of proof on that issue and failed to make that demonstration with evidence in the record, and the Regional Board failed to support this finding with evidence. Therefore, this finding cannot be relied upon to disprove the existence of an upset.<br><br>Moreover, it is not clear that the upset defense would not apply to the 100-year flood protection requirement, which is also a technology-based requirement. In addition, other testimony demonstrated that the WWTP had been upgraded to provide 100-year flood protection. (HT at 282:23-283:4; Ex. 98-5 (para. 14), Ex. 98-30 (para 49).) |
| 8.(c.) The Discharger failed to properly maintain the emergency pump by keeping the effluent valve closed. The operator's inability to fully open the effluent valve caused sewage to back up into the collection system and eventually overflow. The District has the ability to keep the valve open at all times and had done so for years [citing HT at 296], but changed its standard operating procedures advising staff to keep the valve closed [citing Ex. 99]. | Although some general citations to pages in the hearing transcript and an exhibit were provided, the Regional Board provided no *specific* citations and, in other cases, failed to provide any evidence to support each of the other findings or conclusions in this paragraph.<br><br>The keeping open of a valve does not raise to the level of a failure to "properly maintain" that valve. (Ex. 1-11 (Prosecution Team admitted that the valve was "inadvertently in the 'closed' position"); HT at 296:12-22 ("human error").) The District's standard operating procedures (SOP) both before and after the spill incident had the same procedure to start the emergency pump. (*See* Ex. 99, Pg. 2, Procedure 2.0, "A. To turn on: 1. Open all 12" valves." and Pg. 3, Procedure 2.0, "A. To turn on: 1. Open all 12" valves.") The only thing that changed was that the procedure for turning *off* the emergency pump after its use. (Ex. 99, Pg. 3, Procedure 2.0.B.4.) The evidence showed that maintaining that influent valve in the closed position was not an operational problem during normal plant operations. (Ex. 98-4:2-3; HT at 275:5-13, 474:11-18.) The only reason it became a problem was the complication caused by flooding into the headworks where the valve was located. (HT at 126:21-24, 255:2-256:5.)<br><br>Moreover, the State Water Board Office of Enforcement had a copy of the District's SOP and had undertaken inspections of the WWTP before the spill event and could have pointed out this |

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| | problem if they had the foresight to know it would be a problem. (Ex. 14-2 and 14-10; HT at 171:2-172:20, 210:21 to 211:5.) |
| 9. The December 2010 Sewer Overflow Event was not a bypass as defined in 40 CFR Section 122.41(m) and in the Discharge's Waste Discharge Requirements Order No. R3-2009-0046, NPDES Permit No. CA0048003. A bypass is an intentional diversion of waste streams from any portion of a treatment systems. The Discharger did not intentionally divert waste streams around treatment systems. The Discharger experienced a sanitary sewer overflow caused by failure of influent pumps and failure of the emergency backup system to pump influent flows. | The Regional Board provided no citation to any evidence to support these findings or conclusions. In addition, the Regional Board failed to include a legal basis for the conclusion that this was not an bypass. (Gov't Code §11425.10(a)(6) and §11425.50(a).) In addition, the Regional Board failed to acknowledge that the Regional Board cannot take an enforcement action if the District had met each of the specific factors required by the defense of bypass, namely that: A) bypass was unavoidable to prevent severe property damage (HT at 252:9-16. 260:20-261:2, 271:15-24; Ex. 98-4 (paras. 10-11)); B) there were no feasible alternatives (Ex. 6-8 to 6-9; HT at 252:17 to 253:14 ("nowhere else for it to go")); and C) the permittee submitted notice of the bypass within 24 hours (HT at 127:17-18, 276:5-8; Ex. 6-10, Ex. 9-3 and 9-16, Ex. 90-1 to 90-2, Ex. 91-1; *see also* 40 C.F.R. §122.41(m) (4)(A)-(C); Permit, Ex. 28-36 to 28-37.)<br><br>The evidence clearly shows that the District <u>did</u> intentionally divert waste streams around the treatment systems to protect the downstream plant. (HT at 271:15-24, 272:2-17; 273:4-12; 274:5-13, 517:14 to 518:1, 218:24 to 219:8; Ex. 1-13 (Prosecution Team recognized "Reported bypass volume"), Ex. 1-13, n. 5 ("total bypass flow").) In fact, one of the Regional Board's own findings in Step 4.b. acknowledged the "Discharger responded quickly by diverting flows to the plant." (Order No. R3-2012-0041 at 8.) That diversion of flows to the plant constituted a bypass overruling the Permit's discharge prohibition in Discharge Prohibition [III.] G of Order No. R3-2009-0046, which states, 'The overflow or bypass of wastewater from the Discharger's collection, treatment, or disposal facilities and the subsequent discharge of untreated or partially treated wastewater, <u>except as provided for in Attachment D, Standard Provision 1.G (Bypass)</u>, is prohibited." (Permit, Ex. 28-11, Ex. 28-36 to 28-37.) Thus, the existence of a bypass overrules the prohibition against an overflow of wastewater from the Discharger's collection, treatment, or disposal facilities and subsequent discharge of untreated or partially treated wastewater. |

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| 12. .... The staff report entitled *Technical Report for Noncompliance with Central Coast RWQCB Order No. R3-2009-0046 and State Water Resources Control Board Order No. 2006-0003-DWQ, "Statewide General Waste Discharge Requirements for Sanitary Sewer Systems", Unauthorized SSO occurring on December19-20, 2010,* dated June 2012, is included in Attachment 3 of the Staff Report and incorporated herein, and analyzes the violations under the Enforcement Policy's penalty calculation methodology.... | The "*Technical Report*" referred to and ostensibly incorporated by reference in Finding 12 of the Order was marked as Exhibit 1 in the ACL hearing. The Prosecution Team admitted several times that there were errors in this document. (*See* Prosecution Team's Reply Brief at 1, note 1; HT at 162:24 to 163:3, 169:9-15, 439:22 to 440:20; *see also* Ex. 98-19 to 98-34 (pointing out errors).) Therefore, the incorporation of this document incorporated those admitted errors. In addition, Exhibit 1 was essentially argument since there was no supporting evidence to justify the conclusions contained therein. Therefore, incorporation of these unsupported conclusions makes the Order similarly unsupported.<br><br>Also, it is unclear what is meant by "is included in Attachment 3 of the Staff Report and incorporated herein" in this finding. There is no Attachment 3 to the Technical Report, so it is unclear what exactly was being "incorporated herein." |
| 12. **1. <u>Step 1 – Potential for Harm for Discharge Violations</u>**<br><br>a. Factor 1: Harm or Potential Harm to Beneficial Uses (5)<br><br>This score evaluates direct or indirect harm or potential harm for the violation. The estimated discharge of 674,400 gallons of untreated sewage entered the Oceano Lagoon, Meadow Creek, Arroyo Grande Creek Estuary, and the Pacific Ocean. In addition, the sewage entered at least six private residences and potentially caused human health risks. San Luis Obispo County posted signs warning the public of the sewage spill and rain advisory on all main beach entrances and all advisory boards for nine days. The REC-1 and REC-2 beneficial uses of the beaches were restricted for more than five days. Therefore, there was a high threat to beneficial uses and a score of 5 or "major" is appropriate. | The Regional Board provided no citation to any evidence to support these findings or conclusions.<br><br>Under the Enforcement Policy, a score of (5) constitutes the greatest possible harm, where "Major" is defined as a "high threat to beneficial uses (i.e., significant impacts to aquatic life or human health, long term restrictions on beneficial uses (e.g., more than five days), high potential for chronic effects to human or ecological health)." Ex. 34-17. No evidence of any significant impacts to aquatic life or human health were presented or cited.[3] In fact, evidence exists to the contrary. (HT at 480:8-482:25; Ex. 1-14 ("undetermined harm"), Ex. 1-16 ("chronic effects...were unlikely"), Ex. 6-14 ("no environmental impacts have been identified").)<br><br>The reference to sewage in private residences does not affect any beneficial use of surface waters regulated by the Regional Water Boards. Sewer backups into homes are beyond the regulatory jurisdiction of the Water Boards and are within the |

[3] Although the Prosecution Team many times alluded to evidence, none was actually submitted. (*See e.g.,* HT at 187:6-8; *see also* HT at 331:6 to 334:1, 336:3-14, 347:2-21 (reliance on hearsay).)

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| | purview of the Department of Public Health or County Health Departments. (*See* Cal. Water Code §13000, *et seq.*, §13193; §13271(c); Ex. 29-20 (Matt Keeling of Regional Water Board stated backups in homes not SSOs).) Further, the local beaches were not restricted for more than 5 days *due to the sewer spill*, but instead the evidence demonstrates that the beaches were closed *prior to* the sewer spill because of a rain and surf advisory, so the affect on beneficial uses was likely low or non-existent. (*See* HT at 478:13-479:4; Ex. 97-3 (closed on 12/19/2010), Ex. 97 (minimal exposure due to low beach attendance) Ex. 98-27 (para. 41), Ex. 98-28 (para. 42), Ex. 98-29 (para. 43), Ex. 52-2, Ex. 61.) Thus, the assignment of a major (5) harm factor was inappropriate and inconsistent with other ACLs in the State. (*See* Ex. 101-2 (showing all other ACLs for sewage spills cited by Prosecution Team were 1-4 in harm factor); Ex. 53, Ex. 88-66 (harm score of 2 for Dec. 17-19, 2010 event because "below moderate harm is warranted because the discharges were diluted with high wet weather flows in the receiving water; and the actual recreational uses are typically less during wet weather events."), Ex. 98-29 (para. 46).) |
| 12. 1. **Step 1 – Potential for Harm for Discharge Violations**<br><br>b. Factor 2: Physical, Chemical, Biological or Thermal Characteristics of the Discharge (4)<br><br>Raw sewage contains microbial pathogens known to be harmful [sic] public health including, but not limited to the following:<br><br>- Bacteria: campylobacter, E. coli, vibrio cholera, salmonella, S. typhi, shigella, yersinia<br><br>- Parasites: cryptosporidium, entameoba, giardia<br><br>- Viruses: adenovirus, astrovirus, noravirus, echovirus, enterovirus, reovirus, rotavirus.<br><br>Raw sewage can cause illness including abdominal cramps, vomiting, diarrhea, high fever, and dehydration. Additionally, it can cause disease such as gasteroenteritis, salmonellosis, typhoid fever, pneumonia, shigellosis, cholera, bronchitis, | The Regional Board provided no citation to any evidence to support these findings or conclusions about microbial pathogens in sewage, the illnesses that can be caused by exposure to sewage, environmental impacts, floatable inorganic objects, or toxicity. Therefore, these findings are wholly unsupported.<br><br>In addition, these findings failed to consider the evidence presented that the sewage in the collection system was diluted by stormwater prior to the spill, and that the spill mixed with 69 million gallons of stormwater from the lagoon prior to being discharged into the creek and Pacific Ocean. (HT at 479:9-480:7; Ex. 52-4, Ex. 61, Ex. 63, Ex. 98-3 (paras. 6-7).) This mitigating factor should have been taken into consideration. (*See accord* Ex. 73-72, 88-66.)<br><br>Also, the Regional Board should have considered that exposure was limited to a small portion of the collection system in an area that was being evacuated due to flooding (not the sewer spill), and that the local beaches were already closed. (HT at 478:13-479:4; Ex. 6-3, Ex. 49-2, Ex. 96, Ex. 98-3 (para.8).) These mitigating factors should also have |

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| hepatitis, aseptic meningitis, cryptosporidium, amoebic dysentery, giardisis, and even death.<br><br>Raw sewage can also cause environmental impacts such as a loss of recreation and can be detrimental to aquatic life support, can result in organic enrichment, and can result in exposure to floatable inorganic objects (e.g., condoms, tampons, medical items (syringes).)<br><br>The degree of toxicity in untreated sewage poses a significant threat to human and ecological receptors. Accordingly, a score of 4 is appropriate. | been taken into consideration. (Ex. 52-4.)<br><br>Finally, the Regional Board apparently failed to consider other evidence of bacteria levels in the lagoon water that was already above applicable water quality standards that would have mixed with the sewer spill water. (Ex. 33; HT at 496:17-20.)<br><br>Thus, the highest possible characteristics factor of 4 was unsupported. There was no evidence to justify modifying upward the ACL Complaint's recommendation of a factor of 3. (Ex. 1-16.) In addition, a characteristics factor of 4 is not consistent with the other sewer spills cases cited by the Prosecution Team. (*See* HT at 189:18-20; Ex. 101-2 (showing all other ACLs for sewage spills cited by Prosecution Team were consistently ranked 3 in the characteristics factor); Ex. 53.) |
| 12. **1. <u>Step 1 – Potential for Harm for Discharge Violations</u>**<br><br>c. Factor 3: Susceptibility to Cleanup and Abatement (1)<br><br>Less than 50% of the discharge was susceptible to cleanup or abatement due to rising floodwaters and multiple discharge points which made cleanup or recovery impossible. Therefore a score of 1 is assigned. | The Regional Board provided no citation to any evidence to support these findings or conclusions. |
| Based on the above determinations, the **Potential for Harm final score** for the violations is [10]<br><br>(5) + (4) + (1) = 10<br><br>= Potential Harm | The Regional Board assigned the very highest possible total harm score to this sewer spill that occurred during a declared flood emergency. (Ex. 6-3.) The Regional Board failed to explain why this sewer spill, which was diluted by more than 69:1 (Ex. 1-11 ("the untreated sewage overflow had been washed away by stormwater runoff and ended up in the Pacific Ocean"), Ex. 1-17 ("discharge was mixed with floodwaters"), Ex. 52-4, Ex. 61, Ex. 63), should rank as high as a huge oil or toxic chemical spill that causes fish kills and bird deaths when there was absolutely no evidence presented of any actual harm to beneficial uses, only presumed harm due to beach closures when the fact was that the beaches were already closed prior to the spill event. (HT at 478:13-479:4; Ex. 97-3 (closed on 12/19/2010), Ex. 98-27 (para. 41), Ex. 98-28 (para. 42), Ex. 98-29 (para. 43); Ex. 52-2, Ex. 61.) Further, this maximum harm score is wholly inconsistent with other sewer spills in California, particularly those in wet weather. (*See* |

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| | *e.g.*, Ex. 101, Ex. 53.) This score is also inconsistent with the Prosecution Team's recommendations. (HT at 190:8-11.) |
| 12. 2. **Step 2 – Assessment for Discharge Violations** …<br><br>Per Gallon Assessment<br><br>Four overflow estimates were presented at the September 7, 2012, hearing including one from the Prosecution team (1,139,825 gallons) and three from the Discharger (Discharger's 417,298 gallons, RMC 674,400 gallons, Appleton 2,250,000-3,000,000 gallons.) The RMC estimate [citing Exhibit 32-9] is the most credible estimate. RMC was hired by the Discharger to evaluate the Prosecution's flow estimate and to provide an overflow estimate. RMC utilized wet weather hydrographs to model the flow rates for the overflow event. The Board recognizes that the RMC estimate may include inaccuracies, including failure to account for potential floodwater influent and inflow, and relying on potentially inaccurate Discharger calculations [citing Exhibit 105, page 8[4]] for overflows occurring after 6:00 pm on December 19, 2010. However, the RMC estimate utilized a detailed hydraulic analysis developed by [sic] engineer with over 30 years of sewer collection experience utilizing flow data from similar wet weather events. The RMC estimate is consistent with the Discharger estimate of 661,000 gallons provide in the Discharger's Technical Report [citing Exhibit 6-118] using a similar method as RMC. The Board finds that the most accurate estimated overflow volume from the December 2010 Sewer Overflow is 674,400 gallons. | Although some citations to exhibits were provided, the Regional Board failed to provide any evidence to support each of the other findings or conclusions in this paragraph. In addition, the Regional Board failed to recognize the difference between the spill estimates provided initially and certified in CIWQS, and those provided at the hearing as a double check on the estimates provided by the District and/or the Prosecution Team. (Ex. 9-5 to 9-8, Ex. 32, Ex. 47; 48-377 to 48-384; Ex. 6-116 to 6-125.) All estimates were just that – estimates. (HT at 428:17-19.) To require that a WWTP or sewer collection agency undertake the kind of detailed analysis done by RMC in order to complete every estimate for the CIWQS spill reporting is an unsupported and burdensome precedent. If the Regional Board believed that the RMC-type of methodology was the most appropriate, then it should have affirmed the District's initial estimate of 661,000 gallons, which it acknowledged in this finding was consistent with RMC's estimate. (*See also* HT at 551:8 to 552:8.)<br><br>Moreover, the selection of this methodology ignored the legal issues related to the requirement to report the spill volume from each manhole in CIWQS, which was the driving force behind the District's selection of a different spill volume. (HT at 476:8-19, 552:9-22; Ex. 46-9, Ex. 68 (blank form showing location required), Ex. 98-22, para. 18, Ex. 98-24 (para. 26).)<br><br>The Regional Board also failed to identify the reasons why the other spill estimates were not valid since each of them were consistent with the State Water Board's training methodologies for sewer spill estimation. (Ex. 66.)<br><br>Finally, the Regional Board failed to subtract 1000 gallons when inputting this amount into the spreadsheet. (*See* last page attached to Order No. R3-2012-0041; HT at 194:8-15 (subtraction required); Wat. Code §13385(c)(2).) This single |

[4] This citation is inappropriate as Exhibit 105 was excluded as evidence, and was allowed only as an equivalent to argument in a brief. *See* HT at 372:13-373:9. Thus, this is not proper "evidence" to rely upon to support this finding.

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| | error resulted in the penalty amount being too high by $1,512.00. |
| 12. **2. <u>Step 2 – Assessment for Discharge Violations</u>** …<br><br>a. Deviation from Requirement (moderate)<br><br>Prohibition C.1 of Order No. 2006-0003-DWQ states that, "[a]ny SSO that results in a discharge of untreated or partially treated wastewater to waters of the United States is prohibited." While the Discharger demonstrated a general intent to comply with the discharge requirements, the Discharge [sic] knew of the risk of flooding and the issue of underground utility boxes containing electrical cables. The Discharger did not implement the proposed improvement project that would have prevented the December 2010 Sewer Overflow, and thus partially compromised the above prohibition in their permit. Therefore the score of "moderate" is appropriate.<br><br>b. Per Gallon Factor (.6)<br><br>Using a Potential for Harm score of "10" and a "Moderate" | The first sentence is merely a statement of law, and not a finding. See *City of Carmel-by-the-Sea v. Bd. of Supervisors*, 71 Cal.App.3d 84, 93 (1977) (held written findings of fact were insufficient as a matter of law because they were merely a recitation of the statutory language). For the remainder, the Regional Board provided no citation to any evidence to support these findings or conclusions. (*But see* Ex. 52-6; HT at 37:2-16.)<br><br>The finding that "the Discharger demonstrated a general intent to comply with the discharge requirements" demonstrates that the selection of the "Moderate" criteria was incorrect since this criteria meets the Enforcement Policy's definition of "Minor" – "(e.g. while the requirement was not met, there is general intent by the discharger to follow the requirement)." (*See* Enforcement Policy, Ex. 34-19.) This sentence also fails to explain "the issue of underground utility boxes containing electrical cables." The uncontroverted evidence showed that underground boxes and the wires therein were designed to have water intrusion and condensation and had drains in the boxes to ensure that there was not standing water. (HT at 31:4-14, 33:11 to 34:13, 41:8-18, 53:22-54:5, 483:1-8; Ex. 25-6:19-21 ("This situation was much different than with incidental rain or the levels of moisture in the box normally expected from rain. Occasional and incidental water is always assumed to be present in an underground box….").)<br><br>The Regional Board also failed to consider the evidence rebutting the conclusion that the "Discharger did not implement the proposed improvement project that would have prevented the December 2010 Sewer Overflow, and thus partially compromised the above prohibition in their permit." The evidence showed that much of the electrical system repairs had been done by 2010. (HT at 474:19-475:8, Ex. 51). In addition, the District's experts testified that the electrical wiring project cited by the Prosecution Team (Ex. 2) would not have prevented the December 2010 Sewer Overflow (HT at 56:9-16, 553:12 to 555:20, 30:11-24, 59:15-19; Ex. 25-6 to 25-9, Ex. 98-21 (para. 11), Ex. 98-31 (para. 51)) and there was no contradictory expert opinion testimony. |

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| 12. **2. <u>Step 2 – Assessment for Discharge Violations</u>** …<br><br>c. Maximum/Adjusted Maximum per gallon liability amount ($2.00 gallon)<br><br>The maximum per gallon liability amount allowed under Water Code section 13385, subdivision (c) is $10 for each gallon discharged to waters of the United States but not cleaned up that exceeds 1,000 gallons. The Enforcement Policy recommends a maximum per gallon penalty amount of $2.00 per gallon for high volume sewage spill and storm-water discharges.<br><br>The Enforcement Policy also states, however, "[w]her reducing these maximum amounts results in an inappropriately small penalty, such as dry weather discharges or small volume discharges that impact beneficial uses, a higher amount, up to the maximum per gallon amount, may be used."<br><br>A $2.00 per gallon maximum for this sewage spill resulted in an appropriate penalty. Therefore, a $2.00 adjusted per gallon liability amount is used. | Although no evidence was cited to support this finding and the District takes issue with the conclusion that the penalty was "appropriate," the conclusion to use the $2.00 per gallon adjusted maximum appears to be consistent with the Enforcement Policy's recommendation for a maximum per gallon penalty amount of $2.00 per gallon for high volume sewage spill and storm-water discharges. (Enforcement Policy, Ex. 34-19; HT at 193:20-24.) |
| 12. **2. <u>Step 2 – Assessment for Discharge Violations</u>** …<br><br><u>Per Day Assessment</u><br><br>To calculate the initial liability amount on a per day basis, a **Per Day Factor** is determined from Table 2 of the Enforcement Policy (page 15) by using the **Potential for Harm score** (step 1) and the extent of **Deviation from Requirements** (minor, moderate, or major) of the violation.<br><br>a. Deviation from Requirement (10)<br><br>The deviation from requirement is (Moderate)<br><br>b. Per Day Factor (.6)<br><br>A Per Day Factor of (0.6) is selected from Table 2 of the Enforcement Policy. | The Regional Board provided no citation to any evidence to support these findings or conclusions. To the extent that the Regional Board relied on earlier findings on the Potential for Harm and Deviation from Requirements, see objections above. |

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| 3. **Step 3 – Per Day Assessments for Non-Discharge Violations**<br><br>Not applicable. | The Regional Board provided no explanation as to why the per day assessments for Non-Discharge Violations alleged in ACL Complaint No. R3-2012-0030 (ACLC at para. 24; Ex. 1-17 to 1-19) were "not applicable" and failed to explain why the Prosecution Team dismissed these claims. (HT at 194:20 to 195:1.) The finding that these assessments are merely "not applicable" is misleading, incomplete, and fails to tell the whole story on this issue. |
| 4. **Step 4 – Adjustment Factors**<br><br>Staff considered certain Conduct Factors to calculate adjustments to the amount of the Initial Amount of the Administrative Civil Liability as follows: | The first sentence stated that "Staff considered certain Conduct Factors…." What was considered by Regional Board Staff is irrelevant, what matters is what was considered by the Regional Board and this section for Step 4 contains no findings or evidence as to what was considered by the Regional Board members. |
| 4. **Step 4 – Adjustment Factors**<br><br>a. Culpability (1.4)<br><br>The Enforcement Policy suggests an adjustment multiplier between 0.5 and 1.5 depending on whether the discharge was a result of an accident or the discharger's intentional/negligent behavior. The Discharger failed to provide adequate protection of its equipment from 100-year frequency floods as required under its Permit. The Discharger also failed to ensure implementation of proper standard operating procedures when the Discharger failed to ensure that the emergency bypass pump valve remained in the "open" position during standby mode. The Discharger failed to comply with the Sanitary Sewer Collection System Order to provide adequate sampling to determine the nature and impact of the release. The Discharger had prior knowledge of the potential risks associated with the electrical wires [citing Exhibit 2, Exhibit 71] and the failure to protect plant equipment from 100-year frequency flood [citing Hearing Transcript page 516] as required by its discharge permit. The Discharger failed to provide redundant pumping capabilities by having all four influent pumps connected to a single shunt trip. A single point of failure, the shunt trip, caused all four influent pumps to fail. The Discharger failed to provide a reliable emergency pump that could operate without repeatedly shutting down. The emergency pump had operational problems | Although some general citations to pages in the hearing transcript and two exhibits were provided, the Regional Board provided no *specific* citations and in other cases, failed to provide any evidence to support each of the other findings or conclusions in this paragraph and to justify increasing the culpability factor by 0.3 over the culpability factor of 1.1 that was recommended in the ACL Complaint. (HT at 196:15-20; Ex. 1-19 to 1-20 (factor of 1.1 recommended on same facts); Ex. 52-8.)<br><br>In addition, where evidence was cited by the Regional Board, this evidence did not support the finding being made. For example, Exhibits 2 and 71 were cited for the finding that "[t]he Discharger had prior knowledge of the potential risks associated with the electrical wires." However, Exhibit 2 does not reference issues with floodwaters, only with deterioration over the years after being submerged in groundwater and failure of non-waterproof wire. (Ex. 2 at 2-3.) Expert testimony demonstrated that replacement of the non-waterproof wire (which was mostly from the initial 1960s wiring and not the subsequent 1986 installation) would not have prevented this event. (HT at 23:4-11, 32:8-19; Ex. 25-5:1 to 25-10:13, Ex. 98-21(para. 11), Ex. 98-31 (para. 51).) Similarly, Exhibit 71 shows that the District was proactive in 2007 by making improvements in the plant to prevent standing water from entering the underground utility boxes, not that the District was |

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| noted before the overflow event. Prior to the overflow event, treatment plant staff recommended sending the pump back to the manufacturer [citing Hearing Transcript page 286]. Therefore, this factor should be adjusted to a higher multiplier of 1.4 for negligent behavior. | negligent for not addressing the wiring issues. (HT at 54:14-25, 56:9-16, 241:13 to 242:18, 244:6-12, 244:21-23, 306:23 to 308:2; Ex. 71-4 and 71-6; *see also* Ex. 36-88 (wiring complete in FY11-12), Ex. 39-6 (complete 8/30/11), Ex. 51, Ex. 98-31 (para. 51); *but see* HT at 124:5-9 and 125:11-15 (Fischer testimony contrary to evidence).)<br><br>As stated above, the Regional Board cites to page 516 of the Hearing Transcript as a demonstration that the District "failed to protect the plant equipment from 100-year frequency flood," but that citation does not prove that fact. There is no evidence to support that this event or the standing water on the ground due to the failures in the local flood gates were less than a 100-year flood event, and the testimony of the District's witness was "As far as I know, over that duration, I do not think that is a one-hundred-year flood." (HT at 516:13-14.) That conditional and uncertain statement does not relieve the Prosecution Team or the Regional Board's burden of demonstrating that it was in fact a was less a one-hundred year flood.<br><br>The Regional Board found that the "Discharger failed to provide a reliable emergency pump that could operate without repeatedly shutting down" and the "emergency pump had operational problems noted before the overflow event. Prior to the overflow event, treatment plant staff recommended sending the pump back to the manufacturer" citing to the Hearing Transcript at page 286. However, that portion of the transcript also recognizes that the District sent "it back to the factory several times before we actually accepted it." (HT at 286:19-20; Ex. 98-3:26 to 98-4:1.) Moreover, there was no testimony that the exact issue that occurred during the spill event, namely the switching off after an hour due to circuit programming, had happened or was evident to the District prior to this event. (HT at 483:10-484:14; *but see* Ex. 98-4:6-9.) The evidence also demonstrated that it was unlikely that this problem would have been discovered except during an emergency since the District was unable to test the pump for that long due to air quality restrictions on diesel engines. (HT at 293:21 to 294:8, 532:19-533:4, 534:1-25; Ex. 30, Ex. 98-4:5-6.) These facts were not acknowledged in the findings.<br><br>Finally, the findings state that the "Discharger failed to provide redundant pumping capabilities by |

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| | having all four influent pumps connected to a single shunt trip. A single point of failure, the shunt trip, caused all four influent pumps to fail." Uncontroverted testimony was given that the shunt trip was a safety switch to shut down the pumps immediately if there were a human safety hazard (e.g., body part stuck in a pump). (Ex. 25-5:9-12; HT at 35:24-36:5.) Thus, for that safety purpose, having a single switch was prudent and not negligent. In addition, the District had a backup of the emergency pump in case all four pumps went out due to the shunt trip or any other reason, even though it was not required. (HT at 274:5-13, 291:5-292:17, 533:17-25; Ex. 98-3 (para. 10).) Finally, there was no mention of the fact that the District has since contracted to split the shunt trip into two switches from two different electrical services to avoid this problem in the future. (HT at 538:19-24; Ex. 39-12, Ex. 23-1.)<br><br>The imposition of a 1.4 culpability score is not only inconsistent with and higher than all other sewer spill ACLs highlighted by the Prosecution Team (Ex. 101), but also fails to take into consideration the steps set forth in the Enforcement Policy (Ex. 34). Under the Enforcement Policy, for this factor, the Regional Board was required to take a first step "to identify any performance standards (or, in their absence, prevailing industry practices) in the context of the violation." (Enforcement Policy, Ex. 34-22.) It is not clear that the Regional Board identified each of the particular applicable performance standards or prevailing industry practices, particularly in relation to the Standard Operating Procedures (SOPs) and sampling findings. If other entities do not have similar SOPs and do not routinely sample when there is a flood event, high surf, and an evacuation order (Ex. 96, Ex. 98-3 (para.8)), then it was inappropriate for the Regional Board to hold these out as standard norms that were violated.[5] Moreover, the findings fail to recognize that the District's emergency pump, which the District was not even required to have, prevented a much greater spill volume from |

[5] In addition, many of these alleged instances of "violation" were not violations alleged in the ACL Complaint and were beyond the scope of this enforcement action because the District was not on notice of these alleged violations. There was no alleged violation of sampling requirements under the ACL Complaint or in Exhibit 1. *See* ACLC, Paras. 20-24, and Exhibit 1 at 7, para. C.3.

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| | being released. (Ex. 98-4, lines 9-11.)<br><br>The test is what a reasonable and prudent person would have done or not done under similar circumstances. (Enforcement Policy, Ex. 34-22; HT at 196:6-9, 501:19 to 502:11.) This analysis is not done with the benefit of hindsight, but what would have been done under the circumstances at hand. There is no indication that this standard was applied in this case. |
| 4. **Step 4 – Adjustment Factors**<br><br>b. Cleanup and Cooperation (1)<br><br>The Discharger responded quickly by diverting flows to the plant and secured additional pumps from other agencies and informed the public regarding the sewage spill. The Discharger also timely responded to the NOV and 13267 letter. Therefore, a multiplier of 1.0 is appropriate. | The Regional Board cites no evidence to support these findings or conclusions. Nevertheless, assuming these findings are true, there is no justification for why 1.0 was chosen out of the range of "between **0.75 to 1.5,** with the lower multiplier where there is a high degree of cleanup and cooperation, and higher multiplier where this is absent." (Enforcement Policy, Ex. 34-22.) Although there may have been an inability to clean up the spill due to the floodwaters, the facts indicated a high degree of cooperation. (HT at 223:24-224:3; 502:12-503:6; Ex. 1-20 ("responded quickly," "secured additional pumps," "timely in its response," noting "Discharger's efforts to manage a difficult situation while coordinating response work."), Ex. 52-9 to 52-11; Ex. 61.) Thus, the multiplier of 1.0 was not adequately justified or demonstrated to be "appropriate." (HT at 225:14-22.) |
| 4. **Step 4 – Adjustment Factors**<br><br>c. History of Violations (.9)<br><br>The Discharger had no history of sewage overflow violations in recent years. Therefore, a factor of .9 is appropriate. | The Regional Board cites to no evidence to support this finding regarding violations, and the finding is inconsistent with the facts that not only is there "no history of sewage overflow violations in recent years," there is no history of violations in 25 years.<br><br>Although the District appreciates the reduction in this factor below a neutral of 1.0,[6] there is no justification why this could not have been less (e.g., .75) given the very long term excellent compliance record on sewer spills by the District. (Ex. 52-9, Ex. 61, Ex. 95-2 (just $6,000 in MMPs since 2000), Ex. 98-2 (para. 5).) |

[6] The Prosecution Team attempted to mislead the Regional Water Board by arguing that a value below 1.0 was not allowed. HT at 198:3-4, 225:23 to 226:18, *but see* 230:22 to 231:6.

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| **6. Step 6 – Ability to Pay and Ability to Continue in Business**<br><br>If there is sufficient financial information to assess the violator's ability to pay the Total Base Liability Amount or to assess the effect of the Total Base Liability Amount on the violator's ability to continue in business, the Total Base Liability Amount may be adjusted to address the ability to pay or to continue in business.<br><br>Sufficient evidence was presented that the Discharger could pay the proposed penalty [citing Exhibit 114]. The Discharger failed to demonstrate it does not have the ability to pay the recommended penalty. Accordingly, the Total Base Liability was not adjusted. | The Prosecution Team failed to present sufficient financial information to assess the District's ability to pay prior to the ACL hearing on September 7, 2012, and the Regional Board cited to no evidence provided prior to that date in support of its findings. The only document cited by the Regional Board, Exhibit 114, was entered into evidence *after* Dr. Horner's testimony and was not a document used previously. (HT at 78:16-79:18, 97:16-25; Ex. 109-2 (Horner stating "[t]he ability to pay analysis *could not be conducted* for the SSLOCSD because the discharger did not submit the necessary financial documents.")(emphasis added).)<br><br>According to the Enforcement Policy, "If staff does not put any financial evidence into the record initially and the discharger later contests the issue, staff may then either choose to rebut any financial evidence submitted by the discharger, or submit some financial evidence and provide an opportunity for the discharger to submit its own rebuttal evidence. In some cases, this may necessitate a continuance of the proceeding to provide the discharger with a reasonable opportunity to rebut the staff's evidence." (Enforcement Policy, Ex. 34-24 (emphasis added).) Since Exhibit 114 was produced at the hearing and there were little to no breaks provided in the 16-17 hour hearing, the District did not have an adequate opportunity to rebut the staff's evidence, and no continuance of the proceeding was provided to allow the District that reasonable opportunity. (HT at 83:13-23, 97:16-21.) Therefore, the District is requesting in conjunction with its Petition for Review to allow for additional evidence on this issue to be allowed into the record on review. (Wat. Code §13320(b); 23 C.C.R. §2050.6.)<br><br>In addition, Exhibit 114 is the audited financial record for June of 2010 for the previous fiscal year. It is not evidence of the District's *current* ability in 2012 to pay this huge penalty exceeding a million dollars. (HT at 64:24 to 65:12, 96:24 to 97:3; 98:1-3.)<br><br>Moreover, the District met its burden to |

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| | demonstrate its *lack* of an ability to pay. (Ex. 36-12 (2012-13 Budget[7] - Accounting funds), Ex. 36-16 (operations fund negative), Ex. 36-38 (substantial decrease in Fund 20 since 2010), Ex. 36-46 (substantial decrease in Fund 26 since 2010), Ex. 36-52 (money earmarked for capitol projects/expenditures), Ex. 52-13, Ex. 94 and HT at 503:7-12 (evidence of large loan debt not addressed by Regional Board), Ex. 98-31to 98-33 (para. 52); Ex. 117 (showing decreased amount in LAIF Fund since 2010), Ex. 6-261 to 6-296, 6-556 to 6-663, 6-859 to 6-862, 6-1932 to 6-2795 (historic budgets); HT at 498:4-500:17 (District testimony re: Ex. 117), 503:7-12.) The District provided testimony and documents to show that the lion's share of its monetary assets are tied up in encumbered funds funded by connection fees that are earmarked for capital improvement projects. (*Ibid., see also* Ex. 1-20 (recognized main fund (20) with most money was from connection fees, and also recognized that the Discharger might provide evidence to warrant a downward adjustment); HT at 107:17 to 108:13 (long term capital projects), 200:22 to 202:19 and 207:23 to 208:25 (District's current need for expensive upgrades).) Testimony was also provided that the District would have to raise rates to pay this penalty, a process subject to a vote of the ratepayers, many of which are low income. (Ex. 52-13; District's Opposition Brief at 35-36, HT at 83:13-84:8, 89:15-90:3, *see also* 421:25-423:14, 423:20-425:10.) None of these facts were recognized or even acknowledged by the Regional Board. Therefore, its findings are not based on evidence in the record. |
| **7. <u>Step 7 – Other Factors as Justice May Require</u>**<br><br>If the amount determined using the above factors is inappropriate, the amount may be adjusted under the provision for "other factors as justice may require," but only if express findings are made to justify this. In addition, the costs of investigation and enforcement are "other factors as justice may require," and should be added to the liability | The Regional Board cites to no evidence to support the claimed $75,000 in staff costs or any justification for the exercise of discretion to impose staff costs on the District. (HT at 220:3-16; Ex. 104 (requested staff costs of $235,000 and got just $70,000).) The only cost figure that was nominally justified by the Prosecution Team was $50,000 at the time the ACL was issued, based on a summary table contained in the Prosecution Team's initial Evidentiary Brief at 11:20-12:27. However, even |

[7] Dr. Horner said that the budget cannot be used for Ability to Pay analysis. (Ex. 109-2 (Horner stating "[t]he FY 2012-13 adopted budget cannot be used to determine fund balance for the District.") However, the Prosecution Team included figures from the District's 2010-11 Budget. (Ex. 1-21.)

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| amount.<br><br>Staff costs incurred by the Central Coast Regional and State Water Resources Control Board are $75,000 and are added to the Total Base Liability Amount … | that amount was unsupported by any time sheets, contemporaneous logs, or other evidence. In addition, there was no analysis by the Regional Board as to whether these claimed staff costs were reasonable given that many of the tasks were done by 3-4 people, and much of the work was done to support the non-discharge violations that were ultimately dismissed by the Prosecution Team. (HT at 128:17-19, 169:9-25, 206:20 to 207:4; Ex. 98-5, para. 15; Ex. 115, Ex. 118-26 to 118-29.) Further, it was never explained how the rates for the Site Cleanup Program applied in this case. (Ex. 17.)<br><br>Further, there was no consideration by the Regional Board under this factor of the declared state of emergency during this flood event (Ex. 6-3, 6-1804, 6-1807) that could have been deemed a mitigating factor, or that many of the spill locations occurred in another sewer service district (OCSD), which is separately regulated. (HT at 119:22 to 120:14, 150:13-25, 434:23 to 435:7.) Had the penalty been issued to both the District and OCSD, OCSD could have made a compelling upset (third party) defense, and could have made a good showing of an inability to pay and/or applied its entire share of the penalty as a Compliance Project due to the low income status of that community, which also bore the brunt of the flooding. (Enforcement Policy, Ex. 34-33 to 34-34; *see also* HT at 164:1 to 165:8.) |
| **8. <u>Step 8 – Economic Benefit</u>**<br><br>The Economic Benefit Amount is any savings or monetary gain derived from the act or omission that constitutes the violation. The Enforcement Policy states that the adjusted Total Base Liability Amount shall be at least 10 percent higher than the Economic Benefit Amount so that liabilities are not construed as the cost of doing business and that the assessed liability provides a meaningful deterrent to future violations.<br><br>The primary economic benefit for the Discharger was the delay of upgrading its electrical wiring system and protecting in-ground utility boxes from potential floodwaters as planned in 2004 for a total budget cost of $200,000. The economic benefit gained from this project delay is calculated at $177,209 based upon the US EPA's BEN model to | As stated previously, the Regional Board failed to cite to any evidence that a "delay of upgrading its electrical wiring system and protecting in-ground utility boxes from potential floodwaters as planned in 2004" would have prevented the spill. Moreover, there was contrary evidence that this wiring upgrade would not have prevented the spill. (Ex. 25-4 to 25-9, Ex. 98-21(para. 11), Ex. 98-31 (para. 51); HT at 23:4-11, 32:8-19, 553:12 to 554:18.) Thus, the $200,000 figure selected, and thus the calculated benefit of $177,209 was not supported by evidence. [It should also be noted that $177,209 was not the figure used in the spreadsheet attached to the final Order; instead that spreadsheet used $180,000.]<br><br>Moreover, the calculated economic benefit using US EPA's BEN model was flawed as demonstrated by Dr. Horner's testimony at the ACL hearing |

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| calculate economic benefits for noncompliance with regulations. | since no justification existed for many of the inputs into that program (*see* Ex. 18, Ex. 72), thereby invalidating the result. (HT at 69:18 to 78:7, 84:14 to 85:13; *see also* Ex. 98-19, para. 2.)<br><br>The Regional Board also failed to address the fact that this was not a true benefit because the costs were ultimately paid (Ex. 36-88, Ex. 39-6), and the only real economic benefit that could be demonstrated was the cost of the missing conduit seal for the shunt trip that was designed to be installed in 1986, but was not installed by the construction contractor. (HT at 34:16 to 35:23, 297:12-298:6, 575:3-12, 73:20-74:2, 313:4-13; Ex. 39-12 ($499.98 for installing needed seal).) |
| **9. <u>Step 9 – Maximum and Minimum Liability Amounts</u>**<br><br>The **Minimum Liability Amount** is **$194,930**. As mentioned in Step 8, the Enforcement Policy states that when making monetary assessments, the adjusted Total Base Liability Amount shall be at least 10 percent higher than the Economic Benefit Amount. Further, Water Code section 13385, subdivision (e) requires the Central Coast Water Board to recover any economic benefit or savings received by the violator.<br><br>The **Maximum Liability Amount** is **$6,754,000**. The maximum administrative civil liability that may be assessed pursuant to Water Code section 13385, subdivision (c) is the sum of ten thousand dollars ($10,000) for each day in which the violation occurs and $10 for each gallon discharged but not cleaned up that exceeds 1,000 gallons. The maximum administrative civil liability that may be assessed pursuant to Water Code section 13268, subdivision (b)(1) is $1,000 per day of violation. | Since the validity of these figures and findings rely on the validity of previous findings, these findings are of dubious validity since the previous findings were not adequately supported with evidence as required by law.<br><br>In addition, it is unclear why this finding was included: "The maximum administrative civil liability that may be assessed pursuant to Water Code section 13268, subdivision (b)(1) is $1,000 per day of violation." All reporting violations were dismissed. Therefore, this finding was inappropriate to be included in this Order.<br><br>Conversely, if a penalty *is* being imposed under section 13268, then there are inadequate findings and evidence to justify which part of the penalty is being assessed under that section as opposed to section 13385. |
| **10. <u>Step 10 – Final Liability Amount</u>**<br><br>In accordance with the above methodology, the Central Coast Water Board finds that the **Final Liability Amount is $1,109,812.80.** This Final Liability Amount is within the statutory minimum and maximum amounts. | Since the validity of this figure and these findings rely on the validity of previous findings, these findings are of dubious validity since the previous findings were not adequately supported with evidence as required by law for the reasons set forth above.<br><br>In addition, this amount is inconsistent with other enforcement actions. (Ex. 50-83, Ex. 27, Ex. 53, Ex. 73 to Ex. 89, Ex. 101, Ex. 102.) Further, it is unclear why some of the figures in this Order were |

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| | rounded and others were not. It seems ridiculous to have a penalty of more than $1 million include cents. Thus, it was unreasonable not to consistently round the figures calculated in the Order. |
| **IT IS HEREBY ORDERED**, pursuant to California Water Code section 13385 and 13268, that the South San Luis Obispo County Sanitation District is assessed administrative civil liability in the amount of $1,109,812.80.<br><br>The Discharger shall submit a check payable to State Water Resources Control Board in the amount of **$1,109,812.80** to *SWRCB Accounting, Attn: Enforcement, P.O. Box 100, Sacramento, CA 95812-0100* by **November 5, 2012**. A copy of the check shall also be submitted to *Regional Water Quality Control Board, Attn: Harvey Packard, 895 Aerovista Place, Suite 101, San Luis Obispo, California, 93401* by **November 5, 2012**. The check shall be made out to the *Clean Up and Abatement Account* and shall include the administrative liability Order No. R3-2012-0041.... | It is unclear why a reference to Water Code section 13268 was included in the Order. All reporting violations were dismissed by the Prosecution Team. Therefore, this citation is inappropriate to include in this Order.<br><br>The Order fails to consider having a portion of the penalty go to Supplemental Environmental Projects (or Enhanced Compliance Actions), even though that was endorsed by the Prosecution Team and some public commenters. (HT at 227:6-12, 420:22-23, Ex. 34-27, 34-35.)<br><br>The directions to submit a check payable to "*State Water Resources Control Board*" in the first sentence, and to the "*Clean Up and Abatement Account*" in the final sentence. These directions are contradictory and confusing and should have been clarified before the final Order was issued.<br><br>In addition, the Order should recognize that if the person or entity subject to the Order seeks review under Section 13320 or 13330, then the time for payment of the penalty is extended during that review period. (Cal. Water Code §13323(d).) |