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BEFORE THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

CENTRAL COAST REGION

In the Matter of:	ACLC No. R3-2012-0030
SOUTH SAN LUIS OBISPO COUNTY SANITATION DISTRICT, ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. R3-2012-0030	PROSECUTION TEAM'S REBUTTAL BRIEF
	August 27, 2012

I. Introduction

At its core, this is a simple matter. There was an illegal sanitary sewer overflow at the South San Luis Obispo County Sanitation District ("District") wastewater treatment plant on December 19-20, 2010. The parties disagree about the volume of the overflow and how to assess the penalty under the State Water Board's penalty methodology. The Board must decide those issues.

While the District has not had reported previous overflows at its waste water treatment plant ("WWTP") before, the December 19-20 overflow resulted in the largest public health exposure to raw sewage entering private residences since the State Board started collecting this information in its public database, CIWQS.[1] In addition, staff's investigation has revealed that the overflow was

[1] CIWQS stands for California Integrated Water Quality System. The CIWQS system has collected overflow information since January 2, 2007, and a total of 3,644 backups have been reported to the database. Prior to the District's overflow in December 2010, the reported events with the highest

[Footnote continued on next page.]

caused and exacerbated by the District's delayed preventive maintenance and repair, incorrect standard operating procedures in place, and failed risk assessment and mitigation issues, which were brought to the attention of the District in advance of the overflow and left unresolved. This evidence was a significant factor in the Prosecution Team's recommended penalty.

II. There Are No Affirmative Defenses Available to the District that Reduce the Penalty to Zero

A. The Upset Defense is Not Available For the Violations Alleged in the Complaint

40 C.F.R. section 122.41(n) provides as follows:

> (n) Upset – (1) Definition. Upset means 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 operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventative maintenance, or careless or improper operation.

The District's permit, at D-3 (Bates-stamped 28-36) is identical, except for changing "permittee" to "Discharger." However, the District intentionally and misleadingly omits three critical words from the definition in its opposition brief, resulting in a bad faith argument being presented to the Board. The District defines an upset as "an exceptional incident in which there is unintentional and temporary noncompliance with effluent limitations because of factors beyond the reasonable control of the Discharger." This definition is incomplete, leaving out the words "technology based permit" preceding "effluent limitations." In developing effluent limitations for NDPES permits, the Water Board must apply limits based on both the technology available to treat the pollutants (technology-based effluent limits) and limits that are protective of the beneficial uses of the receiving water (water quality-based effluent limits). In the 1980s, the EPA refused to extend the

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number of backups were CIWQS Spill Id. Nos. 708690, in which four retail shops were affected, and 7771368, in which seven discharge locations in a hotel building were reported.

upset defense to water quality-based effluent limits. The upset cases cited by the District were decided primarily during the creation of the doctrine (the 1970s/1980s), not cases in which the defense was applied to a particular discharger. Following the creation of the defense in the Code of Federal Regulations, states were allowed to omit the defense from its permits, thereby making compliance with state standards more difficult. *Mianus River Preservation v. Administrator, E.P.A.* (1976) 541 F.2d 899, 906 ("A State that has enacted more stringent standards thus could, and presumably would, without violating the [Clean Water Act], issue NPDES permits containing those more stringent requirements.")[2]

In examining the language of the permit at issue, the District simply misquotes it, perhaps because there is case law directly on point that states that violations of water quality-based effluent limits **are not subject to the defense**. *See Student Public Interest Research Group of New Jersey, Inc. v. P.D. Oil & Chemical Storage, Inc.* (1986) 627 F.Supp. 1074, 1086 ("Defendant's permit provides that the effluent limitations for biological oxygen demand and total suspended solids are based on state water quality standards. Violations of these limitations are not subject to the upset defense.") The technology-based permit effluent limitations that would be subject to the upset defense are specified at 40 C.F.R. 133 and Table A of the California Ocean Plan, and would be BOD, TSS, settleable solids, turbidity, oil & grease, and pH (Permit, Table F-5, p. F-12, Bates 28-81). The ACLC does not allege violations of any technology-based or water quality based effluent limitations, nor does it seek any penalties based on such violations.

A significant portion of the District's brief is dedicated to why the upset defense should apply, **but it does not apply to this illegal overflow**. The District may be arguing for the EPA to extend the defense to water quality based effluent limits, but the EPA has not yet done so, and Regional Boards would not be obligated to include the defense even if EPA modified the federal regulations. *See Mianus River, supra*, 541 F.2d at 906. Currently, the District's argument is a collateral attack on the permit and improper in the context of an enforcement action. *See for*

[2] The District's permit does contain the upset defense.

example, Sierra Club v. Union Oil Co. of California (1988) 716 F. Supp. 429, 437; ("[Discharger] should have commenced an administrative challenge to its NPDES permit. It may not attempt to modify its permit here in defense to a citizen enforcement action."); *see also Connecticut Fund for the Environment v. Upjohn Co.* (D. Conn. 1987) 660 F.Supp.1397, 1413; *Connecticut Fund for the Environment v. Job Plating Co.* (D. Conn. 1985) 623 F.Supp. 207, 216-17.

To the extent the Board would like to consider whether the upset defense should be applied, even though it is not provided for in either the Code of Federal Regulations or the current District permit and would be an extension of existing case law, we will review the cases cited by the District and the evidence required, since a permittee seeking to use the affirmative defense of upset has the burden of proof to show:

(i) An upset occurred and that the permittee can identify the cause(s) of the upset;

(ii) The permitted facility was at the time being properly operated; and

(iii) The permittee submitted notice of the upset as required in paragraph (1)(6)(ii) (B) of this section (24 hour notice).

(iv) The permittee complied with any remedial measures required under paragraph (d) of this section.

It is the Prosecution Team's position that a series of human errors related to delayed preventive maintenance and repair, incorrect standard operating procedures in place, and failed risk assessment and mitigation issues resulted in the overflow, rendering the upset defense unavailable by its very definition. However, an analysis of the factors shows that the storm event was not significant enough to qualify as an upset, nor does the District qualify for the upset defense for a number of other reasons.

In terms of identifiable causes, the District points to the rain event, the electrical system shunt trip switch failure, and the emergency diesel pump's 12" discharge valve located in the influent bay ("discharge valve") being closed. In response, the Prosecution Team argued in its initial brief and as will be stated in more detail *infra*, the rain event was not of such an "exceptional" character to qualify as an upset, and both the shunt breaker tripping and the discharge valve being closed were due to human error and not technical failures. Neither the shunt trip

switch failure nor the discharge valve being closed were beyond the control of the District. The electrical upgrading project had been a budget item for over 6 years, but had consistently been delayed despite warnings that during storm events water tended to gather in the headworks influent structure, and an awareness that the damaged wiring caused fires and power failures. (Ex. 2) Contrary to the District's allegation, the discharge valve was not "inadvertently" closed – **it was closed pursuant to incorrect Standard Operating Procedures that were issued by the District October 2010, less than two months before the spill** and modified in May 2011, after the District recognized that keeping the discharge valve shut drastically affected the volume of the overflow and the District's ability to respond to it. (Exhibit 99; October 29, 2010 Standard Operating Procedures: "3. Close all 12" valves;" May 6, 2011 Standard Operating Procedures: "4. Close 12" Valve in influent bay must be left open and locked out in that position.")

In addition, former WWTP Chief Plant Operator ("CPO") Jeff Appleton, who was CPO during the day of the overflow, testified as to several other maintenance issues, including grading issues and a leaky influent gate. Mr. Appleton's voiced his concerns to John Wallace prior to the overflow that these issues were not remedied prior to the overflow. (Exs. 19, 20)

> I was concerned because the main motor leads ran through this box, and we knew from prior concerns that the wiring condition in the plant was very poor, so there was the possibility that even with a minimal rainfall that this box could flood and we could have a very serious issue if we lost pumping capacity at the plant.

Appleton Deposition Transcript, Exhibit 100, 22:8-14.

And:

> The influent gate leaked considerably. That's putting it mildly.

Appleton Deposition Transcript, Exhibit 100, 39:17-18.

The District does not plan to call any WWTP employee to testify about conditions at the District. While credibility is a matter for the Board members to judge for themselves, Mr. Appleton was the District's plant superintendent for more than a decade and on site during the overflow. His testimony indicates that the District was not being properly operated, such that the District should not be entitled to a complete defense for the December 19-20 overflow, and pay no liability for its

actions.

While the cases cited by the District largely focus on the creation of the upset doctrine and how it originally came into existence, **while at the same time failing to describe its boundaries and inapplicability to the current overflow**, the District cites to only two cases in which the upset defense was successful. There are many more cases in which courts examine the factors of the upset defense and find the dischargers have not carried their burden. *See Natural Resources Defense Council, Inc. v. Texaco Refining and Marketing, Inc.* (1992) 80 F. Supp.1, 17 (equipment failures including a leaking check valve, unidentified problems with final clarifiers and desalters, and a failure of the pumping system were not found to be beyond the reasonable control of the Discharger and so the upset defense was denied); *Student Public Interest Research Group of New Jersey, Inc., supra*, (granting summary judgment to plaintiff as to liability); *Connecticut Fund for the Environment v. Upjohn Co.* (1987) 660 F.Supp. 1397 (summary judgment denying defense granted); *United States v. City of Toledo* (1994) 867 F.Supp.598 (defense denied); *International Union, United Automobile, Aerospace and Agricultural Implement Workers Of America, AFL-CIO v. Amerace Corp.* (1990) 740 F.Supp.1072, 1082-83 (defense denied when violations were caused by alleged mechanical problems).

In conclusion, the District is not entitled to the upset defense because the overflow was caused or exacerbated by the lack of preventative maintenance and careless operation. Furthermore, the complaint does not allege violation of technology-based effluent limitations and so the defense is not applicable. Finally, the District is unable to provide evidence, even if the defense did apply, that it should apply to the current facts.

B. The District Has Not Provided Any Evidence It Intentionally Bypassed Treatment

In another questionable presentation of the statutory provisions, the District fails to define bypass. "Bypass" means the **intentional** diversion of waste streams from any portion of a treatment facility. 40 C.F.R. section 122(m). The District's permit language is identical. See Attachment D, Standard Provisions, G(1) (Bates stamped 28-35). However, the District admits twice in its brief that the overflow was unintentional (District Brief, p. 10:6 and fn. 8). While the

District is allowed to argue in the alternative, the crucial component of a bypass is intention and the District's bypass argument (District's Brief, 16:7-18-3) thus must fail.

A bypass is an intentional, deliberate action to divert the waste stream, usually around the whole treatment facility or components of it, resulting in effluent violations. In this case, while the District did pump sewage flows around the failed influent pumps at the WWTP, the pumped flows were into the WWTP and the sludge drying beds, not around the entire WWTP. While the District claims it meets the factors of the bypass defense, it is prohibited when "adequate back-up equipment should have been installed." (40 C.F.R. section 122.41(m)(i)(B); Permit Attachment D, Section G(3)(b), Bates 28-36; *see also* SSS WDR D.6(v), Ex. 56-8)

While the District is not entitled to the bypass defense because it lacked the requisite intention, nor has it satisfied the factors of the defense, cases are few and far between granting the defense to dischargers and excusing liability. For example, the bypass defense was denied in *U.S. v. City of Toledo, Ohio*, in which plaintiff argued that the regulation contemplated an emergency only, not routine wet weather events. *U.S. v. City of Toledo, Ohio* (1999) 63 F.Supp.2d 834, 839; *Save Our Bays and Beaches v. City and County of Honolulu* (1994) F.Supp. 1098, 1136 (holding that a bypass was not unavoidable when a feasible alternative would have been to install adequate backup facilities, despite the economic realities of doing so). The District should not be able to escape liability under this affirmative defense.

C. Impossibility Is Not a Defense To Clean Water Act Liability

Despite the District's arguments, impossibility is not, as a matter of law, a valid defense to Clean Water Act liability. All citations to the contrary are dicta.[3] *United States v. City of Hoboken* (1987) 675 F.Supp. 189, 197-98; *United States v. CPS Chemical Co., Inc.* (1991) 779 F.Supp. 437, 453; *cf. United States v. Boldt* (1991) 929 F.2d 35, 41 (holding the Clean Water Act also does not recognize a defense of economic of business necessity).

III. The Recommended Penalty Is Consistent with the Enforcement Policy and Other

[3] "Dicta" is not binding as legal precedent, and is a statement by a court that goes beyond the facts for determination.

ACLCs

A. Per Gallon Amount

Attached as Prosecution Team Exhibit 101 is a summary of the SSO cases that have been resolved using the Water Quality Enforcement Policy effective May 20, 2010.[4] As discussed in the Prosecution Team's Case in Chief Brief, the recommended penalty is $1.21 a gallon based on the Prosecution Team's estimated volume. This amount is lower than the penalties applied to North Tahoe Public Utility District ($1.85/gallon) and City of Oakland ($1.88/gallon), and after the District provided additional examples, is also lower than those applied to Grass Valley ($1.55/gallon), Redwood City ($1.67/gallon), Sebastopol ($2.74/gallon), Ukiah ($4.42/gallon), and Irvine Ranch ($2.06/gallon). While the facts of all cases are different, the Prosecution Team did consider the circumstances of this spill and choose factors it believed represented the best penalty based on the Policy guidance. An analysis of other ACLCs, where the recommended penalty is not an outlier, does not compel the Prosecution Team to lower the penalty amount. Each factor was discussed by the Prosecution Team in the Technical Report, submitted as Exhibit 1 with the Prosecution Team's Case in Chief Brief.

B. Harm

As pointed out in the Prosecution Team's previous brief, it did not penalize the District aggressively in every factor. While it did assess at 1.10 for culpability, it chose "moderate" for the deviation factor, while a majority of SSO cases select "major." However, the Prosecution Team felt most strongly about the harm and nature factor, for which it selected a 5. The District would prefer a 2. The Enforcement Policy (Ex. 34) provides that:

> The evaluation of the potential harm to beneficial uses factor considers the harm that may

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[4] The District's reference to cases initiated prior to the effective date of the Enforcement Policy are irrelevant. Those matters were governed by Water Code 13385, but without the methodology that has been provided in the Enforcement Policy, which must now be followed by all Regional Boards, since it has the force of law. Such matters are the City of San Luis Obispo settlement agreement, Lake Berryessa Resort Improvement District ACLO, and Town of Discovery Bay Community Services District ACLO, which were included as Exhibits 81, 82, and 83, respectively.

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 harm is negligible (0), minor (1), below moderate (2), moderate (3), above moderate (4) or major (5).

…

2 = Below moderate – less than moderate threat to beneficial uses (i.e., impacts are observed or reasonably expected, harm to beneficial uses is minor).

…

5 = 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).

During the overflow, **raw sewage backed up into people's homes**. The sewer overflow resulted in the largest number of wastewater backups produced from a single sewer spill in California to date with 11 confirmed residential sewer backups. In addition to contaminated floodwaters entering homes from outside, residents and their belongings inside each of the 11 homes were directly exposed to raw sewage overflowing from pipelines leading to the Distrcit's WWTP. Some residents reported being sick with flu for days following the sewer overflow, with one resident reporting being sick with pneumonia for months. The neighbors dubbed it the "flood flu."[5] There was obviously a significant financial component for the residents whose homes were inundated with sewage. Some SSOs never have a human component, even though they involve millions of gallons of spilled waste. The Prosecution Team felt a 5 was appropriate given the particular facts of this case. We note for the record that other ACLCs, even one with a small per gallon amount (Santa Margarita), often select a harm factor of 4 (Santa Margarita, North Tahoe PUD, Sebastopol).

C. Staff Costs

This matter involved settlement negotiations lasting more than a year, which unfortunately

[5] The Prosecution Team summarized which homeowners experienced backups in Exhibit 6, submitted with its Case in Chief Brief. Additional investigation has revealed additional homeowners with sewage backups. *See* Exhibit 103.

could not resolve the matter without a hearing. The basis for the Prosecution Team's staff costs has been identified, including how they are calculated, staff who incurred them, and on which date. To the extent that the Regional Board would like a final estimate, as of the date of the July 27, 2012 submission, the Prosecution Team's staff costs exceeded $63,000[6]. Combined with the total costs for all of Region 3 enforcement staff and the additional efforts of the last month, including preparing for and attending the deposition of Jeff Appleton and in preparing this rebuttal submission, our costs exceed $75,000. Despite our costs continuing through the hearing, we request $75,000, in a final Order.[7]

By way of comparison, $20,550 in staff costs was awarded in the North Tahoe PUD SSO case. The North Tahoe spill also occurred on December 19, 2012, and the case proceeded to hearing in May 2012. The Board awarded costs based on the following statement in the complaint:

> The cost of Lahontan water Board Prosecution Staff investigation to date is $20,550, based on 137 hours of staff time at an hourly rate of $150. As a result, the Total Base Liability is recommended to be adjusted upward by $20,550…

(Ex. 102; North Tahoe ACLC Attachment B, pg. 12) In a construction stormwater case, Caltrans and the contractor had protracted settlement negotiations before the ACLC was issued and staff costs were $70,182 at the time the complaint was issued, and which were granted in the Board's final Order. (Ex. 104). The Prosecution Team has provided repeated opportunities for informal (and thus, more inexpensive) resolution of this matter; it is within the District's right to proceed to a hearing. The Prosecution Team balances providing an ample amount of time for frank settlement discussion against the public's desire for swift enforcement. When it became clear that the parties could not resolve this matter, we prepared the ACLC. The District cannot dictate how the Prosecution Team staffs its cases, and every member listed has played an integral role in bringing this matter to hearing. The staff costs were identified in the ACLC, and while the District had the

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[6] Case in Chief Brief, page 12.

[7] If the Board would like the Prosecution Team to submit additional information supporting its costs prior to issuing an Order, then the Prosecution Team will seek costs through the hearing.

opportunity to depose the members of the Prosecution Team, it chose not to. The District does retain the right to cross-examine the members of the Prosecution Team identified as testifying witnesses as to their time spent on this matter, and if the Board would like further documentation it can be provided. However, the Prosecution Team has met its burden of proof for staff costs: when they were incurred, by whom, and the rate of compensation.

IV. The Prosecution Team's Method of Calculating the Volume of the Overflow Is the Only Method that Considers all the Circumstances

After failing to convince the Prosecution Team that 417,000 gallons was the correct volume of the overflow, the District hired two outside consultants to provide paid opinions. RMC provided an estimated volume of 674,400 gallons, but failed to account for stormwater, therefore vastly underestimating the total overflow. CH2MHILL criticized the Prosecution Team's method of calculating the volume, but itself drew a few inaccurate conclusions about the Prosecution Team's methods and data. CH2M-HILL also admitted that the District failed to account for all discharge locations. In general, the significant issues with the District and consultant's methods were:

- The Duration and Flow method is unreliable and inconsistent.
- The District misrepresents video evidence and points of discharge.
- The District claims there was no discharge outside of the residents' homes, which contradicts the photographic evidence and numerous eyewitness accounts by residents.
- The District survey method is unreliable and based on speculative evidence.
- The District's flow rates are highly suspect.
- The District relies on visual estimates which are highly subjective in nature.

Exhibit 105 summarizes the Prosecution Team's criticisms of the District's, CH2M-HILL's and RMC's analysis regarding the overflow. Exhibits 105 through 108 directly rebut the District's evidence related to the overflow volume.

V. As the Permittee, the District is Responsible for Reporting Overflows Caused by Its System

Despite the District's arguments to the contrary, the District is responsible for reporting all sewer overflows in CIWQS, including sewer overflows defined in Part A of the SSS WDRs (Ex.

56-5), which states:

1. **Sanitary sewer overflow (SSO)** – Any overflow, spill, release, discharge or diversion of untreated or partially treated wastewater from a sanitary sewer system. SSOs include:
(i) Overflows or releases of untreated or partially treated wastewater that reach waters of the United States;
(ii) Overflows or releases of untreated or partially treated wastewater that do not reach waters of the United States; and
(iii) Wastewater backups into buildings and on private property **that are caused by blockages or flow conditions** within the publicly owned portion of a sanitary sewer system.

(Emphasis added; *see also* Ex. 57.) The District failed to adequately investigate and determine all overflows that resulted from the District's electrical failure and large overflow. The District's argument that the spills into people's homes were private lateral sewage discharges ("PLSDs") utterly ignores the **cause** of backups in such residences. The permit's focus is not on ownership and location, but on cause and effect. A simple analogy can illustrate why this must necessarily be the case. If a homeowner negligently maintained a private lateral by allowing a tree root to interfere with safe and free flow, leading to a sewer backup, the permit would not require the District to report such a backup from the homeowner's residence, nor could the District face any liability in that hypothetical situation. However, the overflow of December 19-20 was caused by the District's negligence and actions, and extended onto private property. Where the sewage flows, so does the District's liability. Perhaps the December 19-20 overflow extended beyond the District's ownership of actual physical pipe, but the cause was its action or inaction, and thus the permit requires reporting of all resulting spills.

For Category 1 SSOs (reaching surface waters), the District would have had 15 days to certify the reports of the private backups in CIWQS after the response and remediation was completed. To date, the District has failed to identify any of the sewer backups as Category 1 SSOs. The District was required to certify six (even though the Prosecution Team's investigation has revealed that at least 11 homes experienced backups) SSOs by January 30, 2012. Therefore,

the ACLC proposes to penalize the District for violating the reporting requirements for all six SSOs by 30 days each via a compressed method at $1,000 a day, which totals $63,000. This is a conservative approach, as the maximum penalty could be as high as 2,406 at $1,000 a day or $2,406,000 for late reporting, or even greater if there are additional backups not identified by the District.[8]

VI. BEN model

A. The District's Criticism of the BEN Model is Misplaced

In its Case in Chief Brief, the Prosecution Team submitted Exhibit 18 and an analysis of the economic benefit the District received by delaying certain upgrades at its plant. Since that analysis only considered the wiring project and other avoid costs (e.g., treatment costs and sampling/analysis costs) and not the cost of purchasing a properly sized pump, repairing the leaky influent gate, or fixing the grading issues, we presume the economic benefit dramatically underestimates the actual benefit to the District. The Water Code and Enforcement Policy require that at least the economic benefit plus 10% be recovered by any penalty.

The Prosecution Team's economic benefit analysis was performed by Gerald Horner, who has estimated the benefits of noncompliance using the BEN model in 33 ACLCs for the State and Regional Water Boards and completed at least 75 informal reports using the model. Mr. Horner's resume and response to the District's criticisms of the BEN model are attached hereto as Exhibit 109.

B. Inability to Pay is an Affirmative Defense, and the District has Presented Insufficient Evidence that It Cannot Pay the Proposed Penalty

The Prosecution Team conducted a review of public documents related to the District's ability to pay, including budgets available through its website. Documents were requested through the settlement process and then again in discovery. However, no evidence has been provided that demonstrates the District has an inability to pay the proposed penalty. The Prosecution Team

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[8] To the extent that the District concludes that only Category 1 SSOs must be certified, it is incorrect. *See* Ex. 57-4, requiring certification of Category 2 SSOs.

specifically requested the District's "Comprehensive Annual Financial Report" ("CAFR") or, barring that, any other documents it would like the Board to consider in evaluating the District's ability to pay. The District provided a signed statement that such documents do not exist, and all documents that it would like the Board to consider had been provided. (Exs. 110, 111, and 112) Yet a budget cannot be used to determine fund balance for the District. The primary difference between a budget and a CAFR is that where the budget is a plan for a fiscal period (often a year) primarily showing where tax income is to be allocated, the CAFR contains the results of the period (year) with the previous year's accumulations. A CAFR shows the total of all financial accounting that a general purpose budget does not. The Board cannot make a finding on ability to pay if the District fails to provide audited financial reports, by whatever name. The audited financial reports would show the amount of unreserved funds available, the annual income and operating expenses, and current debt condition. The District has not provided this information.

In short, a budget is prospective and "wishful thinking," while a financial report is concrete, based on collected income and expenses paid. The District has not provided sufficient information to indicate that it cannot pay the proposed penalty.[9]

VII. Significance of Rain Event

While the District has claimed the flood event was "severe" (Ex. 6-105), the District has never provided evidence the flood event was a 100-year frequency flood. The District recently completed the Influent Flood Wall Replacement, with a significant portion of the funding coming from FEMA (Appleton's Deposition, Exhibit No. 2). The District undertook this project because the flood walls/gates were not consistent with the current published FEMA flood maps (Id.). The

[9] The District has not provided much information about its assets and liabilities, including the number of connections. However, according to its website, the sewer rate for residences and apartments is $14.86 a month. The median monthly charge for a single family dwelling in California for wastewater services is $26.83. This means that the District could reasonably increase its rates if sufficient funds were not available to pay the proposed ACL. (Ex. 113)

evidence the District produced to the Water Boards in response to the Notice of Violation describing the flood events (e.g., Ex. 6 and 9), does not indicate that the influent flood wall was overtopped with flood waters. This indicates that the flood event was not a 100-year event.

The Prosecution Team's Case in Chief Brief stated "December 18 had 2.87 inches of rain and December 19 had an additional 1.73 inches for a total of 4.6 inches over the two days." (11:3-4) This data was provided to the Prosecution Team **by the District,** the source of which is the rainfall station located near the intersection of Halcyon and Highway One – Station KDYCAOCE2 (Ex. 6-45 and 6-66). The District is incorrect when it claims that the rainfall from Station KDYCAOCE2 is 4.7 inches (Ex. 6-34)[10]. The District has not shown that the value from the OCSD water yard (5.14 inches) is accurate. In light of the error in reporting rainfall from Station KDYCAOCE2, the Prosecution Team used the correct total from this Station KDYCAOCE2 in comparing it to the Precipitation Frequency Estimates (Ex. 16). 4.6 inches of precipitation is outside of the 90% confidence interval for the 100-year rain event and is consistent with a rain event with a frequency between 10 and 25 years.

The District's Brief also includes the rain the fell during the days following the flood event at the treatment plant. As no violations alleged for the time period after the morning of December 20, this information is irrelevant for determining whether the spill was larger than a 100-year flood on December 19.

The San Luis Obispo County Department of Public Works also investigated the size of the storm (Ex. 6- 332). The County's Report shows the 100 year flood plain (Ex. 6-350). The County states "all of the flooding that occurred in December 2010 occurred within the known flood plain" (Ex. 6-332). In other words, since the flood event did not exceed the 100 year floodplain, the flood event was not a 100 year flood. Furthermore, the County states "the storm event itself was not a "100 year Storm."

VIII. Miscellaneous Issues

[10] 2.87 inches of rain + 1.73 inches of rain = 4.6 inches of rain, not 4.7.

A. Authentication of Documents Can Occur at the Hearing, to the Extent Necessary

The District claims that the Prosecution Team failed to authenticate any of the documents submitted as evidence. Evidence Code 1400 requires only the introduction of evidence sufficient to sustain a finding that the writing that the proponent of the evidence claims it is or the establishment of such facts by any other means provided by law. Such evidence can be testimony by the Regional and State Board witnesses, who received or sent many of the documents. Some documents are self-authenticating, because the District has acquiesced to a document's authenticity, or because the authenticity of the document is not in dispute (the District's Response to the Notice of Violation ("NOV") was submitted by both parties as evidence, which thus renders Exhibit 6 authentic; the District responding to the NOV authenticates the NOV (Exhibit 5) itself).[11] Despite noting this hearing is being conducted according to informal rules, counsel is attempting to exclude evidence prior to the hearing on evidentiary technicalities that do not apply in this context. Government Code section 11513 applies to this hearing, and "relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs." To the extent that the Prosecution Team witnesses or counsel is needed to authenticate documents, simply providing testimony at the hearing from a witness with personal knowledge of how the Prosecution Team obtained the exhibit, how the exhibit had been identified and that it is a true and correct copy of the original is sufficient for authentication purposes, even in a court of law. *Greenspan v. LADT, LLC* (2010) 191 Cal.App.4th 486, 523.

B. Hearsay Evidence Can Be Admitted In This Proceeding

Since the District has repeatedly changed its story about the extent of the damage to private

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[11] The court will overrule objections based on authentication when, "[t]he party against whom [the writing] is offered has at any time admitted its authenticity; or (b) The writing has been acted upon as authentic by the party against whom it is offered." *Ambriz v. Kelegian* (2007) 146 Cal.App.4th 1519, 1527. To the extent that *Ashford v. Culver City Unified School District* (2005) 130 Cal.App.4th 344, cited by the District, disallowed additional authentication evidence of a videotape in the context of an administrative decision, that decision has been disapproved by the California Supreme Court. *Voices of the Wetlands v. State Water Resources Control Board* (2011) 52 Cal.4th 499, 534-35.

residences caused by the December 19-20, 2010 overflow, the Prosecution Team had to do extensive interviews with the residents who live near the WWTP. It's the Prosecution Team's understanding that many of the residents may submit written statements directly to the Regional Board or provide oral comments during the public hearing on September 7, 2012. However, the Prosecution Team has not identified any homeowner as a potential witness for a variety of reasons. First, the homeowners all experienced the overflow differently. Some had insurance and financial resources to respond to the spill while others did not. We also recognize that there may be an inherent contradiction in working with the Prosecution Team, to the extent that if successful, the District may pass the penalty on to its ratepayers.

The oral statements provided to the Prosecution Team by homeowners are hearsay. They are admissible in this proceeding pursuant to Government Code section 11513(d), and can be used to supplement or explain other evidence. There is a vast amount of non-hearsay evidence upon which the Board can rely to make its findings.

C. The Office of Enforcement Has Authority Over This Matter Being Heard at the Regional Board

In Exhibit B to the Aaron Yonker declaration, the District insinuates that the Prosecution Team lacks authority to prosecute this matter because the Regional Board staff received assistance from State Board staff. First, as was made clear at an April 2012 settlement meeting that Mr. Yonker attended only a portion of, Region 3 staff has been involved in the development of the case from the outset of the investigation. As Michael Thomas (Assistant Executive Officer) and Harvey Packard (Supervising Engineer/Enforcement Coordinator) have ultimate decision-making authority over the decisions whether to settle the case or proceed to hearing, the Regional Board did have "primary responsibility for matters directly affecting the quality of waters within their region." Mr. Yonker had no basis for his statement, nor is there any evidence that the explanations provided to the District at the April 2012 settlement meeting were incorrect. Furthermore, there were requests from the Regional Board to the State Board for assistance, on this and other matters. The Prosecution Team did not submit them as evidence, as the statements by Mr. Thomas should have been sufficient and the requests are protected by attorney client and work product privileges.

D. The District's Prior History is Relevant Under the Enforcement Policy

The Enforcement Policy requires the Board consider evidence of prior history of violation and the degree of culpability of a discharger. The Prosecution Team has presented evidence of a previous discharge of unchlorinated effluent (Ex. 24) and numerous effluent violations. The management and staffing of the WWTP and collection system are largely identical, and therefore highly relevant for the Board to consider.

As was argued *supra*[12], the District had a number of maintenance issues that affected both the collection system and the WWTP. In contrast to the District's argument (District Brief, pg. 7; *see also* PMK Declaration of Aaron Yonker) that there was improper operation or maintenance of the collection system, the SSS WDRs (Ex. 56) require the Regional Board to consider whether the overflow could have been prevented by the exercise of reasonable control of the illicit inflow and infiltration ("I/I") into the District's collection system and the WWTP. Had I/I been better controlled, it would have reduced the amount of sewage in the District's collection system, allowing more sewage to be stored and less sewage to be discharged into the environment.

E. The Evidence that Proves the Overflow Entered Private Residences Proves a Nuisance

The Prosecution Team struggled with the District to get it to admit how many private homes were affected by raw sewage and to certify this information in CIWQS. (District Brief, 25:3-26:6 arguing it has no duty to report such spills on private property; Ex. 29 ; the District claiming there was some "confusion" on the part of the homeowners and that all sewer overflows were recaptured into the sewer system; PMK Declaration of Aaron Yonker at 98-24, ¶24, admitting that six bathtubs had sewage backups.) In its Case in Chief Brief, the Prosecution Team submitted evidence that individual homes had sewage backups. (Ex. 8) Continued investigation has revealed the number of homes to be even greater, and to currently stand at 12. (Ex. 103). The Prosecution Team attributed the sewage to the overflow caused by the District's actions prior to December 19,

[12] Refer to maintenance issues discussed in upset section, *supra*.

2010. The entire brief and evidentiary submission was indicative of the creation of "nuisance," which is defined as anything which meets the following requirements (Water Code section 13050(m)):

(1) Is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property.

(2) Affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.

(3) Occurs during, or as a result of, the treatment or disposal of wastes.

The District's argument in its Brief at 22:15 that the Prosecution Team did not present any evidence regarding nuisance regarding nuisance is nonsensical; for the affected homeowners, *the overflow was the nuisance*.

F. The Recommended Penalty is Not Unconstitutional

The California Supreme Court has often recited a well-settled principle, "In the exercise of its police power a Legislature does not violate due process so long as an enactment is procedurally fair and reasonably related to a proper legislative goal." *Hale v. Morgan* (1978) 22 Cal.3d 388, 398. A statute is presumed to be constitutional and must be upheld unless its unconstitutionality clearly, positively, and unmistakably appears. *Id.* at 404. The Enforcement Policy and Water Code 13385 require the Regional Board to employ the methodology embodied in the methodology, which is consistent with the factors in in 13385(e). As stated above, while the District permit does contain the upset and bypass defenses, the subject overflow does not come within the scope of the defense. Case law makes clear that if California chose to exclude the defense, making the water quality standards more difficult to comply with than EPA's federal standard, that would be acceptable. The Prosecution Team's recommended penalty is consistent with the Enforcement Policy, and Water Code sections 13327 and 13385, as written and as applied.

G. The Prosecution Team Does Not Object to a SEP

This illegal overflow had a significant impact on the local community. The Prosecution Team would not object to a Supplemental Environmental Project ("SEP") being considered for the

maximum portion of the recommended penalty, consistent with the SEP policy.[13]

H. Additional Time is Not Needed for This Hearing

This matter began with a number of cordial settlement meetings in which the parties tried to reach a compromise over the volume of the overflow and the recommended penalty. The District submitted over 900 pages of material in response to the NOV issued to it in April 2011. While the parties may continue to disagree, their positions have been well-documented and argued. The Prosecution Team did not place any limit on the District's ability to depose members of the Prosecution Team, or question Mr. Appleton, a former employee of the District during his deposition. The Prosecution Team will abide by any evidentiary rulings made by the Advisory Team regarding the scope of proper testimony. However, there is no need to extend the hearing beyond the current allotted time. To the extent that Board members have questions of any witness, about any document, or any theory, whether legal or technical, such questions are not counted against either party's allotted time. This results in the decision makers, the Board members, having both an extensive paper record upon which to rely and a thorough understanding of the matter.

IX. Conclusion

In conclusion, while the Regional and State Boards always have a duty to protect water quality and the people affected by discharges, we felt that this overflow had a significant impact on the local community and that without an enforcement action, preventive measures would not be taken to address the cause of the overflow or prevent another similar discharge in the future.

Signed this 27th day of August 2012.

Julie Macedo

Julie Macedo,
Senior Staff Counsel, Prosecution Team

[13] The SEP policy can be found on the State Water Resources Control Board website at http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/rs2009_0013_sep_finalpolicy.pdf.