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SOUTH SAN LUIS OBISPO COUNTY SANITATION DISTRICT (SSLOCSD)

BEFORE THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

FOR THE CENTRAL COAST REGION

In the Matter of:

Administrative Civil Liability Complaint No. R3-2012-0030
SSLOCSD, San Luis Obispo County

SSLOCSD's Brief Opposing Imposition of Proposed Administrative Civil Liability Penalties

I. INTRODUCTION

The issue to be decided is simple – is it fair and consistent with other similar situations in the state for the Regional Water Quality Control Board for the Central Coast Region ("Regional Board") to fine South San Luis Obispo County Sanitation District ("SSLOCSD" or "District") more than a million dollars (i.e., $1,383,007.50) for an unintentional and temporary sewer spill that occurred during a declared state of emergency when no evidence was presented of any harm? The record reflects that the spill resulted from a series of unfortunate events occurring during a flood event that could not have been predicted to occur simultaneously. Further, none of these events, as described in detail herein, happening alone likely would have caused this spill. 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. Based on this record, this issue must now be decided by the Regional Board members, who will hopefully provide a more reasonable result than that proposed by the Prosecution Team.

II. 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* Prosecution Team's Evidence ("PTE") Exhibit ("Ex.") 1, at 4,[1] PTE 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. (PTE Ex. 6 at 6-367; Declaration of Aaron P. Yonker, Designated as Person Most Knowledge to testify for the District ("Yonker Decl.") 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. (Yonker Decl. at ¶4.) The WWTP is regulated under an NPDES permit, Order No. R3-2009-0046. (*See* Ex. 28.[2])

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 in size and no District-owned force mains, or laterals in the spill area. (*See* PTE 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* PTE Ex. 6 at 6-1020 and 6-1023, Collection System Questionnaire; PTE 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. (Yonker Decl. at ¶ 5; Ex. 93 [showing 4 alleged spills in Ex. 24 were not District spills]; *see also* PTE Ex. 1 at 20 ("a review of the California Integrated

[1] The Prosecution Team failed to bates label or otherwise number its exhibits for easy reference so the District will attempt to cite to and identify portions of those exhibits as best as possible.

[2] Although referenced in its Index of Documents, the Prosecution Team did not include copies of the permits at issue in this matter in the evidence submitted. In order to be able to cite to pages and provisions of those permits, the District has included true and correct copies of the NPDES permit, Order No. R3-2009-0046, as Ex. 28, the Sanitary Sewer Overflow ("SSO") Waste Discharge Requirements (WDR), Order No. 2006-0003-DWQ, as Ex. 56, and the Monitoring and Reporting Program for the SSO WDR, Order No. 2008-0002-EXEC, as Ex. 57.

Water Quality System (CIWQS) Sanitary Sewer Overflow database shows that the Discharger had no history of sewage overflow violations in recent years").)

III. SPILL EVENT BACKGROUND

A significant rain event on December 18th and 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. (PTE Ex. 9 at 2.[3]) This substantial rain event resulted in stormwater levels increasing in the lagoon to the west of the WWTP as well as ponding in the WWTP itself. (*Id.; see also* PTE 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").) As lagoon levels rose, stormwater flooded the adjacent neighborhood and began encroaching into the northern boundary of the WWTP. (PTE Ex. 6 at 6-1783 to 6-1799.) This caused the area around the generator building to pond up to approximately one foot deep with stormwater. (PTE Ex. 9; *see also* PTE, 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. (PTE Ex. 9 at 15.) 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. (*Id.* at 2; Yonker Decl. at ¶ 7.) The District also speculated that manhole(s) may have been lifted by unknown persons to allow accumulated stormwater to drain into the sewage collection system.

[3] The 157 square mile watershed tributary to the flooding area is very large and the rainfall is not uniform over the area. (District's Ex. 45; PTE 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. (PTE 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. (PTE Ex. 6 at 6-332.) Thus, an exact rain measurement for the entire area surrounding and tributary to the Oceano lagoons is not possible.

(PTE Ex. 9 at 2.) The net result was very high influent flows hitting the WWTP on the morning of December 19th. (*Id.*) These flows were 50% higher than any flows experienced since I&I remediation work at was completed several years before. (*Id.*) 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 being evacuated by local police and fire departments. (Yonker Decl. at ¶ 8.) In addition, treatment plant staff attempting to reach the plant 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.*)

Water entering the electrical system stopped the electricity feeding all four influent pumps and other plant equipment. (PTE Ex. 9 at 2.) As a result, all four pumps stopped pumping at 10:26 a.m. (*Id.*) On-site District Staff started the emergency diesel-powered influent pump within minutes, by approximately 10:35 a.m. (*Id.* at 16.) However, it was immediately discovered that a pump discharge valve located in the headworks was inadvertently left in the closed position. (*Id.*; Ex. 1 at 11.) Due to rising water and the fact that the valve is 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 it. (PTE 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. (PTE Ex. 9 at 2; Yonker Decl. at ¶ 6.)

As the trunk system backed up, Sewer System Overflows ("SSOs") occurred 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. (PTE 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 City of Pismo Beach was contacted to obtain their portable diesel pump as well as an outside contractor to provide on

site assistance. (*Id.*)

The headworks was pumped down with the District's 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. (PTE Ex. 9 at 3; Yonker Decl. 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. (PTE 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. (PTE 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 diesel pump shutting off for a brief period. (*Id.*) Based upon a review of the effluent data, two other brief overflows may have occurred overnight. (*Id.*) In an effort to be conservative, the District assumed these overnight spills occurred, even though there is no actual proof that they did indeed occur. (*Id.*) Based upon the District's analysis, the potential volume spilled on December 20th could be as much as 2,200 gallons for all three occurrences. (*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.

(PTE Ex. 9 at 3; *see also* Ex. 46 at 46-9 (request from J. Fischer to individually report manholes).)

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. (*Id.* at 5-13.) Of the spill volume estimates provided, the District believed that the third approach presented represented the most accurate estimate of 384,200 gallons. (*Id.* at 8.) This amount was later refined and *revised upwards*, based on photographic evidence for the manholes and detailed calculations based upon hydraulic grade line, to a final spill estimate of approximately **417,000 gallons**.[4]

IV. LEGAL BACKGROUND

The Water Code authorizes the imposition of civil penalties for specified violations of NPDES permit conditions. (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 is not an MMP; it is 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.*

[4] *See* PTE 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* PTE Ex. 1 at 11.

(1997) 54 Cal.App.4th 373, 395; *see also* PTE Ex. 1 at 7, Ex. 56, SSO WDR at 8-9 (additional factors that must be considered for enforcement of the SSO WDR).)

V. LEGAL ARGUMENT

A. Response to ACL Complaint

1. No Evidence was Presented of Improper Operation or Maintenance, or Inadequate Capacity in the District's Collection System.

The ACLC alleged in Paragraph 14 that "[t]he 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." Also, the ACLC alleged in Paragraph 22 that "[t]he 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 ACLC also alleged in Paragraph 23 that "[t]he 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 December 2010 spill event had nothing to do with capacity in the District's sanitary sewer collection system, or a failure to properly maintain, operate and manage the District's sanitary sewer collection system, and no evidence was provided by the Prosecution Team to prove otherwise. (*See* PTE Exs. 1-24.) The backup of sewage into the collection system was caused by a large storm causing shunt trip power failure to the pumps at the treatment plant, and causing the District to be unable to continue pushing water through the treatment plant. (Ex. 25 at ¶17.) Without that pumping, water backed up into the collection system and spilled out through the manholes. (Yonker Decl. at ¶ 10.) Had the pumps been working at the time, there is no evidence that any spills would have occurred in the satellite collection systems. (Yonker Decl. at ¶ 9.) Given the fact that SSLOCSD has not had a sewer spill in the last 25 years, and no other major

incidents warranting enforcement actions at the treatment plant (besides $6000 in MMPs since 2000)(Yonker Decl. at ¶ 5; Ex. 93.), no evidence has been presented that the collection system operation and maintenance or capacity is in any way deficient.

2. The District's Discharges were Covered by an NPDES Permit and that Permit's Upset Defense.

The ACLC alleged in Paragraph 15 that "[t]he 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." The ACLC also alleged in Paragraph 17 that "[t]he 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," and in Paragraph 19 that "[t]he Discharger violated section 301 of the Clean Water Act ["CWA"], 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."

These allegedly unlawful discharges by SSLOCSD are covered by the **upset defense** in the federal NPDES permit regulations at 40 C.F.R. section 122.41(n), and in the SSLOCSD 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).[5]) Although the CWA is a "strict

[5] 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).)

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 effluent limitations, 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).)

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

The federal regulations define "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." (*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).)[6]

[6] In 1982, EPA proposed to extend the upset defense to violations of water-quality-based limits. (47 Fed.Reg. at 52,089/1.) The defense would be available only to permittees who could demonstrate that despite the upset, instream water quality standards were maintained in all stream segments and for all parameters that could have been affected by the discharge. (*Id.*) Although EPA did not regard this extension as legally required (*id.* at 52,079/2), it offered the proposal on the view that there was no reason to punish a permittee for an upset if it could prove the absence of injury to water quality standards. (*Id.*) In 1984, after reevaluating its proposal in light of various criticisms, the agency concluded that it would be impractical to extend the upset defense to violations of water quality-based effluent limitations. (49 Fed.Reg. at 33,038/2.) EPA reasoned that "[a]lthough the proposal would seemingly allow permittees to claim an upset defense, the costs, burdens, and technical difficulty of establishing that water quality standards were not violated would make the defense nearly impossible to establish." (*Id.* at col. 3.) Rather than leave in place an affirmative defense it believed "illusory," EPA decided to deny extension of the defense and to rely instead on case-by-case prosecutorial discretion. (*Id.*)

Industry's objections to EPA's action was two-fold: 1) the agency is legally required to provide for such a defense, at least where the discharge does not result in the violation of a water quality standard; and 2) the agency's decision to scrap its 1982 proposal was arbitrary and capricious because, even if the defense (as proposed) could not be met and was therefore "illusory," the agency failed to evaluate potential alternatives. 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.

SSLOCSD is able to prove the existence of an "upset," through properly signed, contemporaneous operating logs or 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* PTE Ex. 9, 6, and 21.)

In addition to a demonstration that the discharge was temporary[7] and unintentional,[8] SSLOCSD can demonstrate that it meets 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 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 overflowing of nearby lagoons causing substantial flooding in the local area. (PTE Ex. 6, at 6-1902 to 6-1924, County Report of May 24, 2011; *also* 6-1882 to 6-1889.) 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. (PTE Ex. 6 at 6-1801 to 6-1807, at 12/27/2010 Proclamation and Declaration Memo Extending Emergency Declarations.)

This rain event resulted in stormwater levels increasing in and overflowing the nearby lagoon, west of the treatment plant, as well as ponding in the treatment plant as well. (PTE Ex. 6, at 6-1926 to 6-1931.) As water levels in the lagoon overflowed, stormwater flooded the local

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(*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).) The Court ordered EPA to conduct further proceeding 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.

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

[8] No evidence exists that this release was an intentional act.

neighborhoods and began to encroach into the treatment plant grounds. (*Ibid.*) This caused the area around the treatment plant's generator building to pond up to a foot or so deep with stormwater. (Ex. 9, Jan 3, 2011 SSLOCSD Submittal to CCRWQCB at 2.)

The **second event** was a shunt trip breaker tripped, stopping all four influent pumps at 10:26 a.m., likely due to water entering into electrical boxes designed to be sealed and water proofed. (*Id.* 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. (Yonker Decl. 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.*; PTE 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 SSLOCSD and not covered by the SSLOCSD 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 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. Although the Prosecution Team alleges differently, the plant and collection system were functioning normally and were generally compliant during every other day of the time periods preceding the spill. (Yonker Decl. at ¶ 5.) In fact, as stated above, the SSLOCSD plant 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 occasionally exceed effluent limitations and well operated systems have 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 with effluent limitations one hundred percent of the time, and thus an upset defense in the permit was necessary.[9] 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. This event, 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 Permit (Ex. 28, at D-3, Provision I.H.2.c.) require that the permittee submitted 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-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 PTE 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

[9] *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).

Regional Board. (*See* PTE Ex. 9, SSLOCSD letter dated January 3, 2011 at 3.)[10] 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.[11] SSLOCSD also notified the Department of Fish and Game at 12:15 pm. (PTE Ex. 9 at 3 and 16.) Thus, timely and proper notifications were made as required by both the federal regulations and the NPDES permit requirements.

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 Permit (Ex. 28, Permit at D-3 to D-4, Standard Provision I.H.2.d) require that the permittee/discharger 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."

(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, SSLOCSD 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 SSLOCSD Submittal); *see also* Ex.

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[10] 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).].)

[11] *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).

23 (10/14/11 updated status of corrective actions).) These repairs and improvements have now been made. (*See* Yonker Decl. at ¶ 13; PTE Ex. 23; Ex. 39.) These remedial activities have been successful since no other SSLOCSD spills have occurred since December 20, 2010. (*Ibid.*)

All of the above demonstrates that the incident experienced by SSLOCSD 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 reviewed the effluent limits and 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."[12] 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 Water Boards apparently believe that a similar "never to occur" or zero discharge standard exists in the NPDES permit for sewer spills. Such a standard is technology-based and subject to the upset defense. Otherwise,

[12] *See Marathon Oil*, 564 F.2d at 1272.

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.

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.) SSLOCSD encourages the Regional Board to recognize this affirmative defense and deem the December 19-20, 2010 spills to not be "violations" subject to assessment of penalties. The Water Board must utilize the "upset" defense to determine that the instances of alleged permit noncompliance do not constitute "violations" for enforcement purposes.

In two cases outside the Ninth Circuit, defendants successfully proved upset. 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 winter storms, vandalism, construction accidents, equipment malfunction, and "blockage in first half of cleaning cycle." (*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 is *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) spills alleged was an upset. (136 F. Supp. at 629.) The court based its holding on the finding that "at all relevant times," the wastewater treatment facility was being operated and

maintained 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. Therefore, the District asks that the Regional Board recognize an upset defense in this case as well.

3. 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. This prohibition does not apply to brine discharges authorized herein.'" However, this prohibition did not apply because the exception in Standard Provision 1.G. related to unanticipated bypass applied.

SSLOCSD is 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;[13] and

C) The permittee submitted notice to the Central Coast Water Board as

[13] 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. (Yonker Decl. at ¶ 10.) Had the District not done this, millions of gallons of sewage would have been spilled during this event.

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, SSLOCSD qualifies for the unanticipated bypass defense.

a) Bypass was unavoidable.

Although the Prosecution Team, using the benefit of 20/20 hindsight, has and will argue that this event was avoidable,[14] once the events described above were happening, there was no way to avoid the bypass. (PTE 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 alternative pumps. (PTE 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. (Yonker Decl. at ¶ 8.) However, the staff members ignored those warnings and came into the plant to try to avoid a bypass event from occurring, and then once it began, tried desperately to slow or stop the bypass. (*Id.; see also* PTE Exhibits 6 and 9.) Further, as explained in more detail below and in Exhibits 25 and 39, the reconductoring work that the Prosecution Team argues would have prevented this event, would not have done so. (*See e.g.,* Ex. 39 at 39-1 (explaining the reconductoring 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); PTE 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. (Yonker Decl. 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 mitigate the amount of the spill and push more water through the treatment plant. (PTE

[14] 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.

Ex. 9 at 3.) Had this not been done, the spill event would have been much larger. (Yonker Decl. at ¶ 10.)

The District also used storage within the system and in its sludge lagoon and drying ponds to try to prevent additional spilling. (Yonker Decl. at ¶ 11; Ex. 32.) This water was later pumped through the treatment plant for full treatment. (Yonker Decl. at ¶ 11.) This storage prevented additional spilling and bypassing of the treatment plant. (*Id.*)

c) SSLOCD Complied With Notice Requirements.

For unanticipated bypasses, such as the spill event at issue, the permit and 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 (*see supra* section V.A.2.c.), far ahead of the 24-hour notice requirements under the permit and the regulations. (PTE Ex. 6, and Ex. 9 at 3.) Therefore, the District complied with the applicable notice requirements.

4. The SSO WDR Allegations Require Consideration of Other Factors.

The ACLC alleged in Paragraph 20 that "[t]he Discharger violated Prohibition C.1 of the Sanitary Sewer Collection System[15] Order which states, 'Any SSO[16] that results in the discharge of untreated or partially treated wastewater to waters of the United States is prohibited.'" Before an enforcement action can be taken to enforce the SSO WDR, there are additional factors that must be considered, in addition to the factors in Water Code section 13327. It is not clear that the Prosecution Team considered, or provided adequate evidence for the Regional Board to

[15] A "Sanitary Sewer System" is defined as "[a]ny system of pipes, pump stations, sewer lines, or other conveyances, upstream of a wastewater treatment plant headworks used to collect and convey wastewater to the publicly owned treatment facility. Temporary storage and conveyance facilities (such as vaults, temporary piping, construction trenches, wet wells, impoundments, tanks, etc.) are considered to be part of the sanitary sewer system, and discharges into these temporary storage facilities are not considered to be SSOs. For purposes of this Order, sanitary sewer systems include only those systems owned by public agencies that are comprised by more than one mile of pipes or sewer lines." (Ex. 56, SSO WDR, Order No. 2006-0003-DWQ at Provision A.2.)

[16] "SSO" is defined by the SSO WDR as "[a]ny overflow, spill, release, discharge or diversion of untreated or partially treated wastewater from a sanitary sewer system. SSO 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; (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." (Ex. 56, SSO WDR, Order No. 2006-0003-DWQ at Provision A.1.)

consider any of the following factors that might mitigate liability (assuming the Regional Board fails to acknowledge the defenses argued above):

a) The Prosecution Team Failed to Acknowledge that the District has Otherwise Complied with the Requirements of the SSO WDR.

The Prosecution Team failed to present evidence of the District's compliance with the requirements of the SSO WDR. That permit requires the adoption and implementation of a Sewer System Management Program ("SSMP"), which the District has had since completed after initially required. (Ex. 6 at 6-360 to 6-555; Ex. 56, SSO WDR, at 10-11, and at 16 (required by May 2006).) The District also has the plans and programs in place as required in the SSMP, and the SSMP was approved by the District's governing board as required.[17] The Prosecution Team has pointed to no missing parts of or flaws in the District's SSMP, even though that was part of their investigation. (Yonker Decl. at ¶ 12.) Thus, the District is in compliance with the programmatic requirements of the SSO WDR. Further, the Prosecution Team's attempts to paint the District as a "bad actor" by citing to other instances wholly unrelated to the sewer spill incident should be ignored as irrelevant and prejudicial.[18]

b) The Prosecution Team Failed to Present Evidence on the Other Factors.

The Prosecution Team failed to identify any other cause of the discharge event other than those identified by the District. (*See accord* Ex. 56, SSO WDR, at 8.) The Prosecution Team also failed to provide evidence of other feasible alternatives; that the causes were in the reasonable control of the District; that the discharge was not exceptional, unintentional, or temporary; that the discharge could have been entirely prevented given the facts; that design capacity of the sanitary sewer system was inappropriate to prevent SSO; or that there were other reasonable steps that could have been taken to stop or mitigate the discharge. (Ex. 56, SSO WDR, at 8-9.) In addition, the Prosecution Team failed to recognize that given the existence of substantial flood waters on the ground, this was not a standard sewer spill where pump trucks could have vacuumed up and

[17] *See e.g.*, Ex. 6, specifically at 6-360, 6-362 to 6-555, *see also* 6-385 to 6-392, 6-527, 6-933 to 6-954 (OERP), 6-393 to 6-395, 6-534 to 6-536 (FOG Control Program), 6-396, 6-537 (SECAP); 6-399 (Communication Program); Ex. 6 at 6-1628 to 6-1733; Ex. 56, SSO WDR, at 10-15.

[18] *See* footnotes 33-35. In addition, the District plans to file objections to Prosecution Team's Brief and Evidence on or before August 29, 2012, pursuant to the revised hearing procedures for this matter. (*See* Ex. 69 at 69-7 to 69-8.)

mitigated the spill, or where enzymes or other disinfection could have been used. (Ex. 56, SSO WDR, at 9, para. 7.) All of these failures by the Prosecution Team demonstrate that the Prosecution Team has not met its burden of proving that the District violated the SSO WDR, or could have feasibly avoided such a violation.

5. The Water Board Did Not Prove the Frequency of the Flood Event or that Planned Projects Would Have Prevented Event.

The ACLC alleged in Paragraph 18 that "[t]he 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."

While the District's permit does state that "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 Prosecution Team presented no evidence that the District's facilities transport or treatment facilities were not adequately protected from "inundation and washout" as a result of a 100-year frequency flood.[19] Moreover, the Prosecution Team provided no evidence of what a 100-year flood event would be in this area, how the event at issue met or did not meet that flood frequency, and did not provide any evidence on how a "100-year frequency flood" was defined. The permit provides no guidance beyond that language of "100-year frequency flood" – i.e., no guidance as to what duration storm (e.g., 5 minutes, 2 hours, 24 hours, 2 days, etc.) that flood frequency applies to is provided. (*See* Ex. 28.)

The Prosecution Team only provided an unauthenticated NOAA "Point Precipitation Frequency Estimate" document (PTE Ex. 16);[20] however, no evidence or expert opinion was

[19] In addition, the upset defense would also arguably apply to this provision of the permit.

[20] The Prosecution Team failed to authenticate any of its documents submitted as evidence. In adjudicatory hearings before the Regional Board, proper foundation is a prerequisite to admissibility of evidence. (*See Ashford v. Culver City Unified School Dist.* (2005) 130 Cal.App.4th 344, 349 [quoting *Desert Turf Club v. Board of Supervisors* (1956) 141 Cal.App.2d 446, 455]: ("While administrative bodies are not expected to observe meticulously all of the rules of

provided as to how to interpret that document, or how the storm event of December 18-20, 2010 measured up to that estimate. 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 flood recurrence interval for 24-48 hour duration storms. (*See* PTE 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.)[21] Again, comparing to the rain totals on PTE 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. (PTE Ex. 16.) If this rain event was at or near a 100-year flood frequency for some duration storm event, then this prohibition was not violated. Moreover, if the storm met or exceeded a 100-year storm, that would weigh greatly in a determination of upset.[22]

Furthermore, the Prosecution Team failed to prove that the projects set forth in the District's budgets that the Prosecution Team used to calculate economic benefit (*see* PTE Ex. 2 (2004-5 Budget Item 16 for $200,000) and Ex. 18 (input $200,000 into EPA's BEN Model[23]))

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evidence applicable to a court trial, common sense and fair play dictate certain basic requirements for the conduct of any hearing at which facts are to be determined." Among the examples cites was that evidence must be produced by *authenticated* documents); *accord* Evid. Code §1401.) All unauthenticated documents should be excluded.

[21] The Prosecution Team's brief states that "December 18 had 2.87 inches of rain and December 19 had an additional 1.73 inches of rain for a total of 4.6 inches over the two days," but provides no citation to any evidence to support this contention or to disprove the facts contained in the District's submittal at PTE Ex. 9.

[22] The original treatment plant built in the 1960s was designed with stop gates to protect from the 100-year flood as defined at that time. (Yonker Decl. at ¶14.) However, flood levels have been modified since then, and the issue was further complicated by the County's installation of flood gates on the Arroyo Grande River. (*Id.*) All new structures at the plant were protected to new FEMA flood elevations and several modifications have been made to the plant over the years to increase flood protection. (*Id.*.)

[23] There are many critics of the BEN Model. *See e.g.*, Jasbinder Singh, *EPA's Narrow Definition of Economic Benefit Vastly Increases Its Economic Benefit Estimate,* 1993 Envtl L. Rep. (Envtl. L. Inst.) 10,121, 10,121-22 (arguing that the BEN model's assumption that the violator would still use the same equipment/perform same fixes to ultimately comply as it would have used had it complied on time); 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.

would have prevented this spill incident had they been completed. (*See* PTE 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.) Therefore, this electrical system upgrade project would not have addressed the issues related to this spill event. (*Id.* at ¶17-26; Ex. 39.) The actual fix to the shunt trip happened in October of 2011 after the shunt trip was conclusively determined to be the cause of the influent pumps' failure,[24] and the cost to fix the shunt trip and install the missing waterproof seal, which was apparently not installed as designed in 1986, was approximately $3,900.[25] This event happened after the reconductoring to that area was completed, so the reconductoring definitely would not have prevented this occurrence. (*See* Ex. 39 ("Woeste Electric completed the reconductoring of the influent pumps on around August 30, 2011.").) Therefore, the Prosecution Team has failed to meet its burden to demonstrate this event could have been prevented by the implementation of Budget Item 16 in the 2004-05 District Budget.

6. The Prosecution Team Failed to Provide Evidence to Prove Nuisance.

The ACLC alleged in Paragraph 21 that "[t]he 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.'"

Nuisance has several elements, each of which must be proven with supporting evidence before enforcing prohibition.[26] (Wat. Code §13050(m).) The Prosecution Team failed to provide

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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 PTE Ex. 18.

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

[25] *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.

[26] In addition, the upset defense would also arguably apply to this provision of the permit.

evidence to prove any of these elements[27] and, therefore, this allegation must be dismissed.

7. The Complaint Improperly Proposes a $63,000 Penalty for Untimely Certification of Non-Category 1 Spill Reports.

The ACLC alleged in Paragraph 24 that "[t]he 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.'"

First, it is not clear that the District had any obligation to report these discharges into private homes because it has no private sewer laterals off of its portion of the collection system where the spills occurred. (Ex. 6, at 6-1020, Collection System Questionnaire at 5 of 24.) The discharges in question were from private laterals connected to a satellite system and into a home, which are not required to be reported at all. (*See* SSO WDR Monitoring and Reporting Program ("MRP"), Ex. 57 at 57-3, para. 6.)

Under the SSO WDR, a Category 2 SSO is any other discharges of sewage (that are not Category 1 or Private Lateral Sewage Discharges) "resulting from a failure in the Enrollee's sanitary sewer system." (SSO WDR MRP, Ex. 57 at 57-2, para. 2.) A Private Lateral Sewage Discharge or "PLSD" covers "sewer discharges that are caused by blockages or other problems within a privately owned lateral." (SSO WDR MRP, Ex. 57 at 57-2, para. 3.) Each of the spills alleged to be late certified were properly classified as PLSD spills. (*See* PTE Ex. 7 (page 1 of 3 of each spill report)(Spill Type stated as "PLSD Category 2").)

PLSD spills are not even required to be reported (*see* Ex. 57, SSO WDR MRP at 57-3, para. 6 ("All sewage discharges that meet the above criteria for Private Lateral sewage discharges *may* be reported to the Online SSO Database based on the Enrollee's discretion.")(emphasis

[27] The Prosecution Team is prohibited from putting on any evidence to prove nuisance in rebuttal or at the hearing since it failed to do so in its ACLC and Case In Chief. This must be the case because each party shall have the right "to rebut the evidence against [it]." (Govt. Code §11513, subd. (b).) This Government Code section applies to adjudicatory hearings before the Regional Board pursuant to Title 23 of the California Code of Regulations. (23 C.C.R. §648, subd. (b), (c) (incorporating Chapter 4.5 of the Administrative Procedures Act (commencing with Government Code section 11400, except for certain specified provisions), Government Code section 11513, and Evidence Code sections 801 through 805.) This same prohibition would apply for any other evidentiary failures discussed herein. (*See accord* 23 C.C.R. §648.4.)

added); Water Code §15 ("'may' is permissive").) Thus, if the PLSD spills were *not required to be reported*, then they were not required to be *certified* either.[28] The $63,000 in discretionary penalties must, therefore, be dismissed as there was no violation.

The sewage in people's homes was not a normal, non-PLSD "Category 2" SSO because it did not result from a failure in the Enrollee's (OCSD's) sanitary sewer system. The spill occurred because of an upset at the treatment plant, not a failure in the collection system, so this definition is inapplicable. Even if a Category 2 definition were arguably applicable, the SSO WDR does not require that Category 2 SSO be *certified* within 30 days. Only Category 1 SSOs are required to be certified. (*See* Ex. 57, SSO WDR MRP at 57-2, para. 4 ("Category 1 SSOs - … A final certified report must be completed through the Online SSO System, within 15 calendar days of the conclusion of SSO response and remediation.")(emphasis added).)

Category 2 SSOs need only be *reported* within 30 days, which was done in this case. (*See* Ex. 57, SSO WDR MRP at 57-3, para. 5 ("Category 2 SSOs – All SSOs that meet the above criteria for Category 2 SSOs must be reported to the Online SSO System within 30 days after the end of the calendar month in which the SSO occurs (e.g. all SSOs occurring in the month of January must be entered into the database by March 1st)."(emphasis added); *see also* PTE Ex. 7 (Spill Reports at pg. 3 of 3)(all state 12/20/2010 as reported date).) Although arguably not required to report these spills for the reasons set forth above, the District *did* report these SSOs in the timeframes set forth in the SSO WDR MRP (Ex. 57), and in fact reported them within a day of the spill occurrence. (*See* PTE Ex. 7 (pg. 3 or 3 on spill reports.) No penalties can be assessed for non-certification because certification was not required and/or no timeline for such certification exists. (Ex. 57.) This is demonstrated by the fact that the State Water Board is now proposing to *CHANGE* the reporting and certification requirements in the SSO WDR MRP. (Ex. 59 at 59-5

[28] The spills into homes are best characterized as Private Lateral Sewage Discharges. The WWTP was built in 1960s and the collection system followed in time. Under state law, backflow valves have been required since 1955 under the Uniform Plumbing Code. (*See* Ex. 60 at 60-10 to 60-13 (UPC excerpts).) The homes into which sewage entered either failed to have backflow prevention devices or failed to have a properly functioning device, so the spill resulted from this problem within a privately owned lateral. (*See* Ex. 67 (spreadsheet of spills).) If it was properly characterized as a lateral spill, then reporting was voluntary, and no certification was required. (*See* SSO WDR MRP Ex. 57 at 57-3, para. 6; Wat. Code §15 ("may" is permissive).) Because the spills into the bathtubs and tubs were not required to be reported, no certification was required and the $63,000 in proposed penalties must be dismissed.

and 59-8.) Such changes would not be necessary if that was the current rule. For these reasons, the $63,000 penalty for alleged late certification must be dismissed.

8. The Complaint Goes Beyond the Regulatory Reach of the Permits.

The Administrative Civil Liability Complaint ("ACLC") inappropriately holds the District liable for events beyond its reasonable control and 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 and provided with the Prosecution Team's Case in Chief recognizes 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[29] in diameter." (*See* PTE Ex. 1, Technical Report 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

[29] 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.)

tributary.") (Ex. 56, SSO WDR at 6.)

Thus, under the SSO WDR, the District can only be held liable for the discharges from its system and for reporting discharges from its system, not from satellite collection systems. (*See* District Ex. 56 at 56-6.) The satellite collection systems adjacent to the District would be responsible for reporting discharges from their satellite system and would have an upset defense for any spills from its system that were beyond their reasonable control.

10. Unconstitutionality of Unreasonably High Penalties.

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.") The trier of fact must use its discretion as applied to the facts of the or else the penalty could violated 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, any action to impose an excessive penalty without adequate consideration of the statutory factors (Wat. Code, §13385(e), §13327) and without the exercise of discretion would be unconstitutional by failing to provide the District with its constitutionally-guaranteed rights to due process, and would violate federal and state constitutional prohibitions against "excessive fines." (U.S. Const., 8th Amend; Cal. Const., art. I, §17.)

B. Response to Prosecution Team's Case in Chief

1. The Prosecution Team's Volume Estimating Methodology is Flawed.

The District requested a third party expert opinions on the reliability and accuracy of the Prosecution Team's spill volume estimates. Attached herein as Exhibits 32 and 47 are the expert opinions drafted by RMC and CH2M Hill. CH2M Hill performed three tasks in its independent review, as follows: 1) checked the mathematical and engineering calculations; 2) reviewed the overall approach used and the strengths and weaknesses of the approach; and 3) developed

opinions regarding the confidence and validity of the Prosecution Team's estimates. (Ex. 47 at 47-13)

In addition to not clearly including application of a time lag in its calculation, CH2M Hill determined that the Prosecution Team had several questionable mathematical calculations in the Technical Report (PTE Ex. 1) that brought into question its final spill volume. (*Id.*) CH2M Hill's expert opinions were as follows:

a) The spill amount derived by the Prosecution Team resulted in "a questionable spill amount." (*Id.* at 47-16.)
b) Calculating the spill estimate down to the gallon is unreasonable and difficult to derive from the data utilized. (*Id.* at 47-16 and 47-21 to 47-22.)
c) No technical or engineering basis exists for determining a wet weather hydrograph by artificially increasing a dry weather diurnal curve to match a certain point on a wet weather hydrograph. This "apples to oranges" comparison is not a reasonable assumption. (*Id.* at 47-16 and 47-21.)
d) The Prosecution Team's methodology relying on effluent flows may not fully capture the fact that stormwater pumps were pumping large volumes of stormwater into the WWTP headworks, at a rate of about 1.4 mgd. (*Id.* at 47-16 to 47-18, and 47-21.)
e) The Prosecution Team's methodology does not accurately consider the amount of wastewater that was stored in the system or onsite, which was later drained back into the system once the pumping systems became fully operational following the storm. (*Id.* at 47-19 to 47-20, and 47-21 to 47-22.)

Based on these opinions, CH2M Hill came to the conclusion that the Prosecution Team's approach lacks a sound engineering basis, is not an approach reported or confirmed in the literature, and does not represent an acceptable volume estimating approach in CH2M Hill's engineering practice. (*Id.* at 47-21 to 47-22.)

RMC also reviewed the Prosecution Team's methodology and determined that the method used "significantly overestimated the actual spill volume." (Ex. 32 at 32-3.) RMC then calibrated a hydrologic model of the SSLOCSD system, applied the model to estimate the rainfall dependent infiltration/inflow ("RDI/I") hydrograph for the December 19-20, 2010 event, and calculated a more accurate estimate of the spill volume for the December 19-20 event. (Ex. 32 at 32-3 to 32-9.) RMC's resulting spill volume estimate is **674,400 gallons**, an amount very close to the District's initial volume estimate using a similar methodology of approximately 661,000 gallons. (See Ex. 32-9 citing page 6 of District's Technical Report of January 3, 2012 [PTE Ex. 9] and

Table 4 on page 11 of Water Board OE's Technical Report of June 19, 2012 [PTE Ex. 1].)

However, the Prosecution Team's volume estimation method (and RMC's as well) does not work well with the SSO WDR's reporting requirements into CIWQS. (Ex. 57, SSO WDR MRP, at 57-3 to 57-5.) Using the "volume under the curve" method, it would be impossible to identify the "location of SSO by entering GPS coordinates," assign a volume and report flows from each manhole and for each SSO in gallons, provide estimated start and stop times, and to provide other requested information. (*Id.*; *see also* Ex. 32 at 32-2.[30]) For these reasons, and the other reasons set forth in more detail in Exhibits 32 and 57, the Prosecution Team's volume estimates should be rejected.

2. The District's Volume Estimations are More Reasonable and Sound.

In addition to reviewing the Prosecution Team's spill volume estimates, CH2M Hill also reviewed the District's volume estimates. CH2M Hill performed the same three tasks as it had performed on the Prosecution Team's estimates. (*See supra* at VI.B.1, pg. 26-27.)

CH2M Hill's review elicited the following opinions about the District's methodology:

a) Unlike the Prosecution Team's method, 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 recognized methods for spill estimation. (*Id.* at 47-11 to 47-12.)

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.) For these

[30] Although the State Water Board is currently proposing ***changes*** to the reporting requirements to re-design "the CIWQS SSO Database to allow 'event' based spill reporting versus the original 'location' based design," (Ex. 59 at 59-2. para. 9, and 59-7, para. 2), the current requirements are location and manhole based. (Ex. 57 at 57-4 to 57-5.)

reasons, and the other reasons set forth in more detail in Exhibit 47, the District's volume estimate should be accepted and the proposed penalty, if any, should be modified accordingly.

3. The Proposed Penalty is Not Consistent with Other ACLs Statewide.

Without providing any supporting evidence or even citations to the complaints referenced, the Prosecution Team attempts to differentiate the spill at issue from other sewer spill cases enforced throughout the State. The Prosecution Team states that "the proposed penalty for the District, at $1.21 per gallon, is not the highest amount per gallon compared to other cases." (Prosecution Team Brief at 9:7-8.) The Prosecution Team then provides three examples in just two regions where the per gallon amounts were higher. (*Id.* at 9:8-11.) However, the Prosecution Team fails to provide citations to the Complaint and Order numbers for those other enforcement actions, and fails to include those documents in their evidence to confirm their allegations.

In addition, the Prosecution Team fails to point out that there are many instances where the per gallon penalty is *substantially less*. For example, a very recent ACL in Region 6 proposed to impose a penalty of less than $1 million for 5 spill events (including one during storms in the December 20, 2010 timeframe), totaling more than 4.3 million gallons (*see* Ex. 73, Proposed Settlement for ACL No. R6V-2012-0048), with an initial proposed penalty of $912,819.87 and a settlement amount of $700,000 (or **less than 2 cents per gallon**).[31] 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 equates 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**).)[32] Thus, the Prosecution Team has wholly failed to demonstrate

[31] For each of the spills, including the largest spill of 4.29 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.)

that the proposed penalty is consistent with other enforcement actions on a per gallon basis.

In addition, the Prosecution Team failed to adequately support its required factor analysis with evidence. (*See supra* footnote 27.) Although a number was assigned to each of the factors, the Prosecution Team's Case in Chief brief failed to discuss these at all, and the evidence included with the ACLC did not adequately explain the basis for each of these numbers, and did not include evidence to support any basis included, if any. (PTE Ex. 1 at pgs. 8-22.)

For example, the Prosecution Team deemed the District's December 19-20, 2010, spill event to be the maximum score of 5, or major impact and harm to beneficial uses. Most of the Technical Report's "analysis" of this factor related to spill volume, not potential harm. (Ex. 1 at 8-14.) The remainder had statements that do not support a "major" harm determination, including statements related to "undetermined harm" (Ex. 1 at 14), and reliance on the beach closure when evidence exists that the beach was closed prior to the spill due to high surf and storm conditions. (Ex. 1 at 15-16; *see also* Ex. 46, Ex. 97.) All other allegations of adverse affects and potential human exposure are wholly unsupported by evidence. (*See evidence of no harm* at Ex. 48 at 48-386 to 48-387.)

As an example, the assignment of a "5 Major" to this spill is inconsistent with other enforcement actions for sewer spills. (*See e.g.*, Ex. 73, Order No. R6V-2012-0048 at 73-71 to 73-72 (Harm score of 3 for over 4 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 is 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, once in three year pollution events authorized with EPA criteria); Ex. 88, ACL Complaint No. R2-2012-0055, at 88-66 (Harm score

[32] *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**).)

of 2 or 1 due to diluted wet weather flows, posting due to stormwater runoff, limited recreation in wet weather).) For these reasons, each of the Prosecution Team's recommended numbers on each of the factors, which all suffer from the same evidentiary infirmities and statewide inconsistency, must be adjusted to lower the penalty, if any, imposed upon the District. The District has provided a spreadsheet and a presentation demonstrating how modification of the factors substantially affects the ultimate penalty amount. (*See* Ex. 61 and Ex. 52.)

The Regional Board must keep in mind that, in disciplinary administrative proceedings, the burden of proof is upon the Prosecution Team 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 for relief or defense that he is asserting.").) The State Water Board has also confirmed that "It is up to the Regional Board staff to *affirmatively prove each element* listed [in section 13350(a)(2)]." (*See In the Matter of the Petition of Freedom County Sanitation District*, SWRCB Order No. WQ 87-2 (emphasis added).) The Prosecution Team has failed to support its factor analysis with adequate findings and evidence, and has failed to meet its burden of proof.

4. The District's Other Enforcement History at the WWTP is Irrelevant.

The mandatory factors for consideration include any prior history of violations and the degree of culpability. However, it would seem that this would be related and relevant to similarly situated *collection system incidents*, not just effluent limitation exceedances or reporting issues generally at the WWTP. The information that the Prosecution Team is attempting to add to the record (Prosecution Team Brief at 8:2-18 and PTE Exs. 11-15, 19-20, and 24) is irrelevant,[33] unduly prejudicial,[34] and should be ignored as those instances either were not subject to a formal

[33] Relevant evidence is "evidence, including evidence relevant to credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code §210.) There are no allegations in the pending complaint about employee issues at the District, and therefore this evidence is irrelevant.

[34] The Prosecution Team provides only prejudicial snippets of the record in the employee investigation conducted by the Office of Enforcement. If these snippets are allowed into the hearing record, then the District reserves the right to

enforcement proceeding or failed to result in substantial penalties.[35] For these reasons, the District's objections to this section and the evidence relied upon therein should be granted and this information should be excluded.

5. Significance of Rain Event Not Proven.

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" (PTE Ex. 1 at 8.) The Prosecution Team argues, again 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 had cited no evidence to support its storm size estimates, nor provided any citation to expert opinion to corroborate its argument about the storm size being a 10 to 25 year frequency. (*See also* Section V.A.5 *supra*.) Without this evidentiary support, the Prosecution Team has failed to meet its burden of proof.

6. The Claimed Staff Costs are Unreasonable.

Without any corroborating time sheets or other evidence to support the alleged staff time spent, the Prosecution Team claims 449 hours (equivalent to more than 11 business day weeks of 8 hour days) has been spent investigating and prosecuting this enforcement action. (Prosecution Team Brief at 11-12.) When billed at $150/hour, this equates to $67,350, which is substantially higher than the amount set forth in the ACLC of $50,000 (an amount that does not appear to be

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supplement the record to provide the entire record of those investigations and the results therefrom. For example, the information submitted about Mr. Appleton only resulted in a letter of reprimand, not a downgrading of his license or any monetary penalties. Due to its objections to these documents, the District has not included documents related to these "employee issues" as they are not relevant to the issues at hand and will take an inordinate amount of time to explain the background, the investigation, the consequences, and the current status of each of the employees. Further, the District will request at least an additional 2 hours to address these issues at the hearing if these tangents are allowed to be explored.

[35] Even if evidence were otherwise admissible, the presiding officer has discretion to exclude it "if its probative value is substantially outweighed by the probability that its admission will necessitate an undue consumption of time." (Govt. Code §11513, subd. (f); *accord* Evid. Code §352, subd. (a) [time consuming evidence is excludable].)

supported by any evidence).[36] (*Id.*)

The Regional Board should carefully consider the amount of time and the amount of money being requested to be reimbursed by the District in this matter, which is substantially higher than 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, 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, it is unclear that three (3) or more people were necessary to accomplish many of the tasks set forth as being undertaken by the Prosecution Team. (Prosecution Team Brief at 11-12.)[37] Further, given the facts at issue, the Regional Board is *not required* to pass on these costs to the District because the District has incurred substantial costs responding to numerous requests for documents and evidence by the Water Boards (*see e.g.*, PTE Exs. 9 and 6), and because awarding these staff costs is 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).)

7. The District Has Not Received Any Economic Benefit.

Based on an assumption, without any supporting evidence or corroborating expert testimony, that a re-wiring project set forth in the District's 2004-05 Budget document would have prevented the spill (*see* PTE Ex. 2 at 2d page), the Prosecution Team plugged into the BEN model the amount of $200,000 as set forth in the 2004-05 Budget. This assumption is inaccurate as the

[36] In addition, the Prosecution Team has failed to demonstrate how the cost document used and provided with its Case in Chief applies since that document is titled "Site Cleanup Program," and this is not a site cleanup action. (*See* PTE 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* PTE Ex. 17.)

[37] It is also unclear why the Prosecution Team was billing for Mr. Mark Bradley's time after he was no longer employed by the State Water Board. (Prosecution Team Brief at 12.) The Prosecution Team continues to spend additional time by numerous staff on this matter, including having 4 people from the Prosecution Team attend the deposition of Mr. Jeff Appleton on August 14, 2012. (*See* Yonker Decl. at ¶ 15.)

District's electrical expert has opined that this project, which proposed to replace the electrical system wiring in the Power Generation Plant with waterproof wiring since it was being submerged by groundwater, would not have addressed the main issue with shunt trip that caused the December 19-20, 2010 sewer spills. (*See* Ex. 25 at ¶ 5-24; Ex. 39 (reconductoring complete before same shunt trip issue occurred again on October 4, 2011); Ex. 51.)

In addition, other inputs to the BEN model are suspect, including the Noncompliance Date of 6/1/2004,[38] when the alleged non-compliance did not occur until December 19, 2010, which skews the data by 5 and a half years. (PTE Ex. 18 at pg. 2.) Similarly, there is no justification for the input of 1/1/2013 as the Compliance Date, since there are no allegations in the ACLC that the WWTP and collection system are not currently in compliance. Thus, without good reason, the compliance date should be 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)).

The Prosecution Team also provided no evidence for: 1) the $5000 estimated cost for its included one-time, non-depreciable expenditure, 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 will not even have occurred by that date). (PTE Ex. 18 at pg. 2.) These unexplained and unsupported inputs into the black box of the BEN Model make the output of $177, 209 highly questionable[39] and the economic benefit calculations equally suspect. Other sewer spill enforcement actions, including one recently adopted by this region (Ex. 81, Order No. R3-2011-0212 at 81-17), routinely have 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 Prosecution Team has failed to meet its burden of demonstrating that the District enjoyed any economic benefit of non-compliance.

[38] This was more reasonably included as the Cost Estimate Date since this amount was included in the Fiscal Year 2004-2005 Budget document. *See* PTE Ex. 18 at 2, and Ex. 2.

[39] To demonstrate this further, another region's enforcement action estimated that a budget item of $200,000-$300,000 would result in an economic benefit amount substantially lower than the one proposed here – of just $25,561. *See* Ex. 84, ACL Complaint R5-2012-0537 at 84-13 to 84-14.

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

The Prosecution Team appears to believe that, because of the District's fund balances, the District has the ability to pay more than one million dollars in penalties. (PTE Ex. 1 at 21 citing District's 2010-11 Budget ("It is anticipated that the District would be able to pay the proposed penalty.").) First of all, the cited dollar amounts attributed to the District's funds are from July 1, 2010 (*id.*), which represents information more than two years old. The proposed penalty would equate to over one-third (1/3) of the District's total fund balances of $3,774,194 as budgeted for FY 2012-13. (*See* Exhibit B to Yonker Decl.; *see also* PTE Ex. 6 at 6-859 to 6-862.) In addition, after all budgeted revenues and expenditures are incorporated into the budget, paying the proposed penalty would leave the District with a negative balance of -$260,794 as of July 1, 2013. (*See* Exhibit B to Yonker Decl.) Thus, the 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[40]), the delay of some major budgeted items not being completed as planned (thereby placing the District in further jeopardy of non-compliance), or the need for a substantial rate increase of approximately 9% just to cover the proposed expenses and to end with a zero fund balance, which would not be fiscally responsible. (*Id.*)

The Prosecution Team's argument that the District can pay by passing the costs on to the ratepayers (Prosecution Brief at 13:9-10) ignores 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."].) Moreover, during this time of extended recession, rate protests have been more prevalent throughout the state, and several rate increases have been protested, including in the City of Colfax. (*See accord* 9/4/08 Roseville EPT article at http://rosevillept.com/detail/92151.html.) Therefore, a rate increase is not a foregone conclusion

[40] In fact, the District has a large loan for $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.

and should not be treated as such.[41]

Finally, the Prosecution Team ignores the fact that each 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....").) Thus, all restricted funds, including the largest fund (Fund 20),[42] should be excluded from the Prosecution Team's ability to pay analysis as these funds cannot be used to pay the proposed penalty. For these reasons, a substantial downward adjustment in the Ability to Pay factor is warranted.

V. RENEWED REQUEST FOR ADDITIONAL TIME AT THE UPCOMING HEARING

The District initially 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 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).) Subsequently, on July 27, 2012, the Prosecution Team provided its brief, witness list, and evidence, including 4 binders full of documents (PTE Exs. 1-24.) This

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[41] To the extent that the Prosecution Team transgresses onto tangents related to the "improprieties of the Wallace Group" without any supporting evidence, these arguments must be ignored as not only unsupported, but also unduly prejudicial, and demonstrating bias by the Prosecution Team. (Prosecution Team Brief at 13-14.) Had the Prosecution Team had any evidence of "improprieties," those allegations and the proper parties should have been added to the ACLC so that they could be properly addressed. Since that was not done, these allegations are improperly raised here. (23 C.C.R. §648.4.) Further, to the extent that the Prosecution Team might be alluding to possible insurance coverage, that reference would also be improper and should be disregarded by the Board. Whether the proposed penalty would be covered by insurance is not germane to the action, and evidence on that issue should be excluded as irrelevant. (*See* Law Rev. Com. Comment, Evid. Code § 1155; *Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1122 [evidence of insurance is irrelevant to both liability and damages].)

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

submission required the District to engage expert witnesses, compile extensive documentary evidence (Exhibits 25-98), and draft this complex factual and legal brief supported by the evidence. Just reviewing this evidence for the Regional Board will take extensive time, as will putting on witnesses for direct and cross examination. The current 90 minutes per side to testify, present evidence, and cross-examine witnesses, and 5 minutes for closing argument is inadequate given the numerous factual and legal issues raised in this hearing.

Accordingly, the District requests at least an additional sixty (60) minutes to present its case in order to have adequate time to explain the multiple issues and ample evidence presented in its briefs during opening and closing arguments, to provide witness testimony to corroborate its arguments, rebut the Prosecution Team's evidence, and to adequately cross-examine the Prosecution Team's two or more witnesses.[43] The District believes that it must be provided due process through the provision of adequate time to present its case related to this alleged penalty of over $1 million. As such, the District renews its request that it be provided at least two (2) and a half hours to present its case.[44] Since this hearing appears to be the only matter on the Regional Board's agenda for September 7, 2012, there should be ample time to accommodate the District's request.

VI. CONCLUSION

The District and its Board of Directors, on behalf of the property owners/sewer users paying the fees that would be used to pay this enormous penalty, respectfully request that the Regional Board use the ample flexibility provided to it through the U.S. EPA regulation, 2010 SWRCB Enforcement Policy, the language of Water Code sections 13385(e) and 13327, and notions of equity and due process, to decline to issue the proposed ACL for $1,383,007.50. Instead, the District asks that the Regional Board determine that the District has met its burden of proving an upset (or bypass) condition that would work as an affirmative defense to the proposed

[43] The amount of time requested will be more if the Prosecution Team calls Mr. Jeff Appleton as a witness or attempts to include any portions of his deposition transcript into the record as evidence since his credibility and the relevance of his testimony will take up an inordinate amount of time.

[44] To be clear, the District requests at least a 2 and 1/2-hour allotment of time to present its case and rebut the allegations against it. If less time is needed to actually present its case, then the District will not utilize the entire time.

violations and penalty. Alternatively, the District requests that the Regional Board takes into account all the facts of this case as set forth by Water Code sections 13385(e) and 13327, including the financial impact on the community and the ability of the District to continue with planned upgrades to, and continued operation of, this relatively small community's WWTP and collection systems. Bringing severe economic hardship on this small community that has no other options for wastewater treatment will not improve, and may adversely impact, water quality. For the reasons provided herein and in the attachments submitted, no penalty, or alternatively a much smaller and more reasonable penalty, should be imposed.

Respectfully submitted,

DATED: August 20, 2012

DOWNEY BRAND LLP

By: _____

MELISSA A. THORME
Attorneys for
South San Luis Obispo County Sanitation District

1271601.1

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SOUTH SAN LUIS OBISPO COUNTY SANITATION DISTRICT (SSLOCSD)

BEFORE THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

FOR THE CENTRAL COAST REGION

In the Matter of:

Administrative Civil Liability Complaint No. R3-2012-0030
SSLOCSD, San Luis Obispo County

SOUTH SAN LUIS OBISPO COUNTY SANITATION DISTRICT'S WITNESS LIST

On behalf of the South San Luis Obispo County Sanitation District ("District"), we hereby submit the following witness list containing the information required by Final Hearing Procedures set forth for this proceeding:

1. **Mr. Aaron P. Yonker, P.E.**, testifying on behalf of the District as the Person Most Knowledgeable (30 minutes*) - On behalf of the District, Mr. Yonker will provide direct testimony on background information about and history of the District, the events that occurred on or about December 19, 2010, technical and factual issues related to the District's compliance and reporting, District employment issues (as relevant), remedial measures undertaken, financial issues related to the District's ability to pay, rebuttal to the Prosecution Team's evidence and arguments, and other relevant issues. Mr. Yonker's

* The time estimates set forth herein may be increased if an increased amount of time is granted for the hearing.

qualifications are included in Exhibit A to his declaration submitted with the District's evidence.

2. **Ms. Mary L. Vorissis, P.E., CH2M Hill** (10 minutes*) – Ms. Vorissis will provide testimony analyzing the spill volume estimates prepared by both the District and the Prosecution Team. Her qualifications are included in her resume, which is attached in the District's Exhibit 47 as sub-Exhibit F, at 47-205 to 47-209.

3. **Mr. Paul Giguere, P.E., RMC** (10 minutes*) – Mr. Giguere will provide an analysis of the Prosecution Team's spill volume estimate and discuss corrections that were needed to this estimate. His qualifications are included in his resume, which is attached in the District's Exhibit 32 at 32-18 to 32-21.

DATED: August 20, 2012

DOWNEY BRAND LLP

By: _____

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BEFORE THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

FOR THE CENTRAL COAST REGION

In the Matter of: South San Luis Obispo County Sanitation District, Administrative Liability Complaint No. R3-2012-0030	ACLC No. R3-2012-0030 **South San Luis Obispo County Sanitation District's Evidence List**

South San Luis Obispo County Sanitation District hereby submits its list of documentary evidence and exhibits proposed to be offered at the hearing in the above-captioned action, as follows:

Exhibit #	Description
6	May 31, 2011 District Response to Notice of Violation (copy of document number 6 submitted by Prosecution Team in Support of ACLC R3-2010-0030 with Bates numbers added, to replace non-Bates numbered copy submitted by Prosecution Team per agreement of the parties)
20	Jeff Appleton electronic email re: headworks issues and photographs (complete copy of document submitted by Prosecution Team in Support of ACLC R3-2010-0030 as document number 20, to replace incomplete copy submitted by Prosecution Team per agreement of the parties)
23	October 14, 2011 District memo regarding Second Electrical Failure (complete copy of document submitted by Prosecution Team in Support of ACLC R3-2010-0030 as document number 23, to replace incomplete copy submitted by Prosecution Team per agreement of the parties)

Exhibit #	Description
25	August 14, 2012 Notarized Declaration of William Thoma of Thoma Electric
26	SSLOCSD's 2006 Capacity Report
27	Santa Margarita ACL
28	District's NPDES Permit for WWTP, Order No. R3-2009-0046
29	Information Related to the Reporting of Private Lateral Spills to SWRCB
30	SSLOCSD Air Permit and related documents
31	Graphs comparing effluent flow to other events
32	RMC Report
33	Exhibit regarding E-coli levels in Lagoon
34	SWRCB Enforcement Policy (2010)
35	1/2/06 Influent flow chart
36	Adopted 2012/13 District Budget
37	District I/I report dated August 3, 2011
38	Appleton response to updated spilled calculations
39	Shunt trip invoices and related emails
40	Exhibit of District Trunk and OCSD collection system
41	Exhibit of all affected manholes including location and spill volume
42	Letter of Proposed Disciplinary Action to Jeff Appleton; Letter of Reprimand to Jeff Appleton
43	Hydraulic response memo
44	Collection system profile exhibit
45	Table summary of December rain day data
46	Information regarding the County Health Department policies and protocols related to closing beaches and posting in relation to sewer spills
47	CH2M-Hill Report
48	District's supplemental information submitted 9/23/2011
49	Spill and Flood Extent Maps

Exhibit #	Description
50	State Water Board 2010 Annual Enforcement Report
51	Graphical summary of electrical projects at plant
52	Rebuttal to Penalty Factors
53	Penalty Comparison of other spills (graph/ table)
54	District's 2011 SSMP
55	Exhibit of Ponded Areas on site
56	SWRCB Order No. 2006-0003-DWQ (SSO WDR)
57	SWRCB Order No. 2008-0002-Exec (SSO WDR MRP)
58	Headworks Diagram
59	New Draft SSO WDR MRP (dated 8/14/12)
60	County code for backflow preventers
61	Penalty factor comparison
62	Onsite Storm Drain Locations Exhibit
63	SLO County Flood Volume Calculations
64	CIWQS spill volume submittals
65	District's SSO NOI
66	SWRCB SSO reduction training
67	Private lateral investigation spreadsheet
68	Blank CIWQS report
69	Final ACL Hearing Procedures
70	District's Objections to Draft Hearing Procedures
71	Headworks pull box raising information
72	BEN Users Manual (1999)
73	Proposed Victor Valley ACL Settlement
74	EBMUD ACL
75	Ukiah ACL

Exhibit #	Description
76	Sebastopol ACL
77	Sonoma Valley ACL
78	Novato ACL
79	Redwood City ACL
80	Oakland ACL
81	SLO ACL
82	Lake Berryessa ACL
83	Discovery Bay ACL
84	Grass Valley ACL
85	Irvine Ranch ACL
86	Eastern MWD ACL
87	Oceanside ACL
88	Ross Valley ACL
89	Greka Oil and Gas ACL
90	OES Email/ Storm Info
91	Documents produced by Jeff Appleton
92	Plant overview slides
93	Documents Demonstrating 4 2001 Spills Were Not the District's
94	Co-Generation Loan Documents
95	Evidence of District's $6000 in MMPs since 2000
96	KSBY.com news article entitled "SLO Co. initiates Arroyo Grande Creek Levee Failure Plan"
97	Email string re: Oceano Dunes SVRA attendance 12/19/10 – 12/29/10
98	Declaration of District's Person Most Knowledgeable, Aaron P. Yonker, P.E.

Respectfully submitted,

DATED: August 20, 2012

DOWNEY BRAND LLP

By: _____
MELISSA A. THORME
Attorneys for SOUTH SAN LUIS OBISPO COUNTY SANITATION DISTRICT (SSLOCSD)