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South San Luis Obispo County Sanitation District

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BEFORE THE

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

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

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

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

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

A. DISTRICT BACKGROUND

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

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

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

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

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

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

B. SPILL EVENT BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

1. NAME AND ADDRESS OF PETITIONER:

South San Luis Obispo County Sanitation District
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Oceano, CA 93475
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bob@sslocsd.us and JohnW@wallacegroup.us

2. THE SPECIFIC ACTION OR INACTION OF THE REGIONAL BOARD WHICH THE STATE BOARD IS REQUESTED TO REVIEW:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. THE MANNER IN WHICH THE PETITIONER IS AGGRIEVED:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b. <u>The Permitted Facility was Being Properly Operated at the Time of the Upset.</u>

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

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

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

c. Notice of the Upset was Submitted as Required.

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

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

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

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

d. Remedial Measures were Implemented as Required

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

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

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

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

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

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

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

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

> "This court is of the opinion that EPA should provide an excursion provision .... <u>Plant owners should not be subject to sanctions when they are operating a proper treatment facility</u>. 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

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

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

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

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

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

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

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

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

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

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

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

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

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

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Further, the District's Permit provides no guidance beyond that language of "100-year frequency flood" – i.e., no identification of what duration storm (e.g., 5 minutes, 2 hours, 24 hours, 2 days, etc.) or what depth of water to which that flood frequency applies. (*See* Ex. 28.) The Prosecution Team only provided an unauthenticated NOAA "Point Precipitation Frequency Estimate" document (Ex. 16); however, no evidence or expert opinion was provided as to how to interpret that document, or how the water on the ground during the storm event of December 18-20, 2010 measured up to a 100-year frequency flood. The evidence shows that "a total rainfall accumulation of 5.14 inches of rain fell at the OCSD water yard located on 19th Street in Oceano between 1 am on Sat the 18th and 6 pm on Sun the 19th." (Ex. 6, Explanation of Incident – Timeline and Narrative.) This would equate to 5.14 inches in 41 hours, and would fall within the 100-year storm recurrence interval for 24-48 hour duration storms. (*See* Ex. 16 at intersection of 100-year recurrence and 24 and 48 hour durations (confidence intervals are 3.81-5.79 inches in 24 hours, and 4.95-7.53 inches in

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a) Bypass was unavoidable.

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

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

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

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

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

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

c) The District Complied With the Notice Requirements.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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