

1 manhole-by-manhole approach be taken to reporting this spill event. (HT at 149:25 to 150:12; Ex.
 2 68 (blank form showing location required).) Thus, the District’s initial estimate was the only
 3 justifiable approach for complying with those requirements. The Regional Water Board failed to
 4 address these legal and factual issues. (Gov’t Code §11425.10(a)(6); §11425.50(a).)

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

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

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

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

26 1. The Amount of the Penalty is Inconsistent with Other Sewer Spill
 27 Enforcement Actions Statewide and Nationwide.

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

1 one of 42.9 million gallons during storms in the same December 20, 2010 timeframe), totaling
2 almost 43.3 million gallons (see Ex. 73, ACL No. R6V-2012-0048), with an initial proposed
3 penalty of \$912,819.87 and a settlement amount of \$700,000 (including \$429,140 for the largest
4 incident = **less than 1 cent per gallon**).²⁵ In Region 2, the East Bay Municipal Utility District ACL
5 (Ex. 74, Order No. R2-2011-0025) imposed a penalty of \$209,851 (including economic benefit and
6 staff costs) for 430,698 gallons of partially or not treated sewage – this penalty for a spill roughly
7 the same size equated to **less than \$0.29/gallon**. Other ACLs in Region 5 have been as low as
8 \$0.10-0.15 per gallon. (See e.g., Ex. 82, Order No. R5-2011-0538 (\$375,000 penalty for 3.834
9 million gallons discharged, which is approximately **\$0.10/gallon**; however, \$360,000 of that
10 penalty was *suspended* if improvements were made so the actual fine was less than a penny a
11 gallon); see also Ex. 83, Order No. R5-2012-0526 (\$241,000 penalty for 1,783,950 gallons spilled
12 or approximately **\$0.14/gallon**).²⁶ Thus, the Regional Water Board wholly failed to demonstrate
13 its penalty of nearly \$1.65 per gallon was consistent with other enforcement actions in California
14 under the new 2010 Enforcement Policy on a per gallon basis. The proposed penalty for this single
15 spill event is also wholly inconsistent with other administrative penalties nationwide. (See EPA,
16 Report to Congress, *supra*, at Appendix K, K-19 to K-25 (describing generally much lower penalty
17 amounts); compare also Proposed Consent Decree in *U.S. v. GSP Management Co.* (proposing \$1.3
18 million for 4,700 violations of federal and state drinking water and sewage treatment laws at 73
19 mobile home parks in 3 states) found at <http://www.justice.gov/usao/pae/News/2012/Sep/perano>
20 [consentdecree.pdf](#).) Thus, the imposed penalty is neither fair nor consistent with other recent
21 enforcement actions under similar laws. Such differential treatment also raises the issue of equal
22 protection under the law. If the law is the same in both places, but the District is being punished

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

26 ²⁶ See also Ex. 86, Order No. R9-2011-0010 (\$353,200 penalty for 1.6 million gallons spilled (revised down from 2.39
27 million) or approximately **\$0.22/gallon**); Ex. 27, Stipulated ACL No. R9-2011-0057 (\$890,000 penalty for 2,293,000
28 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**.)

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

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

5 The Enforcement Policy requires that ACL penalties be fair and consistent. (Ex. 34 at 34-6,
6 34-7, 34-14, 34-15). Nevertheless, the Regional Water Board failed to demonstrate that that each of
7 the penalty adjustment factors were fairly assigned by failing to adequately support its factor
8 analysis with evidence. (See Exhibit C.) Although the Regional Water Board assigned a number to
9 each of the factors set forth in the Enforcement Policy, there were little to no citations to evidence
10 to adequately explain the basis for each of these numbers. (Order No. R3-2012-0041; see also Ex.
11 1 at pgs. 8-22.)

12 For example, the Regional Water Board deemed the District's December 19-20, 2010, spill
13 event to warrant the maximum score of 5, or major impact and harm to beneficial uses. Yet, the
14 Regional Water Board cited to absolutely no evidence to support this arbitrary determination. To
15 the extent it relied on the Prosecution Team Technical Report, that report's "analysis" of this factor
16 mostly related to spill volume, not potential harm. (Ex. 1 at 8-14.) The remainder did not support a
17 "major" harm determination, including statements related to "undetermined harm" (Ex. 1 at 14),
18 and reliance on the beach closure when evidence demonstrates that the beach was closed *prior to*
19 the spill and there was minimal attendance at the beach due to dangerous high surf and storm
20 conditions. (Ex. 1 at 15-16, Ex. 46, Ex. 97-3 (closed on 12/19/2010), Ex. 98-27 (para. 41), Ex. 98-
21 28 (para. 42), Ex. 98-29 (para. 43), Ex. 52-2, Ex. 61; see also See HT at 478:13-479:4.)

22 Moreover, the assignment of a "5 Major" to this spill was inconsistent with other
23 enforcement actions for sewer spills. (See e.g., Ex. 101, Ex. 53, Ex. 73, Order No. R6V-2012-0048
24 at 73-71 to 73-72 (Harm score of 3 for a nearly 43 million gallon spill); Ex. 87, ACLC No. R9-
25 2012-0036, at 87-4 (Harm score of 2 (moderate) for greater than 5 million gallon spill); Ex. 79,
26 ACLC No. R2-2011-0006 at 79-7 to 79-8 (Harm score of 3 where lagoon closed to public for 14
27 days); Ex. 78, ACLC No. R2-2010-0102, Supporting Memo at 78-20 (Harm score of 1 for spill in
28 wet weather when human use was minimal and sewage is diluted); Ex. 74, ACLC No. R2-2010-

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

7 The State Water Board must keep in mind that, in disciplinary administrative proceedings,
 8 the burden of proof is upon the Regional Water Board and guilt must be established to a reasonable
 9 certainty and *cannot be based on surmise or conjecture, suspicion, theoretical conclusions, or*
 10 *uncorroborated hearsay.* (*See Cornell v. Reilly* (App. 1 Dist. 1954) 127 Cal.App.2d 178, 273 P.2d
 11 572; *see also* Cal. Evid. Code §500 (stating “Except as otherwise provided by law, a party has the
 12 burden of proof as to each fact the existence or nonexistence of which is essential to the claim”).)
 13 The State Water Board has also confirmed that “[i]t is up to the Regional Board staff to
 14 *affirmatively prove each element....*” (*See In the Matter of the Petition of Freedom County*
 15 *Sanitation District*, SWRCB Order No. WQ 87-2 (emphasis added).) The Regional Water Board
 16 failed to support its factor analysis with adequate findings and evidence, and also failed to meet its
 17 burden of proof to establish that its final factors are fair and consistent with other SSO enforcement
 18 actions as required by the Enforcement Policy (Ex. 34). For these reasons, the Regional Water
 19 Board’s factors analysis are unlawful and must be overturned.

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

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

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

1 and Ex. 18 (input \$200,000 into EPA's BEN Model²⁸) would have prevented this spill incident had
 2 that work been completed prior to December 2010. (See Ex. 1 at 20 (electrical work "could have
 3 prevented" overflow).) The project set forth in Exhibit 2 related to the replacement of wiring to the
 4 motors in the motor control center with waterproof wire. (Ex. 2, District 2004-05 Budget Item,
 5 Electrical System Update.) The lack of waterproof wiring was not the cause of this incident. (Ex.
 6 25 at ¶5-25, Ex. 98-21 (para. 11), Ex. 98-31 (para. 51); HT at 56:9-16, 553:12 to 555:20, 30:11-24,
 7 59:15-19.) Therefore, this electrical system upgrade project was not demonstrated to have
 8 conclusively addressed the issues related to this spill event. (Ex. 25 at ¶17-26; Ex. 39.)

9 The actual fix to the problem happened in October of 2011 after the shunt trip was
 10 conclusively determined to be the cause of the influent pumps' failure (because it tripped again, this
 11 time *without* a spill),²⁹ and the cost to fix the shunt trip and install the missing waterproof seal,
 12 which was not installed by the contractor as designed in 1986, was approximately \$500 to \$3,900.³⁰

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

23 In addition, other inputs to the BEN model were suspect, including the Noncompliance Date of 6/1/2004, when
 24 the alleged non-compliance did not occur until December 19, 2010, which skews the data by 5 and a half years. (Ex.
 25 18 at pg. 2.) Similarly, there is no justification for the input of 1/1/2013 as the Compliance Date, since there were no
 26 allegations in the ACLC that the WWTP and collection system are not currently in compliance. Thus, without good
 27 reason, the compliance date should have been December 21, 2010 when the collection system was back to regular
 28 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)).

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

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

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

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

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

10 **G. The Awarded Staff Costs were Unsupported, Unreasonable, and Inconsistent**
 11 **with Other ACLs.**

12 Without any corroborating time sheets or other evidence to support the alleged staff time
 13 spent, the Prosecution Team initially claimed 449 hours (equivalent to more than 11 five-business-
 14 day weeks of 8-hour days) had been spent investigating and prosecuting this relatively straight-
 15 forward enforcement action. (Prosecution Team Brief at 11-12.) When billed at \$150/hour, this
 16 equated to \$67,350, which was substantially higher than the amount set forth in the ACLC of
 17 \$50,000 (an amount also unsupported by any evidence).³¹ (*Id.*)

18 The Regional Water Board *increased* this amount to \$75,000 (Order No. R3-2012-0041 at
 19 10, para. 7) without any findings as to reasonableness of these costs, without any supporting
 20 evidence, and without carefully considering that this amount was substantially higher than staff
 21 costs awarded in numerous other enforcement actions statewide. (*See e.g.*, Ex. 75, Order No. R1-
 22 2011-0109 (**\$10,500** in staff costs), Ex. 76, ACL No. R1-2010-0081 (**\$15,525** in staff costs (using
 23 \$135/hr)); Ex. 79, ACL No. R2-2011-0006 (**\$9,750** in staff costs); Ex. 81, Order No. R3-2011-0212
 24 (**\$12,000** in staff costs); Ex. 82, Order No. R5-2011-0538 (**\$19,500** in staff costs); Ex. 85, Order
 25 No. R8-2010-0073 (**\$9,000** in staff costs); Ex. 87, R9-2012-0036 (**\$19,500** in staff costs); Ex. 86,

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

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

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

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

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

23 Thus, the imposition of this excessive penalty (e.g., more than one million dollars for a
24 single spill event) without adequate consideration of the statutory factors (Wat. Code, §13385(e),
25

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

1 §13327) and without adequate exercise of its discretion is unconstitutional by failing to provide the
 2 District with its constitutionally-guaranteed rights to due process, and by violating federal and state
 3 constitutional prohibitions against “excessive fines.” (U.S. Const., 8th Amend; Cal. Const., art. I,
 4 §17; *see also infra* footnote 36.)

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

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

13 The Regional Water Board also ignored the evidence that, even if all monies could be used,
 14 the proposed penalty would equate to over one-third (1/3) of the District’s total fund balances of
 15 \$3,774,194 for FY 2012-13. (*See* Ex. 98-31; *see also* Ex. 6 at 6-859 to 6-862.) In addition, after all
 16 budgeted revenues and expenditures for this fiscal year are incorporated into the budget, paying the
 17 proposed penalty would leave the District with a negative balance (-\$260,794) as of July 1, 2013.
 18 (*See* Ex. 98-31 to 98-33.) Thus, the Regional Water Board ignored the fact that payment of the
 19 proposed penalty would result in a full depletion of the District’s fund balances (jeopardizing the
 20 District’s bond rating and current loan repayment ability³⁴), the delay of some major budgeted items
 21 not being completed as planned (thereby placing the District in further jeopardy of non-
 22
 23

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

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

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

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

15 Finally, the Regional Water Board ignored the fact that much of the District's cash is tied up
 16 in restricted funds to be used for capital improvement projects, which were acknowledged by the
 17 Prosecution Team to be necessary for the proper operation and maintenance of the wastewater
 18 treatment plant. (HT at 107:17 to 108:13 (long term capital projects), 200:22 to 202:19 and 207:23
 19 to 208:25 (District's current need for expensive upgrades), 216:5-9.) Most of the funds held by the
 20 District are not available for the purpose of paying a penalty. Where the funds originally came from
 21 capacity charges paid by new hook-ups (e.g., sewer connection fees), Government Code section
 22 66013 sets forth substantial and mandatory limitations on the use of such funds. (*See accord* Gov't
 23 Code §66013(c)("A local agency receiving payment of a charge as specified in paragraph (3) of
 24 subdivision (b) shall deposit it in a separate capital facilities fund with other charges received, and
 25 account for the charges in a manner to avoid any commingling with other moneys of the local
 26 agency, except for investments, and shall expend those charges *solely* for the purposes for which
 27 the charges were collected...")(emphasis added).) Thus, all restricted funds, including the largest
 28

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

4 **J. The District Was Denied Adequate Due Process in the ACL Hearing Process.**³⁶

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

7 The formal adjudicative hearing on the June 19, 2012 ACL Complaint filed by the Regional
 8 Board's Prosecution Team against the District, began at approximately 8:30 a.m. on September 7,
 9 2012 and ended nearly *seventeen hours* later at approximately 1:00 a.m. on September 8, 2012.
 10 The only significant breaks in the proceedings were a lunch break for an hour at approximately
 11 12:30 p.m. and a 45-minute dinner break at approximately 7:15 p.m. In some cases, District
 12 counsel and the court reporter had to beg for breaks. (*See* HT at 408:12-19; 461:4-7; 548:23-25.)
 13 Two of the District's main witnesses had to testify late in the evening, after the dinner break, and
 14 into the next morning. In fact, the District's primary witness, Aaron Yonker, did not begin his
 15 testimony until almost 9:00 p.m., more than twelve (12) hours after the hearing began and after
 16 everyone was already tired.³⁷ (HT at 447:2-4.) Clearly, this was neither a fair nor adequate
 17 adjudication procedure. (Stats. 2006, ch. 404 (S.B. 1733), §1.)

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

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

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

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

11 The Regional Water Board's decision not to continue the hearing to another date after the
12 Prosecution Team completed its case-in-chief after business hours deprived the District of due
13 process and a reasonable opportunity to be heard. The Regional Water Board's decision to require
14 the District to present the majority of its case from approximately 6:30 p.m. until after midnight did
15 not ensure that the District would have a fundamentally fair opportunity to present its position.
16 When the District began its case-in-chief, the District's counsel and remaining witnesses along
17 with the Regional Water Board members had already been through a full day of hearing starting at
18 8:30 a.m. with the Prosecution Team's case-in-chief. Furthermore, the District's counsel and
19 witnesses were at a distinct disadvantage, having their case heard after dinner, in a warm, non-air-
20 conditioned room, and in front of Regional Water Board members that were necessarily fatigued
21 and less alert.

22 Adequate due process requires a reasonable opportunity to be heard. (*Rosenblit v. Superior*
23 *Court* (1991) 231 Cal.App.3d 1434, 1445; *see also Pinsker v. Pacific Coast Soc. of Orthodontists*
24 (1974) 12 Cal.3d 541, 550 [providing that the procedures formulated to provide this notice and
25 opportunity to be heard must ensure a fair opportunity for the party to present its position].)

26
27 exception was made for any of the remaining District witnesses. Thus, the earliest time the District could begin
28 presenting the majority of its case was after the Prosecution Team finished its case-in-chief, after the close of normal
business hours.

1 Whether a hearing was fundamentally fair is a question of law. (*Rosenblit*, 231 Cal.App.3d at
2 1443.)

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

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

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

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

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

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

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

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

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

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

1 examine witnesses has been extended to 90 minutes.” (Ex. 69 at 69-1 (email from J. Jahr/final
2 Hearing Procedures).) Subsequently, on July 27, 2012, the Prosecution Team provided its brief,
3 witness list, and evidence, including 4 binders full of documents (Exs. 1-24.) This submission
4 required the District to engage expert witnesses, compile extensive documentary evidence (Exhibits
5 25-98), and draft a complex factual and legal brief supported by the evidence. Because of the
6 volume of information, the District requested at least an additional sixty (60) minutes to present its
7 case in its Opposition Brief, with more time requested if the Prosecution Team called Mr. Jeff
8 Appleton as a witness or attempted to include any portions of his deposition transcript into the
9 record as evidence.

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

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

23 3. The Regional Water Board Improperly and Inappropriately Deliberated in
24 Closed Session.

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

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

6 The Regional Water Board's conduct of deliberations on September 7th/8th, 2012 in closed
 7 session, and the Regional Board's conducting further deliberations in closed session on October 3,
 8 2012, violated the Bagley Keene Act because such deliberations were not properly noticed for
 9 September 7th and 8th,⁴¹ and were not permitted to be conducted in closed session. (*See* Govt. Code
 10 §11120 ["In enacting this article, the Legislature finds and declares that it is the intent of the law
 11 that actions of state agencies be taken openly and that their deliberation be conducted openly."];
 12 *see also* Govt. Code § 11132 [Except as expressly authorized by [the Bagley-Keene Act], no
 13 closed session may be held by any state body.] (emphasis added)).

14 The stated objectives of the Bagley-Keene Act are to assure that "actions of state agencies
 15 be taken openly *and that their deliberation be conducted openly.*" (Govt. Code § 11120 [emphasis
 16 added]; *see North Pacifica LLC v. California Coastal Comm'n* (2008) 166 Cal.App.4th 1416,
 17 1432, *review denied* [holding that the agency took "reasonably effective efforts to notify interested
 18 persons of a public meeting [in order to] serve the statutory objectives of ensuring that state actions
 19 taken and deliberations made at such meetings are open to the public".])

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

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

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

22 ⁴² Gov’t Code § 11126, subd. (a).

23 ⁴³ Gov’t Code § 11126, subd. (e).

24 ⁴⁴ In its 9/27/12 Ruling at page 4, the Hearing Officer ruled that 23 C.C.R. §647 *et seq.* are similar provisions to those
 25 conducted under Chapter 5 of the Government Code. However, this ignores that these regulations state that “chapter 5
 26 of the Administrative Procedures Act (commencing with section 11500 of the Government Code) does not apply to
 27 hearings before the State Board, any of the Regional Boards, or hearing officers or panels appointed by those Boards.”
 28 23 C.C.R. §648(c)(emphasis added). The 9/27/12 Ruling failed to explain how or provide any case law to prove that
 the Chapter 4.5 and 23 C.C.R. §648 *et seq.* procedures are “similar” to Chapter 5 procedures, since the procedures used
 by regional boards do not include administrative law judges, accusations, notices of defense, discovery procedures,
 motions to compel, deposition procedures, proposed decisions, reconsideration procedures, petitions for reduction of
 penalty, direct judicial review, or continuance procedures. *See* Gov’t Code §11500 to §11524. Thus, this ruling was
 inaccurate.

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

3 Voting Regional Water Board members were permitted to and did ask ample questions of
4 the witnesses during this adversarial hearing for the purpose of clarifying the witnesses’ testimony.
5 In addition, members of the Prosecution Team asked questions of witnesses during their direct
6 and/or cross-examinations in order to elicit facts and admissions. Because this occupied the field
7 of necessary questioning, no need existed for a member of the supposedly “neutral” Advisory
8 Team, who was neither putting on nor advocating for the agency’s case-in-chief nor deciding the
9 resolution of the case, to question or cross-examine witnesses. By doing so, the Interim Executive
10 Officer necessarily took on the role of an advocate rather than a neutral advisor, creating the
11 appearance of bias in favor of the Prosecution Team⁴⁶ and against the District, and interjecting a
12 substantial risk that the Regional Water Board’s judgment in the case was similarly skewed in
13 favor of the prosecution. Further, many of the questions asked by the Interim Executive Officer
14 were of a highly legal nature, amounting to requests for legal conclusions or admissions, and were
15 objectionable on other grounds.⁴⁷ “Procedural fairness ... does require some internal separation
16 between advocates and decision makers to preserve neutrality.” (*Department of Alcoholic*
17 *Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1, 10.) Therefore,
18 all questions to witnesses posed by the Interim Executive Officer, and the witnesses’ answers to all
19 such questions, should have be stricken from the record and not considered by the Regional Water
20
21
22

23 ⁴⁶ Bias by the Prosecution Team was enough. See <http://www.newtimeslo.com/cover/8481/too-close-for-comfort/>.

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

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

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

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

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

23 ⁴⁸ The District also asked in its reply to its initial objections for an alternative narrower result, where just the questions
 24 asked by Mr. Harris requiring a legal conclusion and the answers thereto be stricken, since such conclusions were
 25 beyond the scope of the District's witnesses' direct testimony. (*See Evid. Code* §§ 761, 773, subd. (a), 775 [scope of
 26 cross-examination limited to matters raised on direct examination]; *see also Amtower v. Photon Dynamics, Inc.* (2008)
 27 158 Cal.App.4th 1582 (testimony relating to question of law properly excluded as inadmissible opinion testimony).)
 28 However, the Regional Water Board either never answered this request or, by inaction, denied the request.

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

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

17
18 **8. A STATEMENT THAT THE PETITION HAS BEEN SENT TO THE REGIONAL**
19 **BOARD:⁵⁰**

20 A true and correct copy of this Petition was mailed by First Class mail on November 1,
21 2012 to the Regional Water Board at the following address:

22 Kenneth A. Harris, Jr.
23 Interim Acting Executive Officer
24 Central Coast Regional Water Quality Control Board
25 895 Aerovista Place, Suite 101
26 San Luis Obispo, CA 93401

27 _____
28 ⁵⁰ The petition is being filed by the discharger.

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

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

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

11 Pursuant to 23 Cal. Code of Regulations section 2050.6, the District requests that the State
 12 Water Board consider evidence not previously provided to the Regional Water Board to further
 13 demonstrate the District's inability to immediately pay a million dollar penalty. The requested
 14 supplemental evidence consists of more recent audited financial statements of the District (FY 10-
 15 11 and FY 11-12) and an explanation by the District's auditors of the District's current financial
 16 situation, various funds held by the District, and details of the audit reports. The newer audit
 17 reports could not have been submitted previously because these reports were not completed by the
 18 District's outside independent auditor by the time that the District had to submit its evidence, or by
 19 the time that the hearing was held on September 7-8, 2012. In addition, the explanation of the
 20 District's current financial situation, restricted funds, and the audits done thereto could not have
 21 been presented because the Prosecution Team's explanation of the District's Ability to Pay was not
 22 made known to the District until during the September 7th hearing,⁵¹ and the District was unable to

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

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

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

Respectfully submitted,

DATED: November 1, 2012

DOWNEY BRAND LLP

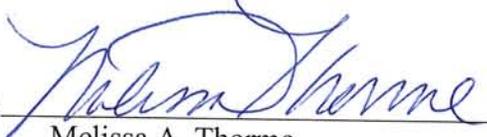
By: 
Melissa A. Thorme
Attorneys for
South San Luis Obispo County Sanitation District

EXHIBIT A



EDMUND G. BROWN JR.
GOVERNOR



MATTHEW RODRIGUEZ
SECRETARY FOR
ENVIRONMENTAL PROTECTION

Central Coast Regional Water Quality Control Board

October 5, 2012

Certified Mail No. 7008 3230 0000 4723 2168

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

Dear Ms. Thorme:

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

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

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

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

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

Sincerely,

A handwritten signature in black ink, appearing to read "Kenneth A. Harris Jr.".

Kenneth A. Harris Jr.
Interim Acting Executive Officer

Attachment: Order No. R3-2012-0041

cc: See next page.

cc (without attachment): via email only

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

Mr. John Wallace
Wallace Group
johnw@wallacegroup.us

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

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

ORDER NO. R3-2012-0041

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

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

1. The Discharger's wastewater treatment facility, located adjacent to the Oceano County Airport and the Pacific Ocean in Oceano, California is subject to Waste Discharge Requirements Order No. R3-2009-0046, NPDES Permit No. CA0048003, adopted on October 23, 2009, by the Central Coast Water Board and the State Water Resources Control Board Order (State Water Board) No. 2006-0003-DWQ, "Statewide General Waste Discharge Requirements for Sanitary Sewer Systems."
2. On December 19, 2010, the Discharger's WWTP influent pump station automatically shut down after floodwater entered an electrical conduit leading into a pump motor control system in the WWTP influent pump station. The penetrating floodwater shorted a critical motor control component (shunt switch) which then resulted in tripping a large main circuit breaker that supplied power to all four influent pumps located in the pump station.
3. The resulting loss of power to all four influent pumps caused untreated sewage to surcharge upstream into the Discharger's collection system and overflow, discharging untreated sewage from the collection system into the environment. Additionally, the Discharger documented and certified six sewer backups where untreated sewage was discharged inside six residential homes through private sewer service lateral connections. The total discharge of sewage between December 19th and 20th is estimated at 674,400 gallons (December 2010 Sewer Overflow).

4. In response to the December 2010 Sewer Overflow, the Discharger submitted a spill report to the Central Coast Water Board on January 3, 2011. On March 7-8, 2011, State Water Board staff inspected the Discharger's WWTP and collection system facilities.
5. On April 18, 2011, the Central Coast Water Board issued a Notice of Violation and a 13267 Letter requiring the Discharger to submit a technical report concerning the December 19, 2010, discharge of untreated sewage from its collection system. In response, the Discharger submitted a technical report dated May 31, 2011, detailing the nature, circumstances, extent and gravity of the unauthorized discharge of untreated sewage.
6. The Discharger is required to properly maintain, operate and manage its sanitary sewer collection system in compliance with the Regional Water Board Order No. R3-2009-0046, NPDES Permit No. CA0048003 and the Sanitary Sewer Collection System Order, and is required by the Sanitary Sewer Collection System Order to provide adequate capacity to convey base flows and peaks flows, including flows related to wet weather.
7. The discharge of untreated sewage to waters of the United States is a violation of the requirements in R3-2009-0046, section 301 of the Clean Water Act, CWC section 13376, and the Sanitary Sewer Collection System Order. Violations of these requirements are the basis for assessing administrative civil liability pursuant to Water Code section 13385.
8. The events leading to the December 19, 2010, headworks failure and sanitary sewer overflow were not upset events. An upset is defined in 40 CFR Section 122.41(n) and in the Discharger's Waste Discharge Requirements Order No. R3-2009-0046, NPDES Permit No. CA0048003, Attachment D, Standard Provision H, as an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.

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

The Discharger failed to protect the treatment plant from inundation from a 100-year frequency flood as required by Order No. R3-2009-0046, NPDES Permit No. CA0048003. The Discharger acknowledged¹ that the storm event was not a 100-

¹ Hearing transcript page 516.

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

The Discharger failed to properly maintain the emergency pump by keeping the effluent valve closed. The operator's inability to fully open the effluent valve caused sewage to backup into the collection system and eventually overflow. The District had the ability to keep the valve open at all times and had done so for years², but changed its standard operating procedures advising staff to keep the valve closed³.

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

MAXIMUM CIVIL PENALTY

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

PENALTY METHODOLOGY

11. Pursuant to California Water Code Section 13385(e), the Central Coast Water Board must consider the following factors in determining the amount of liability for the violations:
 - Nature, circumstances, extent, and gravity of the violations,
 - Whether the discharge is susceptible to cleanup or abatement,
 - Degree of toxicity of the discharge,
 - Discharger's ability to pay,
 - Effect on the Discharger's ability to continue in business,
 - Voluntary cleanup efforts undertaken by the Discharger,
 - Discharger's prior history of violations,
 - Discharger's degree of culpability,
 - Economic benefit or savings, if any, resulting from the violation, and

² See Hearing transcript page 296.

³ Exhibit 99.

- Other matters that justice may require.

12. On November 17, 2009, the State Water Board adopted Resolution No. 2009-0083 amending the Water Quality Enforcement Policy (Enforcement Policy). The Enforcement Policy was approved by the Office of Administrative Law and became effective on May 20, 2010. The Enforcement Policy establishes a methodology for assessing administrative civil liability. Use of the methodology addresses the factors in Water Code section 13327 and section 13385, subdivision (e). The staff report entitled *Technical Report for Noncompliance with Central Coast RWQCB Order No. R3-2009-0046 and State Water Resources Control Board Order No. 2006-0003-DWQ, "Statewide General Waste Discharge Requirements for Sanitary Sewer Systems", Unauthorized SSO occurring on December 19-20, 2010*, dated June 2012, is included in Attachment 3 of the Staff Report and incorporated herein, and analyzes the violations under the Enforcement Policy's penalty calculation methodology. This methodology is set forth in detail below:

1. Step 1 – Potential for Harm for Discharge Violations

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

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

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

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

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

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

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

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

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

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

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

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

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

= *Potential for Harm*

2. Step 2 – Assessment for Discharge Violations

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

Per Gallon Assessment

Four overflow estimates were presented at the September 7, 2012, hearing including one from the Prosecution team (1,139,825 gallons) and three from the Discharger (Discharger's 417,298 gallons, RMC 674,400 gallons, Appleton 2,250,000 – 3,000,000 gallons.) The RMC estimate⁴ is the most credible estimate. RMC was hired by the Discharger to evaluate the Prosecution's flow estimate and to provide an overflow estimate. RMC utilized wet weather hydrographs to model the flow rates for the overflow event. The Board recognizes that the RMC estimate may include inaccuracies, including failure to account for potential floodwater influent and

⁴ Exhibit 32-9.

inflow, and relying on potentially inaccurate Discharger calculations⁵ for overflows occurring after 6:00 pm on December 19, 2010. However, the RMC estimate utilized a detailed hydraulic analysis developed by engineer with over 30 years of sewer collection system experience utilizing flow data from similar wet weather events. The RMC estimate is consistent with a Discharger estimate of 661,000 gallons provided in the Discharger's Technical Report⁶ using a similar method as RMC. The Board finds that the most accurate estimated overflow volume from the December 2010 Sewer Overflow is 674,400 gallons.

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

a. Deviation from Requirement (moderate)

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

b. Per Gallon Factor (.6)

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

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

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

⁵ Exhibit 105, page 8.

⁶ Exhibit 6-118.

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

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

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

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

= Initial Liability

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

Per Day Assessment

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

- a. Deviation from Requirement (10)

The deviation from requirement is (Moderate).

- b. Per Day Factor (.6)

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

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

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

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

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

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

Not applicable.