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

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

Beneficial Uses of Affected Waters

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Factor #3 - Susceptibility to Cleanup or Abatement

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

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

Step #2: Assessment for Discharge Violations

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

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

> Minor - the intended effectiveness of the requirement remains generally intact (e.g., while the requirement was not met, there is a general intent by the Discharger to follow the requirement).
>
> Moderate - the intended effectiveness of the requirement has been partially compromised (e.g., the requirement was not met, and the effectiveness of the requirement is partially achieved).
>
> Major - the requirement has been rendered ineffective (e.g., the Discharger disregards the requirement, and/or the requirement is rendered ineffective in its essential functions).

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

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

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

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

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

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

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

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

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

Table 7 – Summary of Non-Discharge Violations

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

Step #4: Adjustment Factors

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

Adjustment for Culpability

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

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

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

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

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

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

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

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

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

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

Adjustment for Cleanup and Cooperation

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

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

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

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

Adjustment for History of Violations

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

Step #5: Determination of Total Base Liability Amount

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

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

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

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

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

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

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

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

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

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

Step #7: Other Factors as Justice May Require

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

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

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

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

Step #8: Economic Benefit

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

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

Step #9: Maximum and Minimum Liability Amounts

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

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

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

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

Step #10: Final Liability Amount

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

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

Table 8 – Summary of Enforcement Policy Penalty Matrix Calculations

Discharger Name/ID:	South San Luis Obispo County Sanitary District		
		Violation 1	
Discharge Violations Step 1	Potential Harm Factor (Generated from Button)	0	
Step 2	Per Gallon Factor (Generated from Button)	0.5	
	Gallons	1,138,825	
	Statutory / Adjusted Max per Gallon ($)	2.00	
	Total		$ 1,138,825
	Per Day Factor (Generated from Button)	0.5	
	Days	2	
	Statutory Max per Day	10000.00	
	Total		$ 10,000
Non-Discharge Violations Step 3	Per Day Factor	0.35	
	Days	180	
	Statutory Max per Day	$ 1,000	
	Total		$ 63,000.00
Initial Amount of the ACL			**$ 1,211,825.00**
Adj't Factors Step 4	Culpability	1.1	$ 1,333,007.50
	Cleanup and Cooperation	1	$ 1,333,007.50
	History of Violations	1	$ 1,333,007.50
Step 5	**Total Base Liability Amount**		**$ 1,333,007.50**
Step 6	Ability to Pay & to Continue in Business	1	$ 1,333,007.50
Step 7	Other Factors as Justice May Require	1	$ 1,333,007.50
	Staff Costs	$ 50,000	$ 1,383,007.50
Step 8	Economic Benefit	$ 177,209	**$ 1,383,007.50**
Step 9	Minimum Liability Amount	194,930	
	Maximum Liability Amount	$ 11,388,250	
Step 10	**Final Liability Amount**		**$ 1,383,007.50**

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

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

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

EXHIBIT C

Exhibit C
to SSLOCSD's Petition for Review

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

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

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

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

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

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

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

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 Board's citation to the hearing transcript and the alleged acknowledgement by the District is not *proof* that this was less than a 100-year frequency flood. The uncorrected transcript at pages 515-518 stated as follows:

515

Do you know what the permit requirements
requires the storm level to be protected against?
A I believe it's a hundred years --
THE REPORTER: I'm sorry, you need to repeat --
THE WITNESS: It's a one-hundred-year-storm
event.
BY MS. MACEDO:
Q Okay. And do you know what -- based on
these rainfall totals, do you have an approximation of
what this worked out to be?

516

A I have heard various statements. I can't
look at those numbers and say there are tables,
which -- but they're both durational based, as well as
volume based. So a 24-hour duration in terms of that
2.7, you know, that 2.7 might have peaked at 2:00 in
the afternoon, and then been excessive until 3:00.
That would be a 24-hour period that would need to be
considered for that analysis, and I can't talk about
these numbers here.
Q Okay. Do you agree that the five or so
inches does not rise to the level of one-hundred-year
flood?
A As far as I know, over that duration, I
do not think that is a one-hundred-year flood.
Q Okay. And yet on your penalty
calculation factor slides, you described this as an act
of God event. Do you know where you got that
terminology?
A Well, act of God -- in many ways. The
tree getting stuck in the flap gate. Washing its way
down to the headworks. Intruding the headworks and
shorting out of the pumps. The flood event that came
up, I would probably say a lot of these community
members would call this potentially an act of God
event. This was a significant event is maybe

517

mischaracterizing that term.
Q Okay. So you're describing it similar to
any rainfall being an act of God, the way you're using
the term?
A I would not say so because this was a
very unique situation. As I mentioned previously in my
testimony, this was a large watershed. It rained the
day prior. It just made its way down to the lagoon
while the new rain fell on top of it, and
increased the situation -- the confluence there with
the two together, it did not work right. There was
substantial flooding. That was a situation more than a
normal rainy Saturday.

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

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

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

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

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

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

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

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

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

12. **2. <u>Step 2 – Assessment for Discharge Violations</u>** … c. Maximum/Adjusted Maximum per gallon liability amount ($2.00 gallon) 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. The Enforcement Policy also states, however, "[w]her reducing these maximum amounts results in an inappropriately small penalty, such as dry weather discharges or small volume discharges that impact beneficial uses, a higher amount, up to the maximum per gallon amount, may be used." A $2.00 per gallon maximum for this sewage spill resulted in an appropriate penalty. Therefore, a $2.00 adjusted per gallon liability amount is used.	Although no evidence was cited to support this finding and the District takes issue with the conclusion that the penalty was "appropriate," the conclusion to use the $2.00 per gallon adjusted maximum appears to be consistent with the Enforcement Policy's recommendation for a maximum per gallon penalty amount of $2.00 per gallon for high volume sewage spill and storm-water discharges. (Enforcement Policy, Ex. 34-19; HT at 193:20-24.)
12. **2. <u>Step 2 – Assessment for Discharge Violations</u>** … <u>Per Day Assessment</u> 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.	The Regional Board provided no citation to any evidence to support these findings or conclusions. To the extent that the Regional Board relied on earlier findings on the Potential for Harm and Deviation from Requirements, see objections above.

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

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

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

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

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

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

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

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

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

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

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

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