November 12, 2008

VIA ELECTRONIC MAIL

Ms. Dyan Whyte
Asst. Executive Officer
Regional Water Quality Control Board for the
San Francisco Region
1515 Clay Street, Suite 1400
Oakland, CA 94612

Re: Comments on ACL Complaint No. R2-2008-0066 and Draft CDO R2-2008-00XX
Client-Matter No. 39552.00000

Dear Ms. Whyte:

The Town of Hillsborough ("Hillsborough") submits the following comments on the draft Administrative Civil Liability ("ACL") Complaint and Cease and Desist Order ("CDO") issued by the Regional Water Quality Control Board for the San Francisco Region. Hillsborough's proposed SEP projects are included in Exhibit F.

COMMENTS ON PROPOSED ACL

(1) The Proposed Penalty Amount Should be Substantially Reduced.

A. The Penalty Should have Been Assessed on a Per Day Basis Instead of Per Gallon.

The ACL proposes to issue a penalty pursuant to California Water Code ("CWC") section 13350. For penalties based on this code section, an ACL may be imposed on a daily basis or on a per gallon basis, but not both. Civil liability on a daily basis may not exceed $5000 for each day in which a violation occurred, and the civil liability on a per gallon basis may not exceed $10 for each gallon of waste discharged. (CWC §13350(e)(1) and (2).) Nowhere does the code state that the Regional Board must select the *higher* of the two methods of imposing civil liability.

The ACL amount would be very different if based on a daily basis as many of the alleged sanitary sewer overflows ("SSOs) occurred on same dates during large storm events. For

example, on January 25, 2008, the SSO chart for Hillsborough attached to the ACL includes 8 SSOs, including 5 on the El Cerrito trunk, which were all at the same time for same surcharge event. Similarly, in earlier storm events, the chart includes 4 SSOs on El Cerrito on January 5, 2008, and 7 SSOs on January 4th, 2008, including 5 on El Cerrito.

A large percentage of the sewage flowing through Hillsborough comes from Crystal Springs and other unincorporated areas of the County. Without those additional flows, Hillsborough would not have these types and volumes of wet weather capacity related events and Hillsborough shouldn't be punished on a per gallon basis when much of the flow is not its own. *See* Exhibit A (flow data and charts). For this reason, Hillsborough respectfully requests that the ACL be recalculated on a daily basis and the current $750,000 penalty be **reduced to <u>$160,000</u>** (32 days times $5,000).

B. <u>The Penalty Should be Reduced Based on the CWC Factors</u>.

The imposition of any ACL penalty by the Regional Board requires the exercise of reasoned discretion concerning a number of factors under CWC §13327 and §13385(e). The proper application of the State Water Resources Control Board's ("SWRCB") Water Quality Enforcement Policy (" Enforcement Policy") requires a significant reduction in the proposed ACL of $750,000 against the Hillsborough. The Enforcement Policy, adopted on February 19, 2002 as SWRCB Resolution 2002-0040, represents a formalized state policy for water quality control that is binding on the Regional Board. (CWC §§13140, 13146.)

State law requires that the determination of the amount of an ACL include the consideration of a number of specific factors. (CWC §§13327, 13385(e); Enforcement Policy at pg. 34.) The Enforcement Policy specifies a step-wise approach to applying these factors and establishing the amount of liability. (Enforcement Policy at pg. 35.)

The first step is to set an "initial liability" based on factors related to the discharge: the nature, circumstances, extent, and gravity of the violation, the degree of toxicity of the discharge, and the susceptibility of the discharge to cleanup or abatement. The next step is to determine the beneficial use liability. This involves a review of the designated beneficial uses of the receiving water and a determination as to whether the violation resulted in any quantifiable impacts related to beneficial uses. The initial liability, together with the beneficial use liability, constitutes the "base amount" of the ACL. (Enforcement Policy at pg 37.)

The base amount must then be adjusted to reflect the various factors set forth in the law, including conduct of the discharger. These adjustments reflect factors such as the degree of culpability of the discharger, any voluntary cleanup efforts undertaken, and the discharger's history of violations. The economic benefit to the Discharger, if any, shall be added to the adjusted base amount unless the Regional Board determines that such an upward adjustment is not appropriate.

The record fails to establish that the Regional Board followed the requisite steps in preparing the ACL proposed in the Complaint. The ACL recommends a penalty of $750,000 even though this money would be better spent by Hillsborough on the millions of dollars needed for capital

projects to prevent future events, and even though there are several mitigating factors, as follows:

1. Nature, Circumstances, Extent, and Gravity of Alleged Violations.

The ACL Complaint included the following related to this factor:

2. **The nature, circumstances, extent, and gravity of the violation or violations**

There were 70 SSOs that total approximately 3,000,000 gallons. The two most common causes of the Discharger's SSOs are root blockages and insufficient capacity.

In general, the gravity of SSOs is high. Sanitary sewer overflows are discharges of raw untreated sewage, so they are a nuisance and adversely affect public health. Of the 70 SSOs, 55 reached surface waters. The combined volume of about 3,000,000 gallons of raw sewage is significant. These SSOs are especially grave because they reached surface waters and adversely impacted water contact recreation and aquatic life. The other SSOs, particularly those that were low in volume, are less significant because only a portion of each would have reached groundwater or surface waters and thus would have minimal adverse toxicity impact.

In considering the nature and circumstances in which an alleged violation occurs, the Regional Board must address several factors, including, but not limited to: (1) the number of violations; (2) the duration of noncompliance; (3) the significance of the violation (degree of exceedance and relative importance of the provision violated); and (4) the actual or potential harm to human health and the environment. (*Hawaii's Thousand Friends v. City and County of Honolulu,* 821 F. Supp. 1368, 1383 (D. HI 1993), citing EPA, "Clean Water Act Penalty Policy," Feb. 11, 1985, at 3-5.)

At issue here are alleged overflow events related predominantly to pipe blockages and pipe capacity. *See* ACL Complaint at pg. 4, para. 2. The Complaint goes back to December of 2004, yet fails to recognize that Hillsborough as a satellite collection system, was not subject to permitting or regulation until 2006 when the State Water Board imposed its first ever "Statewide General Waste Discharge Requirements for Sanitary Sewer Systems," Order No. 2006-0003-DWQ. Under that Order, Hillsborough was not even required to apply for coverage under that permit until November 2 of 2006 and its Sewer System Management Plan ("SSMP") was not required to be developed until May of 2007. After that, Hillsborough is required to have in place its overflow emergency response program, legal authority, operation and maintenance program and grease control program by November of 2008, which has just arrived. A final SSMP including a System Evaluation and Capacity Assurance Program ("SECAP") must be in place nine months later, by August of 2010. Many of these dates have not yet arrived, but Hillsborough is being held to meet standards of a municipality that has already completed and fully implemented an SSMP and a SECAP. There was no point to imposing a time schedule for compliance if enforcement actions enforce violations as if no schedule for action already exists.

Moreover, the ACL Complaint fails to consider each of the mandatory considerations laid out by the State Water Board to be considered "in any enforcement action." *See* Statewide Order No. 2006-0003-DWQ at pgs. 8-9, para. 6. These considerations must be undertaken before the ACL penalty is imposed.

Finally, the ACL Complaint does not directly acknowledge that one alleged SSO, included on the chart as 2290 Skyfarm on 1/25/08, accounts for 1,923,000 gallons or almost 64% of the total volume of the total spills alleged, and that this event was not caused by either insufficient capacity or root blockage. This event was caused by a large storm beginning on January 25, 2008, which caused flooding within a canyon that forced a large tree stump into the storm drain pipe, completely blocking the storm drainage and creating a lake of rainwater that submerged several manholes on a 6" main that serves a total of 152 upstream residential properties and 1 private school (no commercial or industrial properties).[1] *See* Exhibits B and D (text and photos). Hillsborough promptly reported this event and spent several days trying to drain the lake created by and remove the blockage. Hillsborough also created a new cage system to cover the storm drain inlet to avoid similar occurrences in the future.

Any spills occurring during this event were highly diluted. Based on the generally accepted engineering standard of 270 gallon per EDU, the properties upstream could have been expected to generate approximately 43,740 gallons per day in wastewater. Over the 5 days of this event, sewage from these residences may have been expected to account for about 218,700 gallons, meaning the stormwater to sewage ratio was substantially diluted with greater than a 10:1 stormwater to sewage ratio. *Id.*

2. <u>Susceptibility to Clean Up or Abatement of the Discharge</u>.

In establishing the initial liability under the Water Code, the Regional Board is also required to consider the susceptibility of the discharge to cleanup or abatement. The ACL Complaint included the following:

> **Insufficient capacity wet weather related SSOs may not be amenable to cleanup or containment because the storm drains and creeks are also flowing full at the time. However, for non-capacity related SSOs, either all or a portion of the SSO, can be contained and returned to the sanitary sewer for treatment. The Discharger recovered a very small percentage of these SSOs (less than 2 percent, by volume).**

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[1] Although the CWA is a "strict liability" statute, several courts (including the 9th Circuit Court of Appeals) have ruled that some sort of upset defense must be provided at the very least for any technology-based effluent limitations, because technology is inherently fallible. (*See FMC Corp. v. Train*, 539 F.2d 973 (4th Cir.1976) and *Marathon Oil v. EPA*, 564 F.2d 1253 (9th Cir. 1977).) The federal regulations and the Standard Provisions define "upset" as an exceptional incident in which there is unintentional and temporary noncompliance because of factors <u>beyond the reasonable control of the Discharger</u>. *See* 40 C.F.R. §122.41(n)(1). "Upsets may be caused by external events, <u>such as</u> power failures or <u>storms</u>…." *Natural Resources Defense Council, Inc. v. U.S.E.P.A.*, 859 F.2d 156, 205 (1988)(emphasis added). In order to prove the existence of an "upset," properly signed, contemporaneous operating logs or other relevant evidence that: (a) an upset occurred and the Discharger can identify the cause(s) of the upset; (b) the permitted facility was being properly operated at the time of the upset; (c) notice of upset was timely submitted in accordance with Standard Provision V.E.2.b (24 hour reporting); and (d) the Discharger complied with any remedial measures required in Standard Provision I.C (duty to mitigate). *See* Standard Provision I.H.2; *see also* 40 C.F.R. §122.41 (n)(3)(i)-(iv). Hillsborough can meet these requirements for upset.

The Town modified its spill response plan in December 2007 to ensure better capture of sewage. Those revisions aided recovery such that, since December 2007, the recovery rate rose substantially. Thus, the Regional Board's percentage does not acknowledge recent improvements.

A 2,000 gallon capacity vacuum/jet truck is owned by the Town and operated by staff in order to capture sewer spills. In addition, in 2006, the Town signed an agreement with the City of Burlingame to hire their jet/vacuum truck on an as-needed basis and for emergency backup. Unfortunately, the topography near the location of many SSOs does not always lend itself to containment.

All 26 public works field staff, not just those assigned to sewer, attend annual training on SSO Response. This practice has been in place for at least 3 years. The Town has written procedures and a copy of the Sewer Response Plan remains in each vehicle for reference, which includes visual aids to estimate volume, testing procedures, and contact information to assist with gathering resources. Procedures require containment whenever practical. Town employees typically respond to SSOs within 20 minutes during working hours, and within an hour during after hours and weekends. One to four employees are available during nights and weekends to respond to sewer calls. On-call employees working after hours and weekends are authorized to request as much manpower assistance as needed to address and contain spills. It should be noted on minor spills where a few gallons are absorbed by soil, the Town's practice is to remove and properly dispose of the soil. *See* Exhibit C.

These facts demonstrate that Hillsborough undertook numerous activities to prevent, avoid, and lessen any overflows, where feasible. However, because no calculations or spreadsheets have been provided to show how or if adjustments to the maximum ACL amount were made, Hillsborough cannot determine how or by how much the ACL amount was adjusted under this or any other factor. The Regional Board should describe how much credit or reduction was provided under this factor and every other factor prescribed by law.

3. Degree of Toxicity of the Discharge

On this factor, the ACL Complaint alleged the following:

4. The degree of toxicity of the discharge

The degree of toxicity of SSOs cannot be accurately quantified. However, raw sewage, as compared to properly treated wastewater, typically has about ten times the concentrations of biochemical oxygen demand, trash, total suspended solids, oil and grease, ammonia, and thousands of times the levels of viruses and bacteria (measured in terms of total and fecal coliform). These pollutants exert varying levels of impact on water quality, and, as such, will adversely affect beneficial uses of receiving waters to different extents. Some possible adverse effects on water quality and beneficial uses as a result of SSOs include:

- Adverse impact to fish and other aquatic biota caused by bio-solid deposition, oil and grease, and toxic pollutants common in sewage (such as heavy metals, pesticides, personal care products, and pharmaceuticals);
- Creation of a localized toxic environment in the water column as a result of the discharge of oxygen-demanding pollutants that lower dissolved oxygen, and elevated ammonia concentration which is a demonstrated fish toxicant; and
- Impairment to water contact recreation and noncontact water recreation and harm to fish and wildlife as a result of elevated bacteria levels including pathogens.

Since storm related SSOs are diluted with storm water, they would not pose the same level of toxicity or impact as an equal volume of raw sewage during non-storm conditions. However, any large SSOs (>5,000 gallons) that occurred during dry weather are very significant because they are full strength and received no dilution. The Discharger reported one such SSO of 20,000 gallons due to root blockage on April 14, 2007. No portion of this SSO was recovered.

The alleged overflows from the collection system contained domestic sewage without any toxic industrial contaminants as Hillsborough is predominately a residential community. The ACL Complaint recognizes that "storm-related SSOs are diluted with storm water, [and] they would not pose the same level of toxicity or impact as an equal volume of raw sewage during non-storm conditions." (ACL Complaint at pg. 5, para. 4.) The Complaint only cited to one SSO of 20,000 gallons in dry weather conditions in 2007. *Id.* As explained above, since changes to the Town's procedures were made in December 2007, Hillsborough has had a much better track record of containment and recovery.

As stated above, the ACL Complaint provides no indication of how much the ACL amount was altered, if any, based on this factor. This failure of the Complaint to explain how the factors were used to adjust the ACL amount brings into question the validity of the entire ACL. The basis for any findings or conclusions in any Regional Board order must be clearly articulated, and this basis must be supported by evidence in the record. Orders not supported by the findings or findings not supported by the evidence constitute an abuse of discretion. (*See Topanga Assn for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 515 (1974); *California Edison v. SWRCB*, 116 Cal. App. 751, 761 (1981); *see also* Enforcement Policy at pg. 35.)

4. Ability to Pay

Under CWC §13327 and §13385(e), the Regional Board must consider various mitigating factors when imposing an ACL. One of those factors is the alleged violator's "ability to pay." The Complaint incorrectly uses a $7.5 million annual operating budget for Hillsborough to determine "ability to pay." Hillsborough's FY 07/08 sewer budget was substantially less, at $6,326,760, and even lower for FY 08/09 at $6,209,464. *See* Exhibit E (CIP Budgets).

Moreover, for purposes of determining civil liabilities, the required ability-to-pay analysis must address the ability to pay of the party above and beyond its other existing financial obligations. Thus, Hillsborough is being required to spend 1/12th of its entire budget on the proposed penalty, money already earmarked for other municipal services related to sewer operation and maintenance. The only funds that are relevant for this analysis are Hillsborough's sewer funds, which for 2008/09 are $6,209,464 and are currently budgeted for other projects and programs. A $750,000 is equivalent to the entire 2006/07 budget for salaries and benefits of all employees under the Sewer Fund, employees needed by the Town to ensure that the sewer system is operated and maintained properly. *Id.*

As acknowledged in the Enforcement Policy, the ability of a discharger to pay an ACL is limited by its revenues and assets. (Enforcement Policy at p. 41) "If there is strong evidence that an ACL would result in widespread hardship to the service population or undue hardship to the discharger, it may be reduced on the grounds of ability to pay." *(Ibid.)*

The Regional Board unduly relies upon the allegation that Hillsborough "has the authority to adjust its rate scale to provide for financial needs." (ACL Complaint at pg. 5, para. 5.) While this may be true, there is no guarantee that an effort to raise rates will be successful. Many communities around California are finding that rate increases are being protested under Proposition 218 and rate increases are made impossible or, at best, substantially delayed. If this were the case, then Hillsborough would not have enough capital to both fund the ACL fine and properly fund and operate its collection and stormwater systems, not to mention have no funding for *improvements* to collection and alarm systems to avoid similar occurrences in the future.

Finally, the ACL does not acknowledge that the Town has already approved rate increases through 2010, two of the four of which have yet to be implemented, or that Hillsborough's rates are one of the highest, if not the highest, in the Bay Area. In order to cover the costs associated with the ACL and CDO, the Town will need to go back to ratepayers to request even higher increases or will have to cut/eliminate its capital program, since the reserve amounts did not contemplate the rapid completion of projects mandated under the CDO.

a. The Regional Board Must Consider the Financial Impacts of the Proposed Penalty.

Any exercise by the Regional Board of its power to assess an ACL penalty against dischargers, particularly those that are public entities, must include consideration by the Regional Board of the impact of its assessments upon the constituents of the entity against which it is assessing liability. In this instance, the interests of the ratepayers within the Town, who have borne the

expense of the Town's remedial efforts with regard to past overflows and who will bear any administrative civil liability in addition to the cost of those efforts, must be considered by the Regional Board in connection with its ultimate determination of the level of liability assessed against Hillsborough. Moreover, the Regional Board must consider that Hillsborough's rates are already some of the highest in the Bay Area.

The police power of the State must be exercised with sufficient consideration for the interests of those affected by such exercise. Local agencies, for instance, before enacting ordinances, must consider any significant or adverse effects of their action on surrounding communities or regions, and such consideration may be determinative of the constitutionality of a proposed ordinance. (*Associated Homebuilders v. City of Livermore* (1976) 18 Cal.3d 582, 608-609.) In connection with a local ordinance regulating housing that may impact the region in which the municipality existed, the Supreme Court stated:

> "When we inquire whether an ordinance reasonably relates to the public welfare, inquiry should begin by asking whose welfare must the ordinance serve. In past cases, when discussing ordinances without significant effect beyond the municipal boundaries, we have been content to assume that the ordinance need only reasonably relate to the welfare of the enacting municipality and its residents. But municipalities are not isolated islands remote from the needs and problems of the area in which they are located; thus an ordinance, superficially reasonable from the limited viewpoint of the municipality, may be disclosed as unreasonable when viewed from a larger perspective. These considerations impel us to the conclusion that the proper constitutional test is one which inquires whether the ordinance reasonably relates to the welfare of those whom it significantly affects. . . . Having identified and weighed the competing interests, the final step is to determine whether the ordinance, in light of its probable impact, represents a reasonable accommodation of the competing interests."

(*Id.* at 608-609.) The Regional Board here, in its exercise of the police power of the State, must also consider the full impact of its potential assessment upon the interests of the constituents of the Hillsborough.

As a local public entity, Hillsborough will be forced to pay for improvements and programs required under the accompanying Cease and Desist Order and any liability penalties principally through the sewer fees and rates assessed upon the individuals and businesses within the Town. These constituents, who as the local residents would be most impacted by sewage overflows, already pay one of the highest sewer rates in the State, even without a publicly owned treatment works of its own. The penalty will merely go into the State's Cleanup and Abatement Account, with potentially some portion going to Supplemental Environmental Projects ("SEPs") approved by the Regional Board, and may not be used on compliance projects that directly benefit these ratepayers. Any benefit resulting to the people and entities most directly affected by the overflows that may result from an assessment of an ACL will be far outweighed by the multiplied penalty that would result from assessing a substantial liability penalty and capital project requirements under the proposed CDO against Hillsborough. Such an outcome is directly contrary to the consideration required for those directly affected by governmental action that is the underlying theme of the *Associated Homebuilders* case. Moreover, every dollar paid to the

Cleanup and Abatement Account is one less dollar that could fund staff, new pipes, and programs in Hillsborough to prevent spills in the future.

5. Ability to Continue in Business.

The ACL Complaint states that Hillsborough "has not provided information indicating that it would be unable to pay or continue in business." (ACL Complaint at 5, para. 5.) Hillsborough is not a business, it is a public entity, and therefore the assessment of a large ACL will not have an effect on its ability to "continue in business." (*Id.*) It must remain in business as a municipality. Nevertheless, the Complaint fails to recognize that a large ACL amount will adversely impact the operation and maintenance of Hillsborough's collection systems because the ACL will divert funds from Hillsborough's existing budget. *See* Exhibit E (CIP and Operation Budget).

As noted by the District Court in refusing to impose a $10 million dollar penalty against the City of San Diego for years of alleged violations:

> "The City is not pleading poverty and has not stated that it is unable to pay the amount requested by plaintiffs. However, insofar as plaintiffs' request would represent a transfer of wealth from the residents of San Diego to the federal treasury, the court is concerned that the only victims in this case will be those residents."

(*United States v. San Diego*, 1991 U.S. Dist. LEXIS 5459, *15 (SD Cal. 1991).) Similarly, if the proposed ACL is imposed, the ratepayers in the Hillsborough service area will be unfairly economically penalized. The ACL Complaint looked only at the overall annual budget of Hillsborough, but failed to undertake an analysis of Hillsborough's budget and the impact a large ACL would have on continued levels of staffing, operation and maintenance. Every dollar spent on the ACL will be one less dollar available for continued operations and maintenance and for additional improvements to the system, and, as such, Hillsborough might suffer a corresponding budget shortfall.

6. Voluntary Clean Up Efforts Undertaken.

On this factor, the ACL Complaint alleged the following:

> **6. Any voluntary cleanup efforts undertaken**
>
> Of the total 3,009,188 gallons of sewage spilled, the Discharger recovered 1,175 gallons. Approximately 3 million gallons were not recovered.

The Complaint acknowledges that Hillsborough undertook voluntary clean up efforts and "recovered 1,175 gallons" (ACL Complaint at pg. 5, para. 6.), but does not give Hillsborough any credit for these activities. Since not all of the town's efforts to control and prevent spills were recognized in the discussion of this factor (*see* ACL Complaint at pg. 11, para. 6.), it is unclear whether a proper and reasonable reduction was given for Hillsborough's voluntary efforts.

As noted in the Complaint, it is not physically practical to contain capacity SSOs during wet weather, which account for 2,918,250 gallons of the total 3,009,188 gallons alleged. For example, the January 25, 2008 event at 2290 Skyfarm could not be contained within the 6" sewer main that serves that area and was too massive for mechanical collection.

The 1,175 gallons represents about 1% of the remaining SSOs since 2004, however it represents 52% of the 9 alleged SSOs since the Town adopted and implemented a more aggressive containment procedure in December 2007.

7. Prior History of Violations.

The Regional Board's Complaint purports to present, as required by Water Code section 13327, the "prior history of violations" in mitigation or aggravation of the liability amount to be assessed. Because the State Board has determined that this prior history is a "conduct factor" used to adjust the amount of administrative civil liability to be assessed, it appears calculated to help determine the level of culpability of the discharger regarding the discharge. (Enforcement Policy at Sec. VII.D., pg. 38.) As such, the ACL Complaint alleges the following:

> **The Regional Water Board's records regarding the discharger's history of violations prior to the timeframe for this Complaint are not complete or accurate; however, it is likely that the Discharger has had prior SSOs.**

Although SSOs were alleged to have occurred prior to 2004, as a satellite system, the Town was not obligated to report SSOs to the Regional Board prior to 2005. Nevertheless, the Town voluntarily began use of the RWQCB reporting system as soon as it became available in 2004.

Like any other municipality operating a sewer system that dates back to the turn of the century, the Town responded to calls of sewage leaks and backups prior to 2004. By the late 1980s, the Town realized that many repairs were needed within the sewer system due to chronic SSO conditions, and commissioned an inflow and infiltration ("I/I") study, which was completed by CH2M Hill in 1991. Projects to protect creeks and other waters of the state were given the highest priority.

Most of the recommendations for projects in the study have been completed. The Town has invested more than $19 million in its sewer infrastructure, and has an approved capital improvement program for $17 million in additional improvements, including the planned repair to the Crystal Springs/El Cerrito Sewer Trunk.

With the exception of the Crystal Springs/El Cerrito trunk, the Town can confidently state that it has no locations that experience chronic SSOs. The Town has implemented Smartcover technology at 18 manhole locations to monitor surcharging in sewer lines, that have been prone to fats, oils and grease ("FOG") and root intrusion. Additional covers are planned for installation in 2008, as these covers have proved useful in locating and preventing potential SSOs.

As of June 2008, although not required, the Town is voluntarily reporting all SSOs on private property to fully disclose all overflow events in the community. Nonetheless, the purported

history discussed in the Complaint ignores these facts and focuses on the allegation that "it is likely that the Discharger has had prior SSOs." (ACL Complaint at pg. 6, para. 7.) However, the Regional Board cites no other events. Thus, this "history" fails to recognize the relatively infrequent number of spill events from Hillsborough's 116 miles of sewer and, instead, appears calculated to maximize the Board's potential assessment rather than to serve the goals that purportedly underlie the concept of administrative civil liability pursuant to Water Code sections 13350 and 13385.

The Regional Board's assessment of administrative civil liability against public entities has been generally upheld by the Supreme Court because such liability is not always solely a punitive assessment, but may also fulfill a "legitimate and fully justified compensatory function of providing full compensation for all aspects, quantifiable and unquantifiable, of a spill as well as to impress upon the public the necessity of taking every precaution against releases." (*See People ex. rel. Younger v. Superior Court* (1976) 16 Cal. 3d 30 at 35-37.) Because this liability must be assessed following an adjudicative procedure based upon evidence in the record before the Regional Board (*see* Code Civ. Proc. §11513), the evidence introduced must be, at a minimum, relevant and reliable. (*Aengst v. Board of Medical Quality Assurance*,110 Cal. App. 3d 275, 283 (1980).)

Relevant evidence is that evidence which has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code §210.) Where evidence of prior offenses or acts is offered to prove another fact in the criminal law context, such evidence is only admissible to the extent that: (1) the evidence is material to the fact to be proved or disproved; (2) the evidence possesses sufficient probative value to prove or disprove the fact; and (3) no rule or policy exists requiring exclusion even if the evidence is relevant. (*People v. Daniels* (1991) 52 Cal. 3d 815, 856.) Such evidence may be admitted if there is a "direct relationship" between the prior offense and elements of the charged offense. (*Id.* at 857.)

The Regional Board failed to state that any other wastewater overflow events referenced were due to the same reasons stated as the cause of the overflows in the ACL Complaint. When considering the Hillsborough's compliance history, the Regional Board must take into account the seriousness and impact of any previous violations. Where there is a pattern of repeated similar violations or the violations were intentional, the assessed liability should consider aggregate impacts. (Enforcement Policy at p. 38.) Here, no such pattern of noncompliance exists. Furthermore, the prior overflows alluded to by the Regional Board have not been demonstrated to have happened or to have resulted in any specified adverse impacts.

The other previous purported "violations," which were presumably introduced in aggravation of the ACL amount by the Regional Board, do not constitute relevant or reliable evidence of negligent, intentional, or culpable conduct, or indicate that future similar releases are more likely. Moreover, despite the fact that the Regional Board has exercised its discretion over the past few decades to not assess administrative liability for these previous "violations," the Regional Board now asserts that the existence of these other overflows somehow makes it more likely that some misconduct by Hillsborough caused these overflows and that Hillsborough must

be deterred by a substantial penalty to avoid similar conduct in the future. This conclusion is not supported by any evidence.

The Regional Board's consideration of historic (pre-2004) overflows while failing to consider the relatively low incidence of such occurrences within the same system suggests that the object of compiling this "history" was to ignore the objective evidence of Hillsborough's overall performance and focus on specific, intermittent instances of lesser performance to inflate the amount of ACL. The existence of these past "violations" is neither probative of the facts asserted by the Regional Board nor consistent with the statutory goals of full compensation for injury and deterrence of future violations.

An example of a better-defined and more reasonable means for considering the real impact of previous conduct by a regulated entity is that applicable to applicants for issuance or renewal of a permit for non-vehicular air pollution sources. Air pollution control statutes provide for a review of the compliance history of an applicant for a permit or renewal of a permit, respectively, that takes into account "the size and complexity of the applicant's operations." (Cal. Health & Safety Code §§42331 and 42332, subd. (b).) The compliance history considered relates to a three-year period prior to the date of application, and also includes, among other things:

(1) whether a notice of violation was issued for each violation;

(2) whether the violations demonstrate a recurring pattern or noncompliance poses a significant risk to public health, safety or the environment;

(3) the severity of the violations;

(4) whether the emissions violations were the result of circumstances beyond the reasonable control of the applicant and could not have been prevented by reasonable care.

(*See* Cal. Health & Safety Code §42333(a)(2), (a)(4), (d)(1) and (d)(2).)

The Regional Board's consideration to date of the "prior history" factor plainly lacks the type of defined, rational approach manifested in the air quality permitting statutes. Rather than considering Hillsborough's overflow history within the context of its entire history of service, comparing Hillsborough's spill incidence to other similarly sized systems, or identifying the specific relationship between the alleged present overflows and these other incidents, the Regional Board appears to seek to consider past overflows only in the aggregate, without perspective or consideration of the relevance or materiality to the goals of ACL assessment. Thus, the Regional Board's analysis is inconsistent with the policy underlying the ACL statutes and with the proper use of the adjudicative function under California law.

8. Degree of Culpability

The Enforcement Policy specifies that, in considering the conduct of the discharger, higher ACL amounts should be set for intentional or negligent violations than for accidental, non-negligent violations. (Enforcement Policy at p. 38.) As a first step, the Regional Board should identify any performance standards (or, in their absence, prevailing industry practices) in the context of the violation. The test is what a reasonable and prudent person would have done or not done under similar circumstances. (*Ibid.*)

The Complaint concludes that, even though Hillsborough has a root control program, this program is not adequate because root blockage SSOs continue to occur. The ACL complaint fails to recognize that satellite collection system regulation is still in its infancy. The "proper operation and maintenance" requirements mandated for publicly owned treatment works (and collections systems under the same jurisdiction and NPDES permit) have not historically applied to satellite sewer systems. Thus, satellite systems should not be held to the same standard before 2006 when these systems were first regulated.

Since 2006, Hillsborough has been implementing a root control program, which is not even a delineated part of the Statewide Order's SSMP program, and this should be considered a mitigating, not an enhancing factor. The ACL Complaint, using 20/20 hindsight, alleges that spills may have been prevented if a different root control program had been in place prior to the discharge. (ACL Complaint at pg. 6, para. 8.) However, in a series of capital projects by Hillsborough to clean, video and line sewer mains, it has repeatedly been shown that root growth development in mains occur because of root intrusion that originates in privately owned sewer laterals, even in mains that have been recently lined. Until private sewer laterals are addressed, the Town's programs will remain hampered.

Similarly, the capacity projects undertaken by Hillsborough should be mitigating. But, instead, the Regional Board seems to focus on Hillsborough not increasing the pipe size in the trunk sewers even though the Regional Board admits the downstream pipes "would not be able to handle the increased sewage flow if the Discharger's Trunk Sewer is upgraded" and that "more SSOs would likely have started occurring from the City of San Mateo's collection system." (ACL Complaint at pg. 6, para. 8.) Hillsborough has every intention of correcting any necessary capacity issues in the trunk sewers, but, as recognized in the ACL itself, this action makes no sense until all the upstream and downstream entities also increase the sizes of their pipes. Hillsborough must not be penalized for its reasonable action to wait in this case. The ACL states the following regarding capacity:

Insufficient capacity. The second most common cause of the Discharger's SSOs is insufficient capacity especially during wet weather. Of the Discharger's 71 SSOs, insufficient collection system capacity caused 22 (or 31%).

This poor performance was demonstrated in January 2008 when 17 of the Discharger's 22 capacity-related SSOs occurred during heavy storm events (on January 4th, 5th, and 25th). Furthermore, 14 of those 17 SSOs occurred from manholes (on Crystal Springs Road and El Cerrito Avenue) along the Crystal Springs/El Cerrito Trunk Sewer (Trunk Sewer). This Trunk Sewer conveys sewage to the City of San Mateo's collection system. The large percentage of capacity-related SSOs reflects the Discharger's collection system's inability to properly convey sewage flows during large storm events. It also reflects a higher than acceptable inflow and infiltration rate into the Discharger's collection system.

In terms of collection system capacity, in 1997, the Discharger identified the Trunk Sewer as having insufficient capacity to convey peak wet weather flows. Subsequently, the Discharger replaced approximately 4,400 feet of the 15,800 linear feet of the Trunk Sewer thereby increasing its capacity. The Discharger lined an additional 4,500 feet of the Trunk Sewer to prevent inflow and infiltration and leaks. However, the Discharger determined that approximately 11,400 linear feet of the Trunk Sewer, measured from the City of San Mateo's city limit and going upstream, is still undersized to handle peak weather flows.

The Discharger secured funding in 2006 and was prepared to proceed with the remaining Trunk Sewer capacity expansion, but decided to wait until the City of San Mateo addresses downstream capacity issues. These include the City of San Mateo's downstream section of the trunk line and WWTP, which would not be able to handle the increased sewage flow if the Discharger's Trunk Sewer is upgraded. In other words, if the Discharger had proceeded, instead of capacity-related SSOs occurring from the Discharger's collection system, more SSOs would likely have started occurring from the City of San Mateo's collection system.

In terms of excessive inflow and infiltration, the Discharger's ratio of wet weather flow to dry weather flow, a measure of inflow and infiltration, varies from 5:1 to 10:1. A more reasonable ratio for a well maintained collection system is between 3:1 and 4:1. One of the main reasons for the Discharger's high wet to dry weather flow ratio is leaky private sewer laterals.

Currently, the Discharger requires inspection of private sewer laterals at the time of property sale. If the inspection identifies leaks in the lateral, the Discharger requests, but does not require, the property owner to repair of the private sewer lateral prior to property transfer. Moreover, properties do not sell frequently within the Town of Hillsborough. Therefore, locating and correcting all defective sewer laterals within the Town of Hillsborough will take many years if only based on inspections at time of sale. The Discharger can implement a more aggressive private lateral testing and repair program to effectively address its infiltration and inflow problem.

The Town does not have information that indicates I/I ratios are between 5:1 to 10:1 coming from the Crystal Springs/El Cerrito trunk. Instead, the data suggests the peak flows are in the 3:1 to 4:1 reasonable ratio range. The 9:1 ratio comes from an old Crystal Springs' 1999 study, and from CH2M Hill studies completed prior to Hillsborough's repair of the worst section of the pipe, which was located in the creek. The pipe is now out of the creek. San Mateo has not provided data for 2007 or 2008 that allows more accurate information to be charted. The previous years for which complete information is available suggests the peak is much lower than indicated in the ACL.

Hillsborough is an all residential community with the majority of mains sized at 6". Capacity is not an issue during dry weather anywhere else within the system. The only main that has known capacity issues is the Crystal Springs/El Cerrito sewer trunk. Most of the capacity upgrade is related to development upstream from the Town of Hillsborough in the Crystal Springs County Sewer District ("CSCSD") and the unincorporated County area that supports a jail and county offices. The Town's annual growth rate has been consistently under 1% for decades.

The Town implemented the first phase of the Crystal Springs/El Cerrito Trunk project to resolve chronic SSOs the Town was experiencing in and near San Mateo Creek. As the first phase was being constructed, the Town arranged for the design of Phases 2 and 3 to increase the capacity of the main downstream. This design was 90% complete in 2004, not 2006 as stated by the Regional Board in the ACL.

Since 2001, the Town has been meeting regularly with the City of San Mateo and representatives of the CSCSD to discuss the replacement of the Crystal Springs/El Cerrito trunk line, along with other issues of common concern. The Town has not been able to obtain CSCSD's agreement to reimburse the Town for its share of expenses, which will be approximately 40% of the project's 8 million dollar cost. The Town did not execute the project in the absence of an agreement because:

a. The improvements in Hillsborough would not resolve the SSOs until such time that the City of San Mateo increased capacity at the Dale Avenue Pump Station and wastewater treatment plant;
b. CSCSD has made virtually no effort to reduce contributions of I/I from its service area, having only completed one of the multiple projects identified from its I/I study;
c. CSCSD has a history of resistance to rate increases and has already experienced a Proposition 218 challenge such that Hillsborough is justified in its concern that reimbursement from CSCSD may never materialize;
d. If upstream I/I were adequately controlled, the El Cerrito trunk line project might prove unnecessary; and
e. The Town made a rational decision to apply available revenues to other projects that repaired mains and reduced inflow and infiltration city-wide, including locations upstream of the Crystal Springs/El Cerrito trunk.

Over the past 13 years, the Town has continuously designed and implemented capital improvement programs to reduce the incidences of SSOs. As recognized in the CDO, the Town "has completed seven phases of cleaning and inspection projects and eight rehabilitation projects since 1995." *See* CDO at pg. 10, para. 27. The Town has also completed many upgrades and improvements to its sewer systems. *Id.* at para. 29; *see also* Exhibit E (Completed CIP Projects).

The Town has required the inspection and testing of sewer laterals at the time of sale since 1989. If the lateral is found to have defects, repairs are required prior to sale. Since December 2007, the Town has required the complete replacement of the lateral if any defects were found.

Approximately 2% of properties are sold in any year, thus the 1989 ordinance may have affected approximately 40% of properties.

The City Council of the Town of Hillsborough is aggressively addressing the inflow and infiltration issue at laterals. In April 2008, the City Council reviewed the sewer capital improvement program, and invited Michael Chee, staff member of the Regional Board, to attend and comment on the program. At that time, implementing a lateral replacement program was set as a priority. On August 11, 2008, the Council approved the design of a pilot project to test the efficacy of replacing laterals to reduce I/I in the Crystal Spring/El Cerrito trunk, and allocated $100,000 for the same. At its September 8, 2008 meeting, the City Council reviewed a proposed ordinance to require replacement of laterals at the time sale, following an SSO or in coordination with capital improvement projects. This ordinance was introduced on October 13, 2008 and is scheduled for adoption on November 10, 2008.

9. Economic Benefit or Savings

No economic benefit or savings inured to Hillsborough as a result of the overflows alleged. Costs to replace the pipes in areas where capacity is limited will only increase over time. Moreover, the Town has completed over $14 million in capital projects since 1999. *See* Exhibit E. Therefore, the conclusion of the Complaint should have been that no economic benefit or savings were realized and, therefore, a reduction from the maximum civil liability was warranted.

10. Other Matters as Justice May Require

The Complaint reveals that, notwithstanding the fact that this is a very large fine for a relatively small town, the Regional Board has not proven that the unprecedented penalty amount proposed in this matter fits the circumstances of the overflows alleged. Instead, the Complaint states the following:

10. Other such matters as justice may require

> The Regional Water Board's Resolution No. R2-2005-0059 declares support of local programs that inspect and rehabilitate private sewer laterals. The Resolution also states that the Regional Water Board would consider the existence of such programs, especially those experiencing significant infiltration and inflow from private sewer laterals, as an important factor when considering enforcement actions for sanitary sewer overflows.
>
> Currently, the Discharger requires inspection of private sewer laterals at the time of property sale, but does not require repair of faulty private sewer lateral. Programs in a few other Bay Area communities are more effective than the Discharger's. Those programs include a testing requirement with any major building modification, and also require (not just request) repair or replacement of faulty laterals.

As noted above, the Town has required the inspection of sewer laterals at the time of sale since 1989. Approximately 2% of properties are sold annually in Hillsborough. This program has likely affected 40% of properties in Town since inception. Video inspection of laterals at time of sale has been the Town's practice since 2006.

The Complaint erroneously states that repairs are requested, not required. If the lateral is found to have defects during a video or pressure tests, repairs are required prior to sale. Since December 2007, the Town has required the complete replacement of the lateral if any defects were found.

The Town has also adopted a backflow protection ordinance in 2005 to help reduce the incidences of sewer overflows. Every property owner is required to maintain two elements of backflow protection, such as cleanouts or backflow control devices since January 2007.

As previously stated, Hillsborough is aggressively addressing I/I from laterals. In March 2008, Council identified the prevention of SSOs and I/I as top priorities in the sewer budget, and, on August 11 2008, approved the design of a pilot project to test the efficacy of replacing laterals to reduce I/I in the Crystal Spring/El Cerrito trunk, and allocated $100,000 for the same. At its September 8 2008 meeting, the City Council reviewed a proposed ordinance to require replacement of laterals at the time sale, following an SSO or in coordination with capital improvement projects. This ordinance was introduced on October 13, 2008 and is scheduled for adoption on November 10, 2008. Each of these actions should be taken into the Regional Board's factor analysis and all inaccuracies should be corrected.

a. The Regional Board has not Proven the Alleged Violations Occurred.

On pages 2 and 3 of the ACL Complaint, several "Allegations" and "Violations" are listed both the Basin Plan and the Statewide SSO Waste Discharge Requirements. No analysis or proof has been offered up by the Regional Board that each of these violations in fact reached waters of the state or are actionable.

For example, the Complaint alleges a violation of Basin Plan Prohibition 15, which states:

> *It shall be prohibited to discharge raw sewage or any waste failing to meet waste discharge requirements to any waters of the Basin.*

See San Francisco Bay Basin Plan at Table 4-1.

It is not clear that the prohibitions contained in Table 4-1 can be directly enforced absent incorporation into an NPDES or some other discharge permit. *See* 1995 Basin Plan at pg. 4-6 ("Acceptable control measures for point source discharges must ensure compliance with NPDES permit conditions, including the discharge prohibitions (Table 4-1) and the effluent limitations provided on the following pages.") Just as the effluent limitations in Tables 4-2 to 4-4 are not independently enforceable absent inclusion in an NPDES permit, the general prohibitions should not be independently enforceable either. These are merely implementation methodologies (*See* Chapter 4 of the Basin Plan) as opposed to water quality objectives (*Compare* Chapter 3 of the Basin Plan). Moreover, direct enforcement of this provision runs contrary to the Basin Plan's Conceptual Approach for controlling wet weather discharges, which advocates allowing "for the evaluation of costs and benefits" and exceptions to the general overflow requirements "where an

inordinate burden would be placed on the discharger relative to the beneficial uses protected, and when an equivalent level of environmental protection can be achieved by alternate means…." *See* 1995 Basin Plan at pg. 4-16.

The ACL also alleges that 2 spills "discharged to 'street/curb or gutter' which eventually washes into surface waters; and the remaining 15 reached groundwater because they discharged to 'yard/land' so a portion of each would have seeped through soil to groundwater." (*See* ACL Complaint at 4.) There is no evidence provided in support of these allegations that any of these 17 spills reached surface waters or ground water. Further, the ACL Complaint contains no evidence that the cited SSOs "adversely impacted water contact recreation and aquatic life." *Ibid.* All unproven allegations must be removed from the Complaint and no ACL amount must attach to those alleged violations.

b. Application of the ACL Statutes Must Serve Some Compensatory Purpose.

California Government Code section 818 provides that public entities shall not be liable for damages imposed primarily as punishment. As previously discussed, the Supreme Court has determined that the "civil penalties" contained in provisions of Water Code section 13350 dealing with oil overflows are not barred as punitive damages because these penalties are not "simply" or "solely" punitive and may fulfill a "legitimate and fully justified compensatory function" to impress upon the public the necessity of taking every precaution against such releases. (*People ex. rel. Younger v. Superior Court,* 16 Cal. 3d 30, 35 (1976).) The Court has also applied this reasoning to penalties assessed under Water Code section 13385. (*San Francisco Civil Service Assn. v. Superior Court,* 16 Cal.3d. 46, 51 (1976).) However, the liability assessed under these statutes is supposed to compensate the people of the state for the unquantifiable damage that an overflow causes and the money assessed is to be used to aid in cleaning up and abating pollution of state waters. (*People v. Alameda Co.,* 16 Cal.3d. 30 (1976); *San Francisco Civil Service Assn.* at 51.)

Given this legal backdrop, ACL assessments must be consistent with the goal of providing *compensation* for any actual harm caused. Where the amount of an assessment exceeds the amount necessary to achieve the goal of reasonable compensation for any actual harm, that assessment is punitive and improperly claimed from a public entity. Where there is evidence that quantifies the impact of a particular factor, no additional amount for "unquantifiable" impacts attributable to the same factor should be assessed. Otherwise, an ACL constructed in such manner would be the equivalent of "double-dipping," and would constitute an abuse of discretion.

Here, no basis exists in the record before the Regional Board on this matter that would justify the imposition of an ACL for punitive reasons. The overflows alleged in the Complaint did not result from intentional or malicious conduct, and Hillsborough has already begun the process of constructing upgrades to its collection system capacity and implementing SSO reduction programs.

The record similarly fails to demonstrate any "unquantified" damages that might also require compensation above and beyond the activities being undertaken by Hillsborough on its own and under the SSO WDR. The evidence in the record fails to support either an adequate basis for punishment or the need for compensation for unquantified damages.

c. The Burden of Proof for ACL Proceedings Must Be Met.

Burden of proof is an evidentiary concept, which obligates the prosecuting party to establish evidence to a requisite degree of belief. (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805.) In administrative proceedings, the burden of proving charges or allegations of violation rests upon the party making the charges or asserting that violations occurred. (*Parker v. City of Fountain Valley* (1981) 127 Cal.App.3d 99, 113; *Cornell v. Reilly*, 127 Cal.App.2d 178, 183.) The obligation of a party with the burden of proof requires the production of evidence for that satisfies this purpose. (*Pipkin v. Board of Supervisors* (1978) 82 Cal.App.3d 652, 658.) For this ACL, the Regional Board is the prosecutor as well as the initial decision-maker and is, therefore, subject to the burden of proof requirement.

The agency has the burden of establishing that each of the elements needed to establish its case is supported by the weight of the evidence. (Cal. Evid. Code §115.) The weight of the evidence test is also called the preponderance of the evidence standard or the "51%" proof standard. Simply stated, "the scales of justice" must be tipped in favor of the agency's conclusions (*e.g.*, the evidence on one side outweighs or preponderates the evidence on the other side). (*People v. Miller* (1916) 171 Cal.649, 652.) The agency's decision must also contain adequate findings to bridge the analytical gap between the evidentiary record and the conclusion in the decision. (*Topanga Assn. v. City of Los Angeles* (1974) 11 Cal.3d 506, 515.)

Two orders of the SWRCB are relevant to the burden of proof issue. Both SWRCB orders cited below involve ACLs issued to the County of San Diego, San Marcos Landfill, by the San Diego Regional Board:

(1) In Order WQ 2001-01, the SWRCB remanded an ACL decision to the Regional Board for further consideration. The key issue was how many days the landfill had not been adequately covered. The State Board indicated (a) it would review an ACL decision that involved some abuse of discretion, (b) more specific findings were needed to justify what appeared to be an excessive assessment, and (c) a remand was appropriate where the Regional Board had not provided adequate justification for a calculation of the number of days of violations.

(2) After remand, another ACL was also petitioned to the SWRCB. In Order WQ 2002-0020, the SWRCB reduced the amount of the assessment attributable to the number of days of an inadequate cover, and stated (a) the Regional Board has the burden of proving each and every day of violation, (b) reliance on hearsay observation is not sufficient proof, and (c) an ACL must be supported by direct evidence, even though it is likely that more days of violations occurred than can be proven. Based on these factors, the State Board reduced the portion of the ACL attributable to the number of days of lack

of adequate cover from $136,500 to $60,600, finding that only 200 days of violations were proven, not the 455 days on which the Regional Board based its ACL.

These precedential decisions place upon the Regional Board the burden of proving all of the elements required to establish each offense or violation for which the issuance of an ACL is appropriate, to justify the amount of the ACL itself, and to disprove the applicability of any defenses raised. To the extent the Regional Board cannot meet this burden, no assessment can be legally justified.

(2) Hillsborough Requests a Higher Percentage of Any Penalty Go to SEPs.

Hillsborough also requests that a substantial portion of the fine (e.g., more than 50%) be put toward local Supplemental Environmental Projects (SEPs), such as a public education and lateral repair program (*see* Exhibit F). Unlike a fine, SEPs benefit the local community and environment by reducing sewer overflows, while at the same time creating a benefit to San Mateo's treatment plant by reducing influent flows during storm events.

(i) Increase SEP Percentage

The ACL Complaint currently limits the SEP amount to 50% (*see* ACL Complaint at pg. 2 (limiting SEP to an amount not to exceed $375,000). Hillsborough believes that this 50% limitation is unfair and not required.

No law or regulation requires limiting SEPs to 50%. In fact, on October 15, 2008, the State Water Board issued a draft policy in which one of the options is a 50% limitation, but that policy has not yet been vetted through a public hearing process and should not be imposed prematurely. Moreover, that is only one of the options out for public comment, with the other alternative being that a SEP percentage can be any amount so long as the State Water Board is notified and can review the percentage on its own motion. These policies are not due for consideration by the State Water Board until February of 2009, and should not be implemented as underground regulations prior to their adoption.

Moreover, holding SEPs to 50% is inconsistent with Regional Board precedent. Hillsborough was sent several SEP proposals by the Regional Board to be used as samples. The proposed SEP percentage for Hillsborough was not consistent with these previous cases. For example, South San Francisco's 2006 fine was set at $516,000, with $32,000 to be paid in cash to the Board and $484,000 to be satisfied through development and expense of a SEP. The SEP percentage in that case was almost **94%**. Rodeo's 2007 fine was set at $45,000, with $15,000 to be paid in cash to the State Water Pollution Cleanup and Abatement Account and $30,000 to be satisfied through SEP. The SEP percentage was **67%**. Sausalito's SEP project was for MMPs, so that percentage is set by statute. It should be noted, however, that even for SEPS under the MMP statute, SEPs are not limited to 50%, but may be 50% plus $15,000. *See* Water Code §13385(*l*)(1).

Principles of equal protection under the law require the Regional Board to treat similarly situated public entities similarly for similar violations. For these reasons, Hillsborough requests that its SEP percentage be set with 80% going to SEPs and the remaining 20% to be paid as penalties. To the extent that this request is not granted and the SEP and penalty amount remain at 50%

each, Hillsborough requests that the ACL be amended to allow Hillsborough to pay the penalty amount over 3 years, without interest being assessed.

COMMENTS ON THE PROPOSED CDO

(1) Hillsborough Requests Modification of Dates in the CDO.

Hillsborough points out that it is caught in a no-win situation in the middle of two other entities over which it has no real control – the downstream entity, San Mateo, which has undersized pipes and treatment plant capacity to carry current levels of wet weather flows, and – the upstream entities, CSCSD and the unincorporated portions of the County, which contribute far too much flow in wet weather, yet have failed to adequately address I/I problems. The CDO (and the ACL) appear to penalize Hillsborough for its unfortunate in between location that has been the recipient of SSOs, not because of its own flows but because of excess flows from outside its jurisdiction and the inadequately sized downstream pipes once the flows attempt to leave the jurisdiction. Hillsborough requests that the CDO be modified to avoid penalizing the Town for being caught in the middle.

A. I/I Improvements Should Precede Large Capacity Improvement Projects.

To aid this situation, Hillsborough requests that the Regional Board consider re-sequencing the events required under the CDO. The dates for large capital projects like increasing the capacity in the El Cerrito trunk sewer should be deferred until after the implementation of I/I reductions measures (CDO at pg. 13, para. I.B.3.) to make sure that capacity levels constructed are actually necessary after appropriate I/I controls are implemented. The CDO should recognize that additional improvements will be among the recommendations from the ongoing I/I study. The I/I study will likely be finished by late fall 2009 or early in 2010. The Dale Avenue pump design has not started, and in the best case with excellent engineers, it will likely take a year for design, – or through early 2011. While that leaves approximately 2 years for construction, the current plant may not have adequate capacity for the additional flows and this must be taken into account.

Thus, the CDO should consider delaying the El Cerrito trunk sewer project until CSCSD implements the tasks set forth in its I/I study as this work may decrease flows enough to make the trunk sewer improvements unnecessary. The $8 million cost of the trunk sewer project would likely be better spent on I/I controls to decrease volume of water through the pipes and to the treatment plant.

B. Modify or Defer Date for Completion of Crystal Springs/El Cerrito Trunk Sewer Until After Downstream Improvements Completed.

The current sequence of events in the CDO is also not workable because it requires Hillsborough to implement improvements on the Crystal Springs/El Cerrito trunk line before San Mateo has completed (or is near completion of) their improvements to the Dale Avenue pump station and downstream pipes, which is essentially the distance from Hillsborough to the treatment plant. Improperly sequencing the repairs will merely cause additional spills that are not caused by the Town's actions, but by inadequately sized pipes and operational decisions *downstream*. (*See*

CDO at pg. 7 (surcharging in the trunk sewer during wet weather "is a result of the way the City of San Mateo controls influent flow to the San Mateo WWTP to avoid discharge of blended wastewater."), and at pg. 8, 2nd para.)

Hillsborough fails to see the current benefit in improving the capacity in its pipes if the wastewater has no where to go once it reaches city limits, except to cause additional spills in Hillsborough's jurisdiction. Such a result should be avoided by having the CDO specify the timing of the downstream pump station and sewer pipe capacity improvements *before* the improvements on the upstream Crystal Springs/El Cerrito trunk sewer. Thus, at a minimum, the CDO at pg. 13, para. I.B.1. should be amended to a date after upgrades are made to the San Mateo pump stations, sewers, and treatment plant to increase capacity.

Another potential solution to this issue would be to treat the El Cerrito trunk sewer rehabilitations from Crystal Springs in Hillsborough to HWY 101 in San Mateo as <u>one project</u> since it consists of about 4 miles of continuous pipeline. If this project were approached as one project, there would be some economy of scale in that the municipalities involved could share the cost of the CEQA analysis and other environmental procedures that are required by the State Revolving Loan Fund ("SRF"). Likewise, if this is approached as one project, and bid at the same time (either jointly or separately), there will be more assurances that Hillsborough's improvements would be effective and that additional SSOs would be avoided.

C. <u>Reconsider the Cleaning and Condition Assessment Schedule.</u>

Hillsborough also asks that the Regional Board reconsider the timeframes included in the CDO. For example, the requirement to clean the whole sewer system in 3 years (CDO pg. 15, para. III.A.1.) will create difficulties both economic and procedural. Although a 3-year timeframe is technically possible, this compressed timeframe will significantly impact Hillsborough's operating costs. In addition, the cleaning crews will also be less productive on getting cleaning done because of the extensive recordkeeping they must also do during their work day in order to meet the requirements of the CDO.

In addition, the condition assessment will be difficult to complete by November 2010 (*See* CDO at pg. 17, para. IV.A.1.). Hillsborough has 2,500 manholes and 117 miles of pipe, which represents a great deal of infrastructure to assess. Hillsborough requests that the Regional Board extend this date until at least March 2012 (which would coincide with the 3 years given to clean 100% of the system or <u>later if the previous request for additional cleaning time is provided</u>) (*see* CDO at pg.15). This modification would be more efficient and economical by allowing staff to do a complete assessment as they are cleaning.

(2) <u>Hillsborough Requests Consideration of the Costs of the CDO in addition to the Penalty Costs and Normal Operating and Compliance Costs.</u>

The Regional Board should consider the costs of all of the work they are requiring on top of the proposed $750,000 in penalties and the Town's other existing financial commitments through 2013. These costs, as set forth below, are well beyond what Hillsborough's current rates can handle:

$8 million for Crystal Springs Trunk Sewer upgrades

$3 -$10 million contribution to San Mateo WWTP improvements

$1.4 million in additional staff costs to complete cleaning in 3 years

$6 million to undertake capacity assessment

$1 million in additional contributions to Burlingame WWTP improvements

Total: $19.4 – $26.4 million

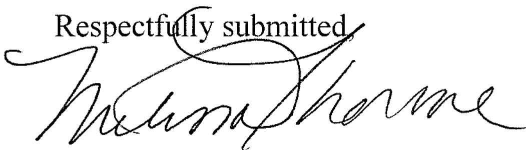
This additional amount does not include rehabilitating, cleaning, or videoing any mains within Hillsborough. Hillsborough will not have any money left for that purpose and its bonding capacity will be effectively at its maximum, as the Town will be struggling to manage debt coverage for an $8 million SRF loan required for the Hillsborough section of the Crystal Springs/El Cerrito trunk sewer project alone.

At best, the CDO inherently assumes that San Mateo can issue bonds to cover construction, and that Foster City/Estero Municipal Service District, which owns part of the plant capacity, can do the same. To cover this kind of debt, they will need to double their rates during an economic downturn. If the rate increase is significant enough, the local governments could be facing Prop. 218 protests and additional delays, none of which is acknowledged in the CDO. All of these issues need to be considered.

Hillsborough respectfully requests that the above comments be given careful consideration and that the Regional Board make changes to the ACL and CDO prior to adoption based on the above requests and comments.

Thank you for your consideration of our requests.

Respectfully submitted,



Melissa Thorme

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Town of Hillsborough

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