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STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

IN THE MATTER OF	**PETITION FOR REVIEW**
Order Pursuant to California Water Code Section 13383 Regarding Order No. 01-182 as amended by Order No. R4-2006-0074 and Order No. R4-2007-0042, NPDES Permit No. CAS004001, WDID 4B190170001 Of REGIONAL WATER QUALITY CONTROL BOARD for LOS ANGELES REGION	[Water Code § 13320; Cal. Code Regs. title 24 § 2050] **Requested to be held in abeyance 23 Cal. Code Regs. §2050.5**

INTRODUCTION

Petitioner City of El Segundo respectfully requests that the State Water Resources Control Board review instant Order and Notice of Violation issued by the Regional Water Quality Control Board, Los Angeles Region on March 4, 2008, with respect to certain facilities owned or operated by petitioner. Petitioner also requests that this appeal be held in abeyance pursuant to Title 23 of the California Code of Regulations, § 2050.5(d) while the petitioner attempts to resolve the dispute with the Regional Board.

1. **Name and Address of the Petitioner:**
   City of El Segundo
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With a copy to:
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2. <u>The Specific Action of the Regional Board Which Petitioner Requests the State Water Board to Review:</u>

Petitioner requests review of the March 4, 2008, Notice of Violation and Order issued Pursuant to Water Code Section 13383 Regarding Order No. 01-182 as amended by Order No. R4-2006-0074 and Order No. R4-2007-0042 NPDES Permit No. CAS004001, WDID 4B19017001 issued by the Los Angeles Regional Water Quality Control Board to the City of El Segundo. A copy of the Notice of Violation and the Order is attached as Exhibits "A " and "B."[1] Petitioner requests that the State Board issue an order either: (a) setting aside the Executive Officer's NOV and Order in its entirety or (b) directing the Executive Officer to withdraw the NOV and Order.

3. <u>The Notice of Violation and Order was issued on March 4, 2008.</u>

4. <u>The Reasons the Action was Inappropriate or Improper:</u>

The action was improper because:

A. The NOV and 13383 Order are unenforceable as they are based on bacteria TMDLs that were developed to implement faulty water quality standards;
B. The Executive Officer did not follow the procedure established in the LA MS4 Permit;
C. The NOV and Order improperly rely on Water Code § 13383 as authority for information request;
D. The Order's requirements constitute unfunded state mandates;
E. The NOV and Order were not supported by substantial evidence because the RWQCB incorrectly calculates geometric mean in the NOV for alleged violations of the Santa Monica Bay Beaches Bacteria TMDL;

[1] Counsel for the State Water Resources Control Board and the Board's Enforcement Policy have indicated that Notices of Violation are an informal action by the Regional Water Quality Control Board and are generally not subject to review by the State Board under Water Code §13320. To the extent that the §13383 Orders are based on violations alleged in the corresponding Notices of Violation mailed to the Petitioners on March 4, 2008, this Petition raises substantive challenges to the Notices of Violation as well. Further, Water Code § 13320 states that, "any aggrieved person may petition the state board to review" "any action or failure to act by a regional board." The NOV clearly constitutes an action from the Regional Board in that it is signed by the Board's Executive Officer.

F. The NOV and Order were not supported by substantial evidence because the RWQCB incorrectly calculates the number of violations and improperly utilizes monitoring data that was not to be used for determining compliance with the TMDL prior to August 7, 2007;

G. The Order and NOV should be postponed pending the results of the reopener;

H. The Monitoring Required By the Order Modifies the MS4 Permit Without a Noticed Hearing; and

I. The NOV and Order Unlawfully Imposes on Petitioner Responsibility for the Discharges of Others.

5. The Manner in Which the Petitioner is Aggrieved:

Petitioner is aggrieved by the NOV and Order because it is based on incorrect allegations of violation of the LA MS4 permit and imposes an excessive and unnecessary financial burden to prove compliance. The Orders purport to make Petitioner responsible for assembling detailed information with respect to alleged exceedances of bacteria water quality standards in a limited period of time. The effort required to assemble this information, to the extent it is even available, in the time frame required by the Orders will be very expensive, both in terms of the monitoring and investigative work required to comply and in terms of the personnel hours required to perform the work. Petitioner has already expanded substantial resources to comply with the bacteria TMDLs both prior and following their incorporation in the LA MS4 Permit. The failure to comply with the Orders, moreover, subjects Petitioners further to administrative civil liability, or potentially to judicially imposed civil penalties, of up to $10,000 per day or $25,000 per day, respectively.

6. Statement that the Petition Has Been Sent to the Regional Board Executive Officer:

A copy of this petition was mailed to the Regional Board Executive Officer, Tracy J. Egoscue, on April 3, 2008.

7. Statement Regarding Raising Substantive Issues or Objections Before the Regional Board:

The substantive issues and objections raised in this Petition could not have come before the Regional Board because the NOV and Order were issued by the Executive Officer, without prior notice or hearing. Petitioner requests that the Petition be placed in abeyance while we attempt to reach an amicable resolution with the Regional Board and intends to raise all substantive issues and objections to the Regional Board.

8. Points and Authorities in Support of Legal Issues Raised in this Petition:

What follows is a statement of points and authorities to support the legal issues and objections raised in this Petition. Petitioner is requesting that this Petition be held in abeyance while the parties attempt to resolve these issues with the Regional Board. The City reserves the right to supplement this statement of points and authorities in the event the Executive Officer or Regional Board take further action (or inaction) which necessitate the City requesting the State Board to convert this Petition to active status, or

if in the process of investigating the allegations in the Notice and preparing a response to the Order, any additional arguments or issues are discovered that were not substantiated at the time this Petition came due.

I. STATEMENT OF FACTS

Petitioner is a permittee under the Los Angeles County Municipal Separate Storm Sewer System Permit, NPDES Permit No. CAS004001, Order No. 01-182 ("LA MS4 Permit"). The LA MS4 Permit, originally adopted on December 13, 2001, was amended on September 14, 2006 by Order No. R4-2006-0074 adopted by the California Regional Water Quality Control Board, Los Angeles Region ("RWQCB") to implement the summer dry weather bacteria waste load allocations established in the Santa Monica Bay Beaches Bacteria Dry Weather Total Maximum Daily Load ("SMBB TMDL"). The LA MS4 Permit was further amended on August 9, 2007 by Order No. R4-2007-0042, adopted by the Regional Board to add the summer dry weather bacteria waste load allocations established in the Marina del Rey Harbor Mothers' Beach and Back Basins Bacteria TMDL ("Marina TMDL").

On March 4, 2008, the Executive Officer of the Regional Board issued Notices of Violation ("NOVs") and Orders to 20 cities that are Permittees under the LA MS4 Permit and the County of Los Angeles, alleging violations of Parts 2.5 and 2.6 the LA MS4 Permit's receiving water limitations ("RWLs"). Specifically, the NOVs alleged exceedances of bacteria water quality objectives during summer dry weather at shoreline and harbor locations adopted for monitoring water quality in Santa Monica Bay and Marina Del Rey harbor. The alleged exceedances were of two types, single sample violations and 30-day geometric mean violations. The NOVs alleged that these exceedances constituted a violation of Water Code § 13376 and rendered the recipients liable under Water Code § 13385. The NOVs threatened recipients with administratively imposed civil penalties of up to $10,000 per day of violation or with judicially imposed civil penalties of up to $25,000 per day of violation.

The monitoring locations at which the alleged exceedances occurred are locations approved by the Executive Officer for the purpose of measuring compliance with the SMBB and Marina TMDLs. On or about April 28, 2004, the Executive Officer approved a separate monitoring program for the SMBB TMDLs entitled "Santa Monica Bay Beaches Bacterial TMDLs Coordinated Shoreline Monitoring Plan." On or about April 13, 2007, the Executive Officer approved a separate monitoring program for the Marina TMDL entitled "Marina del Rey Harbor Mothers' Beach and Back Basins Bacterial TMDL Coordinated Shoreline Monitoring Plan." The LA MS4 Permit contains its own monitoring program, with its own monitoring sites, identified as Monitoring and Reporting Program CI 6948.

The SMBB TMDL and Marina TMDL Coordinated Monitoring locations were adopted pursuant to their own criteria. For example, the SMBB TMDL monitoring locations are "those shoreline locations currently monitored by the City of Los Angeles [EMD], County Sanitation Districts of Los Angeles [LACSD], and the Los Angeles County Department of Health Services [LACDHS] at the time of adoption of this TMDL by the Regional Board" and "For those subwatersheds without an existing shoreline monitoring site, responsible jurisdictions and agencies must establish a shoreline monitoring site if there is measurable flow from a creek or publicly owned storm drain to the beach during dry weather." See SMBB Monitoring Plan, pp. 5 and 6.

Prior to issuing the NOVs and Orders, the Executive Officer did not follow the protocol set forth in the LA MS4 Permit for issuing such NOVs and Orders. When the Regional Board amended the MS4 Permit in September of 2006 to add the SMBB TMDL, the Regional Board adopted a special finding, No. E.33 setting forth the procedure the Regional Board would follow if an exceedance at a monitoring location occurred. Finding E.33 in the LA MS4 Permit read as follows:

If the Receiving Water Limitations are exceeded at a compliance monitoring site, the Regional Board will generally issue an appropriate investigative order pursuant to Cal. Water Code § 13267 or § 13225 to the Permittees and other responsible agencies or jurisdictions within the relevant subwatersheds to determine the source of the exceedance. Following these actions, Regional Board staff will generally evaluate the need for further enforcement as follows:

> (a) If the Regional Board determines that the exceedance did not result from discharges from the MS4, then the MS4 Permittees would not be responsible for violations of these provisions.
>
> (b) If the Regional Board determines that Permittees in the relevant subwatershed have demonstrated that their MS4 does not discharge dry weather flow into Santa Monica Bay, those Permittees would not be responsible for violations of these provisions even if the Receiving Water Limitations are exceeded at an associated compliance monitoring site.
>
> (c) If the Regional Board determines that Permittees in the relevant subwatershed have demonstrated that their MS4 summer dry weather discharge into Santa Monica Bay is treated to a level that does not exceed either the single sample or the geometric mean bacteria objectives, those Permittees shall not be responsible for violations of these provisions even if the Receiving Water Limitations are exceeded at an associated compliance monitoring site.
>
> (d) If the Regional Board determines that one or more Permittees have caused or contributed to violations of these Receiving Water Limitations, the Regional Board will consider appropriate enforcement action, including a cease and desist order with or without a time schedule for compliance, or other appropriate enforcement action depending upon the circumstances and the extent to which the Permittee(s) has endeavored to comply with these provisions.

The Regional Board had relied on the adoption of this finding in amending the MS4 Permit on September 14, 2006. This finding was further amended and currently reads as Finding E.37 in the LA MS4 Permit as amended on August 9, 2007, which now includes references to the Marina Del Rey Harbor.

Nevertheless, the Executive Officer did not follow the protocols set forth in Finding E.37 before issuing the NOVs or the Orders. The Executive Officer did not issue an order pursuant to Water Code § 13267 or Water Code § 13225 requesting Petitioner to investigate the cause of the alleged RWL exceedances, nor did the Executive Officer provide Petitioner with an opportunity, prior to issuance of the NOVs, to indicate that the alleged exceedances were not the result of discharges from the MS4 or were otherwise not the legal responsibility of Petitioner. The

Executive Officer did not, instead of issuing NOVs, issue a cease and desist order to Petitioners with or without a time schedule order.

Instead, the Executive Officer issued NOVs and Orders pursuant to California Water Code § 13383. The Orders demanded, that the recipients provide, by April 21, 2008, certain detailed information set forth in the text of the Order including (a) identification of the sources of the alleged violations for each shoreline location; (b) a detailed description of remedial actions taken both before and after incorporation of the SMBB TMDLs into the MS4 Permit; and (c) a detailed description of "additional corrective and preventative actions" to be taken "to preclude future violations" plus a time schedule "designed to achieve full compliance;" Order, p. 3.

In addition, the Orders demanded that if a recipient contended that "it is not responsible for one or more of the violations," it must submit evidence that the cause of the RWL was from "some other sources or discharges," that it was not discharging dry weather flow at the monitoring site or that it was treating discharges to a level that did not exceed the RWLs. Order, p. 3. The subject Order is attached to this Petition as Exhibit "B."

The Orders further stated that any violation of the requirements set forth in the Order would subject recipients to civil penalties of up to $10,000 or for judicially imposed civil penalties of up to $25,000 per day, as well as "penalties pursuant to other sections, and other forms of enforcement proceedings . . . if compliance does not timely occur." Order, p. 3-4.

Water Code § 13320 provides that an aggrieved person may challenge the act of a regional board under, inter alia, Chapter 5.5 of the Water Code within 30 days of such action. The subject Order, based on alleged violations cited in the corresponding Notice of Violation, was issued pursuant to that chapter, under authority of Water Code § 13383 and thus are appropriate for challenge under S§ 13320. Moreover, the Order itself provides that it may be challenged under § 13320. As set forth in Section 5, Petitioner is an aggrieved person with respect to the Order and the Notice of Violation and the Petition is properly before the State Board.

II. POINTS AND AUTHORITIES

A. THE NOV AND 13383 ORDER ARE UNENFORCEABLE AS THEY ARE BASED ON BACTERIA TMDLS WHICH WERE DEVELOPED TO IMPLEMENT FAULTY WATER QUALITY STANDARDS

The bases for the Notice of Violation ("NOV") and imposition of the §13383 Order are alleged violations of waste discharge limits for the Santa Monica Bay set forth in the Los Angeles Municipal NPDES permit ("LA MS4 Permit")(also referred to as Board Order No. 01-182, as amended by Order No. R4-2006-0074 and Order No. R4-2007-0042). The waste discharge limits are also set forth in the Basin Plan, as adopted by the RWQCB on January 24, 2002, and commonly referred to as the Santa Monica Bay Beaches Bacteria TMDLs. The relevant portions of the LA MS4 Permit relied upon for the issuance of the NOVs and 13383 Orders were added through amendments adopted in September of 2006 and in August of 2007, so as "to implement the summer dry weather waste load allocations established in the Santa Monica Bay Beaches Bacteria Dry Weather Total Maximum Daily Load (TMDL) and the Marina del Rey Harbor Mothers' Beach and Back Basins Bacteria TMDL" (collectively, "Bacteria TMDLs").

The Bacteria TMDLs were adopted to implement specific water quality standards set forth in the Water Quality Control Plan for the Los Angeles Region ("Basin Plan"). By law, however, such water quality standards were required to have been adopted only after an analysis of the various factors and considerations set forth under California Water Code sections 13000 and 13241 had been completed. For example, Water Code Section 13000 requires the regulation of the State's waters "to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." Water Code § 13000.

Further, Water Code Section 13241 requires the establishment of water quality objectives so as to ensure the "reasonable protection of beneficial uses," based on whether the desired water quality conditions "could reasonably be achieved," along with a consideration of the "economic" impacts of the water quality standards on the dischargers in question, as well as a consideration of various other factors, such as the impacts on housing within the region. (See Water Code §§ 13241 and 13241(a)-(f); also see *City of Burbank v. State Water Resources Control Board* (2005) 35 Cal.4th 613, where the California Supreme Court determined that Water Code § 13241 requires a consideration of the "discharger's cost of compliance").

With respect to the water quality standards in the Basin Plan which were used to develop the Bacteria TMDLs (with the TMDLs then forming the bases for the amendments to the LA MS4 Permit), vis-à-vis "storm water" (which term includes urban and dry weather runoff pursuant to 40 CFR § 122.26(b)(13)), such water quality standards have to date not been developed based on a consideration of the Water Code section 13241 and 13000 factors and requirements. The Regional Board shall consider past, present and future probable beneficial uses of water; environmental characteristics of the water; water quality conditions that could be reasonably achieved through the coordinated control of all factors which might affect the quality of water, economic considerations and the need for developing housing in the region. Cal. Water Code § 13241. The State Board, and the L.A. Regional Board, had not previously considered the Water Code section 13241 and 13000 factors, vis-à-vis storm water, before applying such standards in the Basin Plan to storm water.

Because the water quality standards that are alleged to be violated under the NOVs and the 13383 Orders, had not been developed through the analysis required under Water Code sections 13241 and 13000, with respect to storm water, the NOVs and the 13383 Orders were wrongly issued.

B. IN ISSUING THE ORDER AND THE NOV, THE EXECUTIVE OFFICER DID NOT FOLLOW THE PROCEDURES LAID DOWN IN THE MS4 PERMIT

As noted in the Statement of Facts above, in amending the MS4 Permit to add the SMBB TMDL and the Marina TMDL, the Regional Board relied upon special finding No. E.37, setting forth the procedure the Regional Board would follow if an exceedance at a monitoring