location occurred.

As also noted in the Statement of Facts, the Executive Officer did not follow that procedure. No Order pursuant to Water Code § 13267 or § 13225 was issued to Petitioners. The Regional Board Executive Officer made no attempt to determine, prior to issuing the NOVs or Orders, whether any permittee was, in fact, responsible for the alleged exceedances of the bacteria RWLs. The Executive Officer did not issue a cease and desist order with or without a time schedule for compliance. Thus, the Executive Officer ignored Finding No. E37 and issued the NOVs and the Orders for exceedances that may, in fact, have no connection with discharges from the MS4. It is an abuse of discretion for an agency not to follow its own procedures. *See Environmental Protection Information Center, Inc. v. Johnson* (1985) 170 Cal.App.3d 604, 630-631 (failure to comply with own regulations required timber harvesting plan to be set aside). Petitioner requests that the State Board set aside the NOV and Order for this reason.

C. THE NOV AND ORDER IMPROPERLY RELY ON WATER CODE § 13383 AS AUTHORITY FOR INFORMATION REQUEST

The Regional Board purports to base its Orders upon Water Code § 13383. That reliance is improper for a number of reasons.

First, the Orders Exceed the Statutory Scope of Water Code § 13383 . The Regional Board's Orders are improper because the requirements set forth therein go well beyond the scope of monitoring requirements permitted under Water Code section 13383. The relevant portions of Water Code section 13383 state:

> (a) The state board or a regional board may establish monitoring, inspection, entry, reporting, and recordkeeping requirements. . . for any person who discharges, or proposes to discharge, to navigable waters. . . .
>
> (b) The state board or the regional boards may require any person subject to this section to establish and maintain monitoring equipment or methods, including, where appropriate, biological monitoring methods, sample effluent as prescribed, and provide other information as may be reasonably required. Water Code § 13383 (emphasis added.)

The Order states:

[S]hould the City of City of El Segundo contend that it is not responsible for one or more of the violations, City shall also submit the following information, if applicable:

1. Evidence that the RWL violation(s) at the shoreline monitoring site is not the result of discharge from the MS4 but from some other sources or discharges;
2. Evidence that El Segundo does not discharge dry weather flow into the Santa Monica Bay at the shoreline monitoring site; and
3. Evidence that El Segundo's summer dry weather discharges into the Santa Monica Bay are treated to a level that does not exceed either the single sample or geometric mean bacteria RWLs.

This Order for additional information is unwarranted. Water Code section 13383 is clearly designed to provide a mechanism whereby the Regional Board can obtain "monitoring, inspection or entry" information regarding a permittee's discharges. The purpose of such reports is to enable the Regional Board to make a reasonable characterization of that discharge. The Orders, however, are not being utilized for that purpose.

Instead of asking for additional "monitoring" of a permittee's discharges into a waterway that ultimately flows into the Pacific Ocean, the Orders require an "evaluation" of "sources," including those "within proximity" of the shoreline. Thus, the Orders purport to require Petitioner to examine other sources and discharges in order to prove that its own discharges could not have caused an exceedance in the shoreline monitoring. This type of "evaluation" goes far beyond monitoring at the point of discharge and exceeds the plain meaning of section 13383.

The Order is also unreasonable. To the extent the Order requires Petitioner to compile information beyond the jurisdictional control, they are unauthorized. Although Water Code section 13383(b) permits the Regional Board to request "other information", such requests can only be "reasonably" imposed. Water Code § 13383(b) ("The state board or regional boards may require any person subject to this section to. . . provide other information as may be reasonably required.") Any reports are also limited in scope by Water Code section 13225(c), which states that:

[T]he burden, including costs, of such reports must bear a reasonable relationship to the need for the report and the benefits to be obtained therefrom. The information requested by the Regional Board is unreasonable as it is not limited to Petitioner's discharge. Rather, the Regional Board's Order purports to require Petitioner to analyze discharges and make assumptions regarding factors well beyond its individual boundaries. The Order places the obligation on Petitioner to not only examine the shoreline monitoring sites, which in many cases may be located miles from its boundaries, but to also conduct an analysis of all upstream sources. This is not reasonable, and is therefore not permitted under Water Code section 13383 or Water Code section 13225. See Water Code § 13383(b) (stating that the Regional Board's request must be reasonable.); Water Code § 13225(c).

Furthermore, the language in the Order is patently unfair in that it improperly places the burden on Petitioner to prove the negative (i.e. that it could not have contributed to the alleged discharge violations) without first proving that Petitioner actually caused the shoreline contamination. The Regional Board has not met its initial burden. It has not shown that the shoreline bacteria exceedances came from any particular water body, much less that Petitioner caused such an exceedance. None of the samples relied on by the Regional Board indicate that the high bacteria levels came from an MS4, or even from the various reaches to which the MS4s discharge. There is no evidence whatsoever that Petitioner's discharges were in any way related to the high bacteria flow. Petitioner should not be required to prove they did not do something when the Regional Board has not raised even a rebuttable presumption that the contamination results from its actions. See Evidence Code § 500; Sergeant Fletcher, Inc. v. Able Corp. (2003) 110 Cal. App. 4th 1658, 1667-1668.

Lastly, the Orders require the provision of information that relates to discharges and/or releases of bacteria that are the responsibility of third parties. As noted above, the Orders

require an "evaluation" and "supporting documentation" on whether alleged violations of the RWLs were caused by "sources in proximity to the shoreline monitoring location." These sources would include those having no connection to the MS4 and potentially are not even of human origin, since birds and other wildlife may be significant contributors of bacteria, as has been noted in the staff reports for the various bacteria TMDLs considered by the Regional Board and the State Board. See also LA MS4 Permit Factual Finding E.33.

Because these requests are unreasonably broad, and because the Regional Board has not met its burden for establishing discharge violations by the Petitioner, any and all extraterritorial requirements should at minimum be stricken from the Order.

D. THE ORDER'S REQUIREMENTS CONSTITUTE UNFUNDED STATE MANDATES

To the extent the Order places a burden on Petitioner to inspect areas beyond its jurisdictional control, the Order constitutes an unfunded state mandate. Article XIII B, Section 6 of the Constitution prevents the state from shifting the cost of government from itself to local agencies without providing a "subvention of funds to reimburse that local government for the costs of the program or increased level of service . . ." State agencies are not free to shift state costs to local agencies without providing funding merely because those costs were imposed upon the state by the federal government. If the state freely chooses to impose costs upon a local agency as a means of implementing a federal program, then those costs should be reimbursed by the state agency. See *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal. App. 4th 898; *Hayes v. Commission on State Mandates* (1992) 11 Cal. App. 4th 1564, 1593-1594. If the state refuses to appropriate money to reimburse a city, the enforcement of the state mandate can potentially be enjoined by a court. See Lucia Mar Unified School District v. Honig (1988) 44 Cal. 3d 830, 833-834.

This determination belongs in the first instance to the Commission on State Mandates. Government Code §§ 17551 and 17552.

E. INCORRECT CALCULATION OF GEOMETRIC MEAN FOR ALLEGED VIOLATIONS OF THE SANTA MONICA BAY BEACHES BACTERIA TMDL

The Executive Officer and technical staff to the Los Angeles Regional Water Quality Control Board ("RWCQB") used a method to calculate the geometric mean that conflicts with the method approved by the RWCQB for the Santa Monica Bay Beaches Bacteria TMDL and may result in higher geometric mean values than the data actually shows. The geometric mean calculations were used to allege violations of Water Code § 13376 in the Notice of Violation ("NOV") and used as authorization for imposing the § 13383 Order, issued together on March 4, 2008. Hence, the alleged violations have been inaccurately calculated and the RWQCB has not properly proved the violations of Water Code § 13376. As such, the RWQCB is not authorized to impose liability under Water Code § 13385 or establish a monitoring, inspection, entry, reporting, or recordkeeping requirement under Water Code § 13383.

In the NOV and corresponding Order, the RWQCB alleges that the City has violated the waste discharge limits for the Santa Monica Bay established by the LA MS4 Permit (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 Bacteria TMDLs were incorporated into the LA MS4 Permit on September 14, 2006, by Order R4-2006-0074.

Under the Santa Monica Bay Beaches Bacteria TMDLs, the responsible agencies within the Malibu Creek and Ballona Creek watersheds were required to submit a Coordinated Shoreline Monitoring Plan to the RWQCB for approval in late 2003. The Monitoring Plan identifies all monitoring locations, the types of monitoring and the frequency of monitoring to be conducted by the responsible agencies at each site. The RWQCB approved the Coordinated Shoreline Monitoring Plan on April 28, 2004. The monitoring data collected under the Monitoring Plan is compiled monthly and submitted to the RWQCB. The RWQCB relied on this coordinated shoreline monitoring data to support its allegations in the NOV and corresponding Order; however, the method used to calculate the geometric mean conflicts with the method that was approved by the RWQCB under the Monitoring Plan and may result in artificially inflated results.

The approved Plan illustrates specifically how the geometric mean is to be calculated.

> The geometric mean is defined in Webster's Dictionary as "the nth root of the product of n numbers." Thus, the 30-day geometric mean calculation for the SMBBB TMDLs will be calculated as the 30th root of the product of 30 numbers (the most recent 30 day results). For weekly sampling, the 30 numbers are obtained by assigning the weekly test result to the remaining days of the week. If more samples are tested within the same week, each test result will supersede the previous result and be assigned to the remaining days of the week until the next sample is collected. This rolling 30-day geometric mean must be calculated for each day, regardless of whether a weekly or daily schedule is selected.

See Sec. 2.2.1 Rolling 30-day Geometric Mean Limits, Santa Monica Bay Beaches Bacterial TMDL Coordinated Shoreline Monitoring Plan.

In other words, the calculation of the geometric mean for each day should use thirty values, which requires extrapolation of the result of a given day sample to subsequent unsampled days in order to calculate values for each of the past thirty days before running the calculation. RWQCB staff has reported that the method used to calculate the rolling 30-day geometric mean in the NOV used *only* actual summer dry weather data; staff did not extrapolate data by filling in dates with no monitoring data with the most recent data result, as required under the Plan. Additionally, wet weather data was not used in calculating the geometric means and when the data values were qualified with a "<" or ">," the exact numeric value was used without a qualifier. Staff has declared that while the method outlined in the Plan was approved based on previous discussions with various RWQCB departments and the United States Environmental Protection Agency, RWQCB staff has since re-evaluated this approach and unilaterally found it to be inappropriate.

The method used by the Executive Officer to cite exceedances in the NOV can result in

higher geometric mean values than the data shows and these artificially inflated mean values cannot be used to support allegations of bacteria exceedance. Finding No. 36 of LA MS4 Permit, states, "[c]ompliance with the Receiving Water Limitations shall be determined using monitoring data obtained in conformance with the Santa Monica Bay Beaches Bacterial TMDLs Coordinated Shoreline Monitoring Plan dated April 7, 2004; the Marina del Rey Harbor Mothers' Beach and Back Basins Bacterial TMDL Coordinated Monitoring Plan dated April 13, 2007; and the Monitoring and Reporting Program CI 6948." Compliance with the waste discharge requirements has not been determined in conformance with the Monitoring Plan; hence, the alleged violations have been incorrectly calculated and the RWQCB has not properly proved violations of Water Code § 13376. Where the Executive Officer's manner of calculating the geometric mean resulted in artificially inflated values, the calculations cannot be used to support allegations of bacterial exceedance. As such, the NOV and Order is not supported by substantial evidence.

F. INCORRECT CALCULATION OF NUMBER OF VIOLATIONS AND IMPROPER RELIANCE ON MONITORING DATA

The NOV incorrectly calculates alleged Receiving Waters Limitations violations by monitoring site for each bacteria indicator, when the TMDL expresses waste load allocations by the number of days that an exceedance is present. In Table 1 of the NOV, the RWQCB alleges multiple violations on the same day for days when more than one indicator of exceedances may have been reported, as summarized in the Total RWL Violations by Site column. According to Numeric Target and Waste Load Allocations set forth in Table 7-4.1 of Attachment A to Resolution No. 02-004, the single sample targets at each existing shoreline monitoring site are assigned an allowable number of *exceedance days* for summer dry weather and winter dry weather. Thus, any citation of multiple violations for the same monitoring day should be stricken from the NOV.

The NOV also incorrectly utilizes additional monitoring data for determining compliance with the TMDL that was not to be used before the LA MS4 Permit was amended on August 9, 2007.

As specified in Table 7-4.3 of Attachment A to Resolution No. 02-004 for dry weather, the responsible jurisdictions and agencies were to select between daily and weekly shoreline sampling when preparing the Monitoring Plan. Accordingly, under section 4.1 Sampling Schedule, the Plan states that, "[t]he proposed compliance monitoring program comprises 67 sites monitored on a weekly basis. All routine samples will be collected on Mondays, and accelerated samples collected on Wednesdays and Fridays." Accelerated sampling is triggered at a monitoring location whenever analysis of a Monday sample indicates that an exceedance has occurred. Weekly sampling resumes for that location once the accelerated sample results demonstrate that bacteria levels no longer exceed the limits. The Monday data set, along with any required accelerated sampling, would be utilized in determining compliance with the TMDL as referenced in Finding E. 32 and in footnote 5 of the Receiving Waters Limitation Provision of the LA MS4 Permit at the time the permit was reopened on September 14, 2006. However, when the MS4 Permit was reopened to incorporate the Marina del Rey Bacteria TMDL on August 9, 2007, the same finding and footnote were further revised to provide that monitoring data collected through the Monitoring and Reporting Program CI 6948 of the LA MS4 Permit would also be used to assess compliance

with the Receiving Waters Limitations. Under CI 6948, additional monitoring on four other days of the week (Tues-Thurs) has been conducted at various monitoring sites throughout the jurisdictional groups. This additional monitoring data should not be used for determining compliance with Santa Monica Bay Beaches Bacteria TMDL/Receiving Waters Limitations provision of the MS4 Permit on dates before the MS4 Permit was amended on August 9, 2007. Accordingly, the NOV and Order was not supported by substantial evidence.

G. THE ORDER AND NOV SHOULD BE POSTPONED PENDING THE RESULTS OF THE TMDL REOPENER

The Order and NOV is untimely considering the TMDL is outdated and overdue for a reopener. According to Regional Board Resolution No. 2002-022, the TMDL relies on monitoring sites and reference points which may potentially skew the data and reduce the overall effectiveness of the TMDL. In Paragraph 22 of Resolution No. 2002-22, it stated:

For the Wet-Weather and Dry-Weather Bacteria TMDLs at Santa Monica Bay beaches, Leo Carrillo Beach and its associated drainage area, Arroyo Sequit Canyon, were selected as the local reference system until other reference sites or approaches are evaluated and the necessary data collected to support the use of alternative reference sites or approaches when the TMDL is revised four years after the effective date. . . . It is the intent of the Regional Board to re-evaluate the use of Leo Carillo Beach due to potential problems arising from the heavy recreational use of the beach and the close proximity of two campgrounds.

As to the monitoring sites in the Northern part of the Bay, the Regional Board stated:

Northern Bay beach monitoring sites are fewer in number and provide less comprehensive data than the extensive shoreline monitoring network elsewhere in Santa Monica Bay. (Regional Board Resolution No. 2002-022, ¶ 23, p. 4.)
Thus, even while adopting the TMDL, the Regional Board acknowledged that potential flaws existed with respect to the significance of the data received.

In order to address these deficiencies, the Regional Board inserted a reopener requirement into the TMDL that would to force the Regional Board to address and re-evaluate:

1.) The allowable winter dry weather exceedance days based on additional data on bacterial indicator densities in the wave wash.
2.) The reference system selected to set allowable exceedance levels; and
3.) The reference year used in the calculation of allowable exceedance days.

The TMDL went into effect on July 15, 2003. As noted in Resolution No. 2002-022 above, the reopener was supposed to have taken place within 4 years after the effective date of the TMDL (i.e. by July 15, 2007). (Regional Board Resolution No. 2002-022, p. 6, Attachment B to Resolution No. 2002-022.) To date, however, no reopener has occurred.

In preparation for the Regional Board's pending reopener, various responsible agencies have been collecting data in order to document and characterize the existing conditions and sources of bacteria contained in the Santa Monica Bay. In many cases, that information directly contradicts previously held beliefs regarding the natural, background levels of

bacteria and the efficacy of the Regional Board's chosen monitoring sites and reference points. It is inappropriate for the Regional Board to issue an Order and NOV based on the current, inaccurate TMDL parameters. Instead, the Regional Board should address these alleged violations only after it has conducted its reopener, re-evaluated its current TMDL, and devised an accurate regulatory mechanism that takes into account all current information regarding beach conditions. Petitioner requests that the State Board set aside the Order and NOV for this reason.

H. THE MONITORING REQUIRED BY THE ORDER MODIFIES THE MS4 PERMIT WITHOUT A NOTICED HEARING

The MS4 Permit contains a monitoring program (Monitoring and Reporting Program No. CI 6948) that was incorporated into the permit at the time of its adoption on December 13, 2001. This monitoring program is very detailed and requires, inter alia, mass emissions, water column toxicity, tributary, and other monitoring for a variety of constituents and over a detailed timeline.

The MS4 Permit is both a NPDES permit and waste discharge requirement ("WDR") issued by the Regional Board under the Porter-Cologne Act (see Water Code §§ 13370-13389). A NPDES permit and WDR cannot be issued or modified except through prior notice and hearing. Water Code § 13378. The Act further provides that only a Regional Board can modify a WDR, and that this function cannot be delegated to the executive officer. Water Code § 13223(a) ("Each regional board may delegate any of its powers and duties vested in it by [the Porter-Cologne Act] excepting only the following: . . . (2) the issuance, modification, or revocation of any water quality control plan, water quality objectives, or waste discharge requirement.")

The Order essentially creates a massive new addition to the MS4 monitoring program. The Order requires Petitioner to provide information on the sources of exceedances at each of the shoreline monitoring sites for which it is jointly responsible, provide details regarding dry weather discharge from the MS4 at each site, and evaluate the sources of exceedances, both upstream and in the proximity of the monitoring site.

The Order, however, was issued without notice and a public hearing. To the extent the Order require Petitioner to expand its monitoring efforts, the Order constitute a modification to the MS4 Permit without notice and hearing.

I. THE NOV AND ORDER UNLAWFULLY IMPOSES ON PETITIONERS RESPONSIBILITY FOR THE DISCHARGES OF OTHERS

The Order is based on the allegation that Petitioner is jointly responsible for the alleged exceedances. To the contrary, Petitioner is not responsible for the discharges of others and neither the Clean Water Act or the Porter-Cologne Act so provides. Petitioner is responsible solely for its own discharges.