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CITY OF INGLEWOOD  
8  
9

10 BEFORE THE  
11 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD  
12

13 IN THE MATTER OF THE PETITION OF  
THE CITY OF INGLEWOOD FOR REVIEW  
14 OF ACTION AND FAILURE TO ACT BY  
THE CALIFORNIA REGIONAL WATER  
15 QUALITY CONTROL BOARD, LOS  
ANGELES REGION, IN ISSUING ORDER  
16 PURSUANT TO CALIFORNIA WATER  
CODE SECTION 13383 AND NOTICE OF  
17 VIOLATION  
18  
19

**PRELIMINARY MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT OF PETITION (Water Code §  
113320)**

[Request for Formal Hearing 23 CCR -  
§2052.6(b)]

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1           Petitioner City of Inglewood ("City") submits this Preliminary Memorandum of Points and  
2 Authorities in support of its Petition for Review filed concurrently herewith pursuant to Section  
3 13320(a) of the Water Code and Section 2050 of Title 23 of the California Code of Regulations.  
4 City reserves the right to file a more detailed memorandum in support of its Petition when the full  
5 administrative record is available and any other material has been submitted.<sup>1</sup>

6 **I.       INTRODUCTION**

7           The City is a permittee under the Los Angeles County Municipal Separate Storm Sewer  
8 System Permit, NPDES Permit No. CAS004001, Order No. 01-182 ("MS4 Permit"). On March 4,  
9 2008, the Executive Officer of the California Regional Water Quality Control Board, Los Angeles  
10 Region ("Regional Board"), issued a Notice of Violation ("NOV") and Order Pursuant to  
11 California Water Code Section 13383 ("Order") to the City. The 13383 Order and the NOV are  
12 attached as Exhibits A and B, respectively, to the City's Petition.

13           The 13383 Order and NOV allege that the City violated the MS4 permit. The allegation is  
14 based on alleged exceedances of the Santa Monica Bay Beaches Bacteria Dry Weather TMDL  
15 ("Santa Monica Bay Beaches TMDL") at the SMB BC-01 monitoring site during the periods from  
16 September 14, 2006 through October 31, 2006 and April 1, 2007 through October 31, 2007. The  
17 13383 Order requires the City to provide detailed information concerning the alleged exceedances.  
18 The City requests that the State Board review the 13383 Order and NOV in their entirety.

19 **II.      FACTUAL BACKGROUND**

20           The City, along with the County of Los Angeles and the Los Angeles County Flood  
21 Control District (collectively, the "County"), and other incorporated cities within the County of  
22 Los Angeles, are permittees (collectively, the "Permittees") under that Permit and 13383 Order  
23 issued by Respondent, Regional Board on December 13, 2001, entitled "Waste Discharge  
24 Requirements for Municipal Storm Water and Urban Runoff Discharges within the County of Los  
25 \_\_\_\_\_

26 <sup>1</sup> The State Water Resources Control Board's regulations require submission of a statement of points and authorities  
27 in support of a petition (23 C.C.R. §2050(a)(7)), and this document is intended to serve as a preliminary  
28 memorandum. However, it is impossible to prepare a complete statement and memorandum in the absence of the  
complete administrative record, which is not yet available.

1 Angeles, and the incorporated cities therein, except the City of Long Beach, Order No. 01-182,  
2 NPDES No. CAS004001" (hereinafter, "MS4 Permit").

3 The Regional Board determined in the MS4 Permit that the City was in the "Dominguez  
4 Channel/ Los Angeles Harbor Drainage" Watershed Management Area, and not either the Santa  
5 Monica Bay or the Ballona Creek Watershed Management Areas (*See*, Attachment A to MS4  
6 Permit.)

7 Storm water and urban runoff originating in the City flows into a municipal separate storm  
8 sewer system ("MS4") operated by the City and thereafter into the MS4 operated by County. The  
9 County MS4 also carries storm water and urban runoff from MS4s operated by other Permittees  
10 upstream and downstream from the City. Storm water and urban runoff from the City's MS4 may  
11 flow from time to time into Centinela Creek, which also receives flows from other Permittees and  
12 eventually drains into Ballona Creek.

13 The Ballona Creek Watershed is subject of the "Total Maximum Daily Loads for Bacterial  
14 Indicator Densities in Ballona Creek, Ballona Estuary, and Sepulveda Channel" ("Ballona Creek  
15 TMDL"), which became effective on April 27, 2007. The Ballona Creek TMDL divides the  
16 Ballona Creek Watershed into Reach 1, Reach 2, Ballona Estuary and Sepulveda Channel. The  
17 point at which Centinela Creek drains into Ballona Creek is located within the Ballona Creek  
18 Estuary. The Ballona Creek TMDL requires that a no exceedances due to summer dry weather  
19 flows be achieved in the estuary by *April 27, 2013*, six years from the effective date of Ballona  
20 Creek TMDL. In addition, the Ballona Creek TMDL establishes a zero exceedance waste load  
21 allocation for Centinela Creek during summer dry weather flows, with the same 2013 compliance  
22 target. The Ballona Creek TMDL has not yet been incorporated into the MS4 Permit.

23 On March 4, 2008, the Executive Officer of the Regional Board issued the NOV and the  
24 13383 Order to the City. The NOV and 13383 Order allege that the City violated the MS4 Permit  
25 because the Regional Board recorded exceedances of the *Santa Monica Bay Beaches Bacteria*  
26 *Dry Weather TMDL* ("Santa Monica Bay Beaches TMDL") at the SMB BC-01 monitoring site on  
27 119 days during the periods from September 14, 2006 through October 31, 2006 and April 1, 2007  
28 through October 31, 2007.

1 To the City's knowledge, the Santa Monica Bay Beaches TMDL neither mentions the City,  
2 nor assigns any waste load allocation to the City, or otherwise identifies the City as a discharger or  
3 potential discharger of pollutants, and, in particular, bacteria, into the area which is the subject of  
4 that TMDL. At no time, has the Regional Board provided any evidence indicating that the City  
5 ever discharged any pollutants into any waters which caused or contributed to any exceedances of  
6 the Santa Monica Bay Beaches TMDL.

7 The 13383 Order purports to require the City, by April 21, 2008, to provide detailed  
8 information concerning the alleged exceedances, including (a) an evaluation of dry weather  
9 discharges from the City's MS4 "at the noncompliant shoreline location on the date(s) of the  
10 violations;" (b) a detailed description of remedial actions taken both before and after incorporation  
11 of the Santa Monica Bay Beaches TMDL provisions into the MS4 Permit; (c) a detailed  
12 description of "additional corrective and preventative actions" to be taken "to preclude future  
13 violations" plus a time schedule "designed to achieve full compliance;" (d) an evaluation of  
14 potential sources for the exceedances within the Ballona Creek watershed; and (e) evidence  
15 supporting contentions made by the City that it is not responsible for the violations.

16 **III. THE REGIONAL BOARD'S ACTIONS IN THE ORDER AND NOV ARE**  
17 **IMPROPER AND INAPPROPRIATE**

18 **A. The Order Improperly Alleges that City is Responsible for Exceedances of**  
19 **Santa Monica Bay Beaches TMDL**

20 **1. City is Not Part of the Santa Monica Bay Watershed Management Area**

21 The City is not responsible for compliance with the Santa Monica Bay Beaches TMDL  
22 because, among other things, the MS4 Permit does not include the City as part of the Santa  
23 Monica Bay Watershed Management Area, and there is no evidence, to the City's knowledge, that  
24 storm water or urban runoff from the City caused or contributed to any of the exceedances  
25 identified in the NOV.

26 Footnote 3 of Part 1.B of the MS4 Permit provides in part that "[a]ll Permittees within a  
27 sub-watershed of the Santa Monica Bay Watershed Management Area are jointly responsible for  
28 compliance with the limitations imposed in Tables 7-4.1 and 7-5.1 of the Basin Plan." (MS4

1 Permit, p. 22.) The MS4 Permit divides the County of Los Angeles into six Watershed  
2 Management Areas. The permittees in each Watershed Management Area are listed in  
3 Attachment A to the MS4 Permit. While some jurisdictions, like the City of Los Angeles, the  
4 County of Los Angeles, and the Los Angeles County Flood Control District, are specifically listed  
5 in more than one Watershed Management Area, the City is not. Attachment A clearly indicates  
6 that the City is under the "Dominguez Channel/Los Angeles Harbor Drainage" Watershed  
7 Management Area only and not under the Santa Monica Bay Watershed Management Area or any  
8 sub-watershed thereof. Accordingly, the City cannot be held responsible for discharges prohibited  
9 under the Santa Monica Bay Beaches TMDL.

10 In addition, the City is not responsible for alleged exceedances of the Santa Monica Bay  
11 Beaches TMDL because it does not fall within the category of jurisdictions or agencies  
12 responsible for such exceedances. Footnote 3 of Part 1.B of the MS4 Permit provides that  
13 responsibility for discharges that cause or contribute to exceedances of the Santa Monica Bay  
14 Beaches TMDLs **"is determined as indicated in footnote 3 part (2) of Table 7-4.1 and footnote**  
15 **2 part (1) of Table 7-5.1 of the Basin Plan."** (MS4 Permit, p. 22.) Footnote 3 of Table 7-4-1  
16 provides that for the purposes of the Santa Monica Bay Beaches TMDL, "responsible  
17 jurisdictions and responsible agencies" includes:

- 18 (1) local agencies that are responsible for discharges from a publicly  
19 owned treatment works to the Santa Monica Bay watershed or  
directly to the Bay
- 20 (2) local agencies that are permittees or co-permittees on a  
21 municipal stormwater permit
- 22 (3) local or state agencies that have jurisdictions over a beach  
adjacent to Santa Monica Bay, and
- 23 (4) the California Department of Transportation pursuant to its  
24 stormwater permit

25 None of the above categories include the City. Obviously, the first, third and fourth  
26 categories do not apply. The Regional Board has not made any findings to explain why it asserts  
27 the City is subject to the Santa Monica Bay Beaches TMDL. The second category could not be  
28 reasonably interpreted to include all co-permittees under the MS4 Permit, because it would make

1 every city in Los Angeles County responsible for receiving water violations at the Santa Monica  
2 Bay beaches regardless of whether any discharges from that city actually caused or contributed to  
3 any pollution in the watershed. Moreover, any such interpretation is not supportable because it  
4 would conflict with the Regional Board's Watershed Management Approach.

5 2. City is Only Potentially Subject to the Ballona Creek TMDL

6 A portion of the storm water and urban runoff from the City's MS4 may discharge from  
7 time to time into Centinela Creek which flows into Ballona Creek. Discharges into Ballona Creek  
8 are subject to the **Ballona Creek TMDL** for Ballona Creek, Sepulveda Channel, and Ballona  
9 Estuary, which was adopted by the Regional Board on July 21, 2006 and became effective on  
10 April 27, 2007. Unlike the Santa Monica Bay Beaches TMDL, which does not contain a single  
11 reference to the City, the Ballona Creek TMDL clearly provides that the City, along with the  
12 County of Los Angeles, Caltrans and the Cities of Los Angeles, Culver City, Beverly Hills, West  
13 Hollywood and Santa Monica, is subject to the Ballona Creek TMDL. Consequently, the TDML  
14 applicable to any discharges from the City to Ballona Creek is the specific Ballona Creek TMDL,  
15 **not** the more general Santa Monica Bay Beaches TMDL.

16 To the extent that the City may be responsible for complying with the Ballona Creek  
17 TMDL, the Regional Board may not take administrative action against the City for failure to  
18 comply with the Ballona Creek TMDL because the Ballona Creek TMDL compliance deadline is  
19 not until April 2013. Moreover, the Ballona Creek TMDL has not been incorporated into the MS4  
20 Permit. "A TMDL does, not, by itself, prohibit any conduct or require any actions. Instead, each  
21 TMDL represents a goal that may be implemented by adjusting pollutant discharge requirements  
22 in individual NPDES permits or establishing nonpoint source controls." (*City of Arcadia v. State*  
23 *Water Resources Control Board* (2006) 135 Cal.App.4<sup>th</sup> 1392, 1414-1415 [quoting *City of*  
24 *Arcadia v. EPA* (N.D.Cal. 2003) 265 F.Supp.2d 1142, 1156].) Therefore, the Regional Board  
25 could not take administrative action against the City for alleged failure to comply with the Ballona  
26 Creek TMDL until the MS4 Permit is reopened to incorporate the Ballona Creek TMDL.  
27 Furthermore, even to the extent that the Santa Monica Bay Beaches TMDL might arguably apply  
28 to the City, there is no evidence of which the City is aware, which in any way demonstrates, that

1 the source of any of the exceedances identified in the NOV was any discharge which originated  
2 within the City.

3         Moreover, even to the extent that the Santa Monica Bay Beaches TMDL might arguably  
4 apply to the City, the City could not be required to comply with the compliance deadline for the  
5 Santa Monica Bay Beaches TMDL before it is required to comply with compliance deadline for  
6 upstream monitoring locations for the Ballona Creek TMDL. The Ballona Creek TMDL requires  
7 that no exceedances due to summer dry weather flows be achieved in the estuary by April 27,  
8 2013, six years from the effective date of Ballona Creek TMDL. It would not only be illogical,  
9 but would defeat the purpose of establishing separate compliance points for different locations  
10 within the Ballona Creek Watershed, if the Regional Board were to require the City to comply  
11 with the compliance deadline for the Santa Monica Bay Beaches TMDL before the compliance  
12 deadline for the Ballona Creek TMDL.

13         In fact, the Ballona Creek TMDL staff report specifically "recognized" that cities  
14 discharging to Ballona Creek – particularly to tributaries like Centinela Creek – would have  
15 "challenges" meeting the shorter compliance deadlines of the Santa Monica Bay Beaches TMDL.  
16 (Ballona Creek TMDL Staff Report, p. 39.) While the shorter deadlines may have been justified  
17 for the Santa Monica Bay Beaches TMDL because planning and construction of diversion  
18 facilities was already underway for storm drains at the beaches, that is "not the case for the  
19 Ballona Creek Watershed." (*Ibid.*) Ironically, the Regional Board found that forcing Ballona  
20 Creek watershed cities to comply with the shorter deadlines (like the NOV and the 13383 Order  
21 seek to do) could actually undermine implementation of the Preferred Strategy. (*Ibid.*)

22             3.         From the Face of the Order, it is Apparent that Most of the Requirements  
23                             are Not Applicable to Ballona Creek Discharges

24         The only reporting requirement in the 13383 Order that is arguably applicable to  
25 the City is the requirement to provide information for site "SMB BC-01" because that is the only  
26 requirement potentially applicable to discharges from Ballona Creek. It is clear from the language  
27 of the 13383 Order that the rest of the reporting requirements apply only to those jurisdictions and  
28 agencies that discharge to the shoreline monitoring locations. For example, the second

1 requirement in the 13383 Order purports to require the City to provide "[t]he source(s) of the  
2 violations for the *shoreline compliance location*, including an evaluation of dry weather  
3 discharges from the MS\$ at the *noncompliant shoreline location* on the date(s) of the violations."  
4 (emphasis added.) The Regional Board erroneously included reporting requirements for shoreline  
5 monitoring locations in the City's 13383 Order even though the City does not discharge to such  
6 locations. This error is a result of the fact that the Regional Board issued virtually the same orders  
7 to 22 different Permittees without adequate investigation or consideration of the locations and  
8 discharges of each jurisdiction. The Regional Board's inadequate investigation and overreaching  
9 is further evidenced by references in the NOV and Order to the Marina del Rey Harbor Mothers'  
10 Beach and Back Basins Bacteria TMDL, a TMDL to which the City is not subject. The Regional  
11 Board's failure to tailor the requirements in the 13383 Order to the City's location and discharges  
12 was clearly improper, arbitrary and capricious and unsupported by the evidence.

13           **B.       The NOV and the 13383 Order Fail to Provide Findings or Evidence to**  
14                       **Support the Allegation that the City Caused or Contributed to the Bacteria**  
15                       **Exceedance**

16           The Regional Board has not satisfied its burden of proving that the City's discharges  
17 caused or contributed to the bacteria exceedances at the SMB-BC-1 monitoring site. Alleged  
18 violations must be based on some quantum of evidence. (*In the Matter of the Petition of the*  
19 *County of San Diego, San Marcos Landfill*, Order WQO 2002-0020, 2002 WL 31694367;  
20 Evidence Code § 500.) The Regional Board cannot merely make broad assumptions based on a  
21 few inconclusive facts. (*Ibid.*) Accordingly, the Regional Board must make findings and provide  
22 evidence that support its contention that the City "caused or contributed" to exceedances of the  
23 Santa Monica Bay Beaches TMDL.

24           There are no explicit findings in either the NOV or the 13383 Order and the evidence  
25 implicitly relied upon by the Regional Board for its assertion that the City violated the MS4 is  
26 entirely speculative, at best. The only relevant fact cited by the Regional Board in the NOV and  
27 the 13383 Order is that exceedances of the Santa Monica Bay Beaches TMDL were recorded at  
28 the SMB-BC-1 monitoring site on 119 of the 260 days (or 46%) during the periods from

1 September 14, 2006 through October 31, 2006 and April 1, 2007 through October 31, 2007. This  
2 fact, without more, is insufficient to prove that the City violated the MS4 Permit, especially given  
3 the fact that there are a number of potential sources of bacteria, including but not limited to,  
4 sanitary sewer and sewage plant overflows and spills, illicit discharges from private drains,  
5 naturally-occurring bacteria from a source within the wave wash, and urban runoff from  
6 separately-permitted facilities, state facilities, or federal facilities.

7           **C.       The Regional Board's 13383 Order Improperly Shifts the Burden of Proof to**  
8                           **the City**

9           The 13383 Order improperly places the burden on the City to prove that it is not  
10 responsible for the violation of the MS4 Permit. The 13383 Order provides in relevant part,  
11                           should the City of Inglewood contend that it is not responsible for  
12                           one or more of the violations, Inglewood shall also submit the  
13                           following information, if applicable:

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

22           The Regional Board cannot require the City to disprove the Regional Board's unsupported  
23           allegation that the City caused or contributed to the violation because the Regional Board has the  
24           burden of proving each fact that is essential to the NOV and the 13383 Order and the burden of  
25           producing evidence in support of said facts. *See Sargent Fletcher, Inc. v. Able Corp.* (2003) 110  
26           Cal. App. 4th 1658, 1667-1668; Evidence Code §§ 115, 500, 520. The Regional Board can only  
27           shift the burden of production to the City, if at all, once the Regional Board has produced  
28           sufficient evidence to prove that the City caused or contributed to the violation. *Sargent Fletcher,*  
*Inc. v. Able Corp., supra*, 110 Cal. App. 4th 1667-1668. The Regional Board, however, has not  
met this initial burden. It has not produced any evidence that the bacteria exceedances came from  
Centinela Creek, let alone the MS4 or, in particular, the City's MS4.

1           Moreover, the Regional Board cannot seek to hold all of the Permittees under the MS4  
2 Permit jointly and severally liable for the exceedances of the Santa Monica Bay Beaches TMDL  
3 without making a sufficient showing that *each* of the Permittees in fact caused or contributed to  
4 the exceedances. The 13383 Order and NOV assert that the City is "jointly responsible" for  
5 violations at the SMB-BC-1 monitoring site along with other Permittees with land area within the  
6 watershed draining to the monitoring site. The "jointly responsible" language in the 13383 Order  
7 implies that the Regional Board is holding the City jointly and severally liable for violations at the  
8 SMB-BC-1 monitoring site. However, in order to do so, the Regional Board must first establish  
9 that the City caused or contributed to the violation. Liability of each party must still be prove  
10 individually for each party.

11           The Regional Board has failed to make any findings or provide any evidence that  
12 demonstrate in any way that the City's discharges caused or contributed to any exceedance at the  
13 shoreline monitoring location. There is no authority under the Porter-Cologne Act, the Clean  
14 Water Act or common law that authorizes the Regional Board to hold the City liable for the  
15 alleged violation without any such proof.

16           **D.     The Regional Board Improperly Relied on Unlawful Water Quality Objectives**  
17                   **in the Water Quality Control Plan for the Los Angeles Region as the Basis for**  
18                   **the Alleged Violations**

19           The 13383 Order is invalid because the Regional Board improperly relied on water quality  
20 objectives and TMDLs in the Water Quality Control Plan for the Los Angeles Region ("Basin  
21 Plan") that were not adopted or reviewed in accordance with the law.

22           **E.     The Regional Board Improperly Relied on Water Code § 13383 in Issuing the**  
23                   **13383 Order**

24           1.     The Regional Board Failed to Follow the Procedures Set Forth in the MS4  
25                   Permit for Addressing Bacteria Exceedances

26           The Regional Board improperly issued the NOV and 13383 Order before complying with  
27 the procedures described in the MS4 Permit for addressing bacteria exceedances. Finding E.37 of  
28 the MS4 Permit provides that if receiving water limitations are exceeded at a compliance

1 monitoring site, the Regional Board will first issue an investigative order “pursuant to Cal. Water  
2 Code § 13267 or Water Code § 13225” to the responsible agencies or jurisdictions *to determine*  
3 *the source of the exceedance*. The finding further provides that only after the Regional Board has  
4 determined that one or more permittees have caused or contributed to violations of receiving water  
5 limitations would “the Regional Board . . . consider appropriate enforcement action, including a  
6 cease and desist order with or without a time schedule for compliance, or other appropriate  
7 enforcement action depending upon the circumstances and the extent to which the Permittee(s) has  
8 endeavored to comply with these provisions.” (MS4 Permit, Finding E.37.) The Regional Board,  
9 however, completely disregarded the process set forth in Finding 37 in issuing the NOV and  
10 13383 Order. This action was unjustified because the Regional Board did not first determine that  
11 the City in fact caused or contributed to the exceedances of the Santa Monica Bay Beaches  
12 TMDL.

13       **F.       Section 13383 does not provide the Regional Board with Adequate Authority**  
14               **to Issue the 13383 Order**

15       The Regional Board's 13383 Order is improper because the requirements set forth therein  
16 go well beyond the scope of monitoring requirements permitted under Water Code § 13383.  
17 Section 13383 authorizes the Regional Board to establish "monitoring, inspection, entry, reporting,  
18 and recordkeeping requirements...for any person...who discharges to navigable waters." The  
19 purpose of this section is to provide regional boards with the authority to obtain “monitoring,  
20 inspection or entry” information regarding a permittee’s discharges so that the regional boards can  
21 adequately characterize a permittee's discharge. Section 13383 does not to provide regional  
22 boards with broad investigative authority.

23       The information requested by the Regional Board requires the City to determine whether  
24 other sources of bacteria or discharges from other agencies or jurisdictions caused the alleged  
25 exceedances. For example, the 13383 Order requests the City to produce:

26       [A]n evaluation and supporting documentation of whether the sources causing the  
27       violations are originating from upstream sources within the Ballona Creek  
28       watershed, or whether the causes of the violations are originating from sources in  
      proximity to the shoreline monitoring location. If the causes of the violations at

1 these sites are originating from sources in proximity to the shoreline monitoring  
2 location, then the City of Inglewood shall provide the information required below.

3 The 13383 Order also states:

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

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

13 These type of requests go far beyond monitoring the City's discharges from the MS4 and therefore  
14 exceed the Executive Officer's authority under Section 13383.

15 **G. The Regional Board's 13383 Order Improperly Requires the City to Provide**  
16 **Information that Exceeds the Scope of Water Code § 13383**

17 The 13383 Order is invalid because it requires the City to provide information that is not  
18 reasonably required and the burden and costs of complying with the 13383 Order does not bear a  
19 reasonable relationship to the need for the report and the benefits to be obtained therefrom in  
20 violation of Water Code Section 13225(c) and Water Code Section 13383. Water Code Section  
21 13383 provides regional boards with the authority to require a discharger "to establish and  
22 maintain monitoring equipment or methods, including, where appropriate, biological monitoring  
23 methods, sample effluent as prescribed, and provide other information as may be reasonably  
24 required." As discussed above, the purpose of this provision is to permit the Regional Board to  
25 adequately characterize discharges by permittees. The information requested by the Regional  
26 Board in the 13383 Order, however, does not relate solely to the City's discharges. Rather, it  
27 requires the City to analyze discharges and make assumptions regarding factors well outside the  
28 City's jurisdiction. For example, the 13383 Order requires the City to examine the shoreline  
monitoring site, which is located miles from the City's boundaries, and to conduct an analysis of  
all upstream sources. The information requested in the 13383 Order is beyond the scope of  
information that may be requested under Sections 13383 and 13225(c).

1           **H.     The Regional Board's 13383 Order Improperly Modifies and Amends the**  
2                           **Monitoring Program Set Forth in the MS4 Permit in Violation of the Porter-**  
3                           **Cologne Water Quality Act**

4           The Regional Board's 13383 Order is invalid because it modifies and amends the reporting  
5 requirements in the MS4 Permit without complying with the modification procedures set forth in  
6 the Porter-Cologne Water Quality Act ("Porter Cologne"). The MS4 Permit is both a NPDES  
7 permit and waste discharge requirement ("WDR") issued by the Regional Board under the Act and  
8 contains a detailed monitoring program the City must comply with. (*See* Water Code §§ 13370 -  
9 13389.) Porter-Cologne explicitly provides that a WDR cannot be issued except through prior  
10 notice and hearing before the Regional Board and that the Regional Board cannot delegate its  
11 authority to modify a WDR to an executive officer. Water Code § 13223(a) ("Each regional board  
12 may delegate any of its powers and duties vested in it by [the Porter-Cologne Act] excepting only  
13 the following: . . . (2) the issuance, modification, or revocation of any water quality control plan,  
14 water quality objectives, or waste discharge requirement."). The 13383 Order issued by the  
15 Executive Officer, however, requires the City to submit detailed reports not required in the  
16 monitoring program under the MS4 Permit, effectively modifying and amending the monitoring  
17 program set forth in the MS4 Permit without notice or hearing in violation of Porter-Cologne.

18           **I.     Regional Board Failed to Consider Whether the Requirements in the 13383**  
19                           **Order Constitute Unfunded Mandates**

20           The Regional Board's 13383 Order and NOV impose unfunded mandates in violation of  
21 Article XIII B, Section 6 of the California Constitution. Article XIII B, Section 6 of the  
22 Constitution prohibits the state from shifting the cost of government from itself to local agencies  
23 without providing a "subvention of funds to reimburse that local government for the costs of the  
24 program or increased level of service . . ." While the decision as to whether a requirement is an  
25 unfunded mandate must first be decided by the Commission on State Mandates, the Regional  
26 Board must also consider whether the requirements in the 13383 Order impose unfunded mandates  
27 to determine whether its 13383 Order is consistent with the maximum extent practicable standard  
28

1 under Clean Water Act Section 402(p) and the requirement to evaluate economic factors under  
2 Water Code § 13125, 13241, 13263 and 13267. The Regional Board, however, failed to do so.

3 **J. Regional Board Improperly Calculated the Geometric Mean for the Alleged**  
4 **Violations**

5 The Regional Board used a method to calculate the geometric mean that is inconsistent  
6 with the Regional Board's approved method for the Santa Monica Bay Beaches TMDL.  
7 Accordingly, the Regional Board incorrectly determined whether there were exceedances of the  
8 Santa Monica Bay Beaches TMDL at the monitoring site.

9 **K. Regional Board Failed to Consider Whether the Alleged Violations Were**  
10 **Caused by an Upset**

11 The Regional Board acted improperly by failing to consider whether the alleged violations  
12 described in the 13383 Order were caused by an upset. Part 6.N. of the MS4 Permit defines an  
13 upset as "an exceptional incident in which there is unintentional and temporary noncompliance  
14 with technology based permit effluent limitations because of factors beyond the reasonable control  
15 of the permittee." Because the Regional Board cannot hold the City liable for an alleged violation  
16 of the MS4 permit if the violation was caused by an upset and there are numerous other sources of  
17 bacteria that could have caused the alleged violations, the Regional Board should have first  
18 considered whether the alleged violations were caused by an upset before issuing the NOV and  
19 13383 Order. The City hereby expressly reserves its right to assert an upset defense to any or all  
20 of the alleged violations.

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1 IV. CONCLUSION

2 Based on the foregoing, the City respectfully requests that the State Board vacate the  
3 13383 Order and rescind the NOV.

4 DATED: April 3, 2008

Respectfully submitted,

MEYERS, NAVE, RIBACK, SILVER & WILSON

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9 Attorneys for Petitioner, CITY OF  
10 INGLEWOOD

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