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April 3, 2008

VIA E-MAIL (FIRST TRANSMITTAL) AND CONFIRMING U.S. MAIL

State Water Resources Control Board
Office of Chief Counsel
Attention: Ms. Jeannette L. Bashaw
P.O. Box 100
Sacramento, CA. 95812-0100

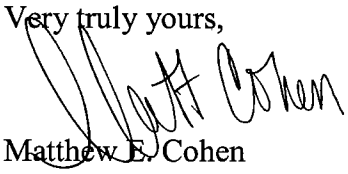
Re: **Petition for Review by City of Agoura Hills**

Dear Ms. Bashaw:

Pursuant to the instructions posted by the State Water Resources Control Board on its website, this is the original "hard copy" version of the Petition for Review and accompanying exhibits filed by the City of Agoura Hills from the March 4, 2008 Order and accompanying Notice of Violation ("NOV") issued by the Los Angeles Regional Water Quality Control Board.

A copy of the petition and accompany exhibits is also being mailed directly to the Executive Officer for the Los Angeles Regional Board.

Very truly yours,



Matthew E. Cohen

Enclosures (Petition and accompanying exhibits)

cc: Ms. Tracy J. Egoscue,
Executive Officer
Los Angeles Regional Water Quality Control Board (w/ enclosures)

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Attorneys for Petitioner
CITY OF AGOURA HILLS

BEFORE THE

STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of CITY OF AGOURA HILLS, FOR REVIEW OF CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, LOS ANGELES, REGION, ORDER PURSUANT TO WATER CODE SECTION 13383	**PETITION FOR REVIEW BY CITY OF AGOURA HILLS** [WATER CODE § 13320(A) AND 23 CAL. CODE REGS. §2050] **[REQUESTED TO BE HELD IN ABEYANCE 23 CAL. CODE REGS. §2050.5]**

Petitioner City of Agoura Hills ("Petitioner") respectfully petitions the State Water Resources Control Board ("State Board") to review the Order pursuant to California Water Code § 13383 (Regarding Violations of Order No. 01-182 as Amended by Order No. R4-2006-0074 and Order No. R4-2007-0042, NPDES Permit No. CAS004001, WDID 4B190147001) ("Order") and Notice of Violation ("NOV") issued

Executive Officer of the California Regional Water Quality Control Board, Los Angeles Region ("Regional Board") on March 4, 2008, attached hereto as Exhibits A and B, respectively.

A. SUMMARY OF PETITION

On March 4, 2008, the Executive Officer of the Regional Board issued the NOV and Order to the Petitioner. The NOV alleged violations of the municipal separate storm sewer system permit ("MS4 Permit") issued to the Petitioner based on alleged exceedances of bacteria water quality objectives at a single monitoring point along a Santa Monica Bay Beach. The Order demanded, by April 21, 2008, the provision of detailed information concerning the alleged exceedances, including (a) an evaluation of dry weather discharges from the MS4 "at the noncompliant shoreline location on the date(s) of the violations;" (b) a detailed description of remedial actions taken before and after incorporation of TMDL provisions into the MS4 Permit; (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;" and (d) evidence supporting contentions made by Petitioner that it is not responsible for the violations.

The Executive Officer's action in issuing the Order and NOV was improper because the Order and/or NOV: (1) improperly seek information based on alleged violations of receiving water limitations that, with respect to stormwater and urban runoff discharges, were improperly established in the Regional Water Quality Control Plan ("Basin Plan") for the Los Angeles Region and incorporated into the MS4 Permit; (2) violate the MS4 Permit's procedures for responding to alleged exceedances of bacteria water quality standards; (3) seek information regarding alleged violation of receiving water limitations established by the Ballona Creek Bacteria Dry Weather Total Maximum Daily Loads ("TMDL") program improperly incorporated into the MS4 Permit; (4) improperly employ Water Code § 13383 as authority to seek such information; (5) to the

extent that the Executive Officer was authorized under Water Code § 13383, seek information that was not "reasonably required" pursuant to that statute; (6) seek information regarding the quality of waters not impacted by MS4 discharges and not in the MS4 system; (7) seek information requiring extensive monitoring and investigation, in contravention of the monitoring program established under the MS4 Permit and amending such program without a hearing, in violation of the Porter-Cologne Water Quality Control Act; (8) seek information regarding alleged exceedances of water quality standards and objectives as to which Petitioner has no responsibility; (9) constitute an unfunded state mandate; (10) the City is subject to a separate and independent Malibu Creek Bacteria TMDL, which is subject to a separate compliance schedule; (11) the timing of the Order and the NOV are improper because the TMDL is due to be reopened in order to examine the efficacy of the reference points; (12) the alleged violation is based on an incorrect calculation of the geometric mean; and (13) the alleged exceedences do not demonstrate Petitioner violated water quality standards.

For the reasons set forth below, the State Board should set aside the NOV and accompanying Order.

B. PETITION FOR REVIEW

1. Name, Address, Telephone Number and E-mail Address of Petitioner:

City of Agoura Hills
Greg Ramirez
City Manager
30001 Ladyface Court
Agoura Hills, California 91301
gramirez@ci.agoura-hills.ca.us

With a copy to:

RICHARDS, WATSON & GERSHON
Craig Steele
Lisa Bond
Norman A. Dupont
Matthew E. Cohen
355 South Grand Avenue, 40th Floor
Los Angeles, California 90071
Telephone: (213) 626-8484
Facsimile: (213) 626-0078
mcohen@rwglaw.com

2. **Regional Board Executive Officer Action State Board Is Requested To Review/Copy of Order:** Petitioner requests that the State Board review the NOV and Order, attached as Exhibits A and B, in their entirety, including the entire "Requirement to Provide Information" section of the Order and the following requirements:

(1) The requirement to provide a "report" "for each of the shoreline monitoring sites, for which it is jointly responsible, where violations have been documented."

(2) The requirement that the report provide: "For sites SMB MC-01, SMB MC-02 and SMB MC-03, which are impacted by discharges from Malibu Creek watershed for which there is a separate bacteria TMDL to address bacteria impairments in Malibu Creek and its tributaries, an evaluation and supporting documentation of whether the sources causing the violations are originating from upstream sources within the Malibu Creek 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 these sites are originating from sources in proximity to the shoreline monitoring location, then the City of Agoura Hills shall provide the information required below."

(3) The requirement that the report provide: "The source(s) of the violations for each shoreline compliance location, including an evaluation of dry weather discharges from the MS4 at each noncompliant shoreline location on the date(s) of the violations. The evaluation shall include, where available:

a. Details regarding dry weather discharge from the MS4 to each noncompliant shoreline location including, but not limited to storm drain position, volume estimate, flow direction, presence of ponding, and proximity to surf.

b. Details regarding existing treatment of summer dry weather discharge from the MS4 at each noncompliant shoreline location, and any upstream treatment including, but not limited to type(s) of treatment system(s), operational capability(ies), and operational status on date(s) of violation.

c. Results of any source investigation(s) of the subwatershed, pursuant to protocols established under CWC § 13178, detailing the locational and/or biological origin of the bacteria causing or contributing to RWL violations."

(4) The requirement that the report provide: "A detailed description of remedial actions taken prior to incorporation of the TMDL summer dry weather requirements into the LA MS4 Permit (i.e., before September 14, 2006) and those remedial actions taken since, and the results thereof."

(5) The requirement that the report provide: "A detailed description of additional corrective and preventative actions that will be taken for summer dry weather discharges from the MS4 to preclude future violations. The report shall include a time schedule designed to achieve full compliance. This timeline shall not be construed as an authorization for any past or future RWL violations."

(6) The requirement that states: "In addition, should the City of Agoura Hills contend that it is not responsible for one or more of the violations, Agoura Hills 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 a discharge from the MS4 but from some other source or discharges;

2. Evidence that Agoura Hills does not discharge dry weather flow into the Santa Monica Bay at the shoreline monitoring site, respectively; and

3. Evidence that Agoura Hills' 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."

3. **Date on Which Regional Board Executive Officer Acted:** March 4, 2008.

Petitioner seeks this review because:

(1) The Order seeks information regarding alleged violations of receiving water limitations incorporated into the MS4 Permit on August 9, 2007. The receiving water limitations provides: "During Summer Dry Weather there shall be no discharges of bacteria from MS4s into Marina del Rey Harbor Basins D, E, or F, including Mothers' Beach that cause or contribute to exceedances of the applicable bacteria objectives" (MS4 Permit, p. 24). The receiving water limitations were incorporated to reflect the Santa Monica Bay Beaches Bacteria Dry Weather TMDL and the Marina del Rey Harbor, Mothers' Beach and Back Basins Bacteria TMDL, respectively.

However, the water quality objectives that are the subject of these receiving water limitations were adopted by the Regional Board and placed in the Basin Plan for the Los Angeles Region without consideration of the application to stormwater or urban runoff of the factors set forth in Water Code § 13241 or Water Code § 13000. As such, the bacteria objectives cannot be lawfully applied to stormwater discharges or urban runoff,

and therefore cannot be a basis either for the violations alleged in the NOV or for the Order.

(2) The Regional Board has made an express finding in the MS4 Permit as to what procedures would be followed by the permittees if bacteria exceedances were recorded. That procedure is set forth in Finding E.37 of the MS4 Permit, and applies to the Permit amendments to reflect the Santa Monica Bay Beaches Bacteria Dry Weather TMDL and the Marina del Rey Harbor bacteria TMDL. That procedure requires the Regional Board to generally first issue an investigative order "pursuant to Cal. Water Code § 13267 or § 13225" to determine the source of the exceedance. If the investigation determines that the permittee's MS4 discharge is not responsible for causing or contributing to the exceedance, or that the discharge was appropriately treated, no enforcement will follow. Only after the Regional Board had determined that one or more permittees had caused or contributed to violations of receiving water limitations would "the Regional Board . . . 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." MS4 Permit, Finding E.37. This process, which emphasized first determining whether there was liability by the MS4 permittees for exceedances of the bacteria objectives, was completely ignored by the Executive Officer in issuing the Order under Water Code § 13383 and in issuing the accompanying NOV.

(3) The Order seeks information regarding alleged exceedances of receiving water limitations established by the incorporation of the Santa Monica Bay Beaches Bacteria Dry Weather TMDL on September 16, 2006. As set forth in the Petition filed by the County of Los Angeles and the Los Angeles County Flood Control District with the State Board on or about October 16, 2006, such incorporation was unlawful and, thus, cannot form the basis for the NOV's alleged exceedances of the MS4 Permit's receiving water

limitations at Santa Monica Bay Beaches monitoring locations or for the Order's request for information relating these alleged exceedances.

(4) The Executive Officer has improperly employed Water Code § 13383 as authority for the Order. Section 13383 was intended by the Legislature to ensure that state law was consistent with the monitoring and reporting requirements of the Clean Water Act. It was not intended to provide regional boards with an investigative power that is greater than that found in the federal Act. Water Code § 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 Order, however, is not being utilized for that purpose.

Instead of asking for additional "monitoring" of a permittee's discharges from the MS4 (the only appropriate subject for inquiry), the Order requires the generation of information not within petitioner's possession or control. The Order requires an "evaluation" of "sources," including those "within proximity" of the shoreline. Thus, the Order purports 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 Executive Officer's authority under § 13383.

(5) Water Code § 13383 states that a regional board may require a discharger "to provide other information as may be reasonably required." The Order seeks a wide variety of information, including with respect to items far beyond the scope of an appropriate request for information, including information on "corrective and preventative actions," provision of a "time schedule," "evaluation" of the sources of alleged exceedances, and the provision of exculpatory evidence and other information, as

described in Section 2 above. Such information is not "reasonably required" of Petitioner.

(6) The Order improperly seeks information on waters not impacted by discharges from the MS4, the only discharges for which Petitioner has responsibility under the MS4 Permit. For example, the Order seeks information on exceedances at shoreline locations which may not be in near proximity to any MS4 discharge point. This stems from the fact that several of the monitoring locations that recorded alleged exceedances of the bacteria standard are not in proximity to MS4 discharge points. The Order further seeks detailed information on discharges from "sources in proximity to the shoreline monitoring location," but do not specify that such sources be part of the MS4. The Order further seeks information on upstream sources in Malibu Creek and tributaries, even though such waterways are not part of the MS4. Petitioner is not required to monitor locations not influenced by the MS4, as they have no legal responsibility, under the MS4 Permit, for discharges not associated with the MS4.

(7) The MS4 Permit, which is alleged in the NOV and in the Order to have been violated by Petitioner, contains a detailed monitoring program. By requiring Petitioner to submit detailed reports not required in the monitoring program under the MS4 Permit, including the provision of exculpatory evidence and the investigation of non-MS4 discharges, the Order modifies and amends the monitoring program set forth in the MS4 Permit without notice or hearing, in violation of the Porter-Cologne Water Quality Control Act.

The MS4 Permit is both an NPDES permit and waste discharge requirement ("WDR") issued by the Regional Board under the Porter-Cologne Water Quality Control Act (see Water Code §§ 13370-13389). A WDR cannot be issued 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*.") (emphasis supplied).

(8) The Order requires individual recipients to investigate discharges of third persons, in violation of Water Code § 13383. As noted above, the Order requires assessment of waters not associated with MS4 discharges, waters that may have been impacted by bacteria sources including septic systems, watercraft, bathers or wildlife.

(9) Although Petitioner recognizes that proper jurisdiction as to this issue rests with the Commission on State Mandates and that the State Board lacks jurisdiction over this issue, in order to avoid arguable waiver of any rights, Petitioner further objects to the Order on the ground that the Order constitutes an unfunded state mandate for several reasons, including but not limited to, because it places a burden on individual permittees to inspect areas beyond their jurisdictional control.

(10) Petitioner is subject to a separate and independent Malibu Creek bacteria TMDL, which is subject to a separate compliance schedule.

(11) The timing of the Order and the NOV are improper because the TMDL is due to be reopened in order to examine the efficacy of the reference points. The Order is based upon data collection, assessment, and exceedence criteria that were required to be revisited by the Regional Board in July 2007, four years after formal implementation of the SMB Beaches TMDL. The Board has failed to conduct this reconsideration, and is therefore relying upon admittedly outmoded and inaccurate data and exceedence day criteria.

(12) The alleged violation is based on an incorrect calculation of the geometric mean. To the extent that improper calculation of a "daily" load based upon weekly sampling was done, then the Board's order is invalid under the Clean Water Act, which clearly and unambiguously requires regulations based upon "total maximum *daily* loads."

Friends of the Earth, Inc. v. EPA, 446 F.3d 140, 144 (D.C. Cir. 2006) ("The law says 'daily.' We see nothing ambiguous about this command. 'Daily' connotes 'every day.'")

(13) The Malibu Creek Watershed drains to Malibu Lagoon where drainage collects until a significant flow rate causes the Lagoon's water elevation to raise high enough to breach its sand berm. These breechings result in a dramatic flushing of the Lagoon's water where months of urban pollutants may have collected and biological impairments are further aggravated by the Lagoon's wildlife. The three sample locations for which exceedences were observed are located at the wave wash (the mixing zone where watershed flow confluences with marine waters). Therefore, samples collected do not represent Malibu Creek Watershed flow during periods where the Lagoon is closed.

See further the Statement of Points and Authorities attached as Exhibit C and incorporated herein.

4. **<u>How Petitioner is Aggrieved:</u>** The Order purports 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 Order 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. The permittees have already collectively spent millions of dollars to comply with the bacteria TMDLs both prior and following their incorporation in the MS4 Permit. The failure to comply with the Order, moreover, subjects Petitioner 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. Additional discussion of the harm to Petitioner is set forth in the Statement of Points and Authorities.

5. **The Action That Petitioner Requests The State Board to Take:** Petitioner requests that the State Board issue an order either:

(a) setting aside the Regional Board's Executive Officer's Order and NOV in their entirety; or

(b) directing the Regional Board Executive Officer to withdraw the Order and NOV directed to Petitioner.

6. **Statement of Points of Authorities in Support of Legal Issues Raised in the Petition:** See attached Exhibit C.

7. **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.

8. **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 Order and NOV were issued by the Executive Officer, without prior notice or hearing.

Dated: April 3, 2008

Respectfully submitted,

CITY OF AGOURA HILLS

By: _____
Lisa Bond
Attorneys for Petitioner
City of Agoura Hills

EXHIBIT "A"

TO PETITION TO

STATE WATER BOARD BY

CITY OF AGOURA HILLS

California Regional Water Quality Control Board

Los Angeles Region

Recipient of the 2001 *Environmental Leadership Award* from Keep California Beautiful

Linda S. Adams
Agency Secretary

320 W. 4th Street, Suite 200, Los Angeles, California 90013
Phone (213) 576-6600 FAX (213) 576-6640 - Internet Address: http://www.waterboards.ca.gov/losangeles

Arnold Schwarzenegger
Governor

March 4, 2008

Mr. Ramiro Adeva
City Manager
City of Agoura Hills
30001 Ladyface Court
Agoura Hills, CA 91301

VIA CERTIFIED MAIL

ORDER PURSUANT TO CALIFORNIA WATER CODE SECTION 13383 (REGARDING VIOLATIONS OF ORDER NO. 01-182 AS AMENDED BY ORDER NO. R4-2006-0074 AND ORDER NO. R4-2007-0042, NPDES PERMIT NO. CAS004001, WDID 4B190147001)

Dear Mr. Adeva:

The California Regional Water Quality Control Board, Los Angeles Region (Regional Board) is the state regulatory agency responsible for protecting water quality in Los Angeles and Ventura Counties. To accomplish this, the Regional Board issues permits under the National Pollutant Discharge Elimination System (NPDES) as authorized by the federal Clean Water Act. On December 13, 2001, this Regional Board adopted the Los Angeles County Municipal Separate Storm Sewer System Permit, NPDES Permit No. CAS004001, Order No. 01-182 (LA MS4 Permit), under which the City of Agoura Hills is a Permittee.

BACKGROUND

The LA MS4 Permit was subsequently amended on September 14, 2006 by Order No. R4-2006-0074 and on August 9, 2007 by Order No. R4-2007-0042 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. The summer dry weather requirements were incorporated in the LA MS4 Permit as specific Receiving Water Limitations (RWLs) for fecal indicator bacteria in Parts 2.5 and 2.6, and a supporting specific prohibition on discharges from the municipal separate storm sewer system (MS4) that cause or contribute to exceedances of the bacteria RWLs.

The Permittees collectively discharge urban runoff and storm water from the MS4 to the Santa Monica Bay, a navigable water of the United States, under the provisions and requirements of the LA MS4 Permit. These discharges, as demonstrated via shoreline water quality monitoring, contain total coliform, fecal coliform, enterococcus and other pollutants, which degrade water quality and impact beneficial uses of the receiving waters at beaches along Santa Monica Bay.

These bacterial indicators are defined as wastes under the California Water Code (CWC § 13000 et seq.).

As documented in the enclosed Notice of Violation, technical staff of the Regional Board has concluded that the City of Agoura Hills is in violation of waste discharge requirements established in Board Order No. 01-182 as amended by Order No. R4-2006-0074 and Order No. R4-2007-0042, and has therefore violated CWC § 13376, and is subject to liability pursuant to CWC § 13385.

The data submitted in the Permittees' shoreline monitoring reports for the summer dry weather compliance periods, beginning on September 14, 2006 through October 31, 2006 and April 1, 2007 through October 31, 2007, reveal violations of the RWLs set forth in Part 2.5 of Order No. 01-182 as amended by Order No. R4-2006-0074 and Order No. R4-2007-0042. These violations occurred at three shoreline monitoring sites located along Santa Monica Bay beaches to which the City of Agoura Hills discharges via the MS4, on 95 days, which included 171 instances where the bacteria water quality objectives set to protect water contact recreation were exceeded. These violations are detailed in the enclosed Notice of Violation. The City of Agoura Hills is jointly responsible for violations at these monitoring sites along with the other Permittees with land area within the watersheds draining to these sites.

REQUIREMENT TO PROVIDE INFORMATION

California Water Code § 13383 provides the Regional Board the authority to require a Permittee to monitor and report and provide other information, under penalty of perjury, that the Regional Board requires. **Pursuant to CWC § 13383, the City of Agoura Hills is hereby ordered to submit the information required in this Order by April 21, 2008.** Furthermore, pursuant to CWC § 13385, failure to comply with any requirements established pursuant to CWC § 13383 may result in the imposition of administrative civil liability penalties by the Regional Board of up to $10,000 for each day in which the violation occurs after the April 21, 2008 due date. (CWC § 13385(a)(3).)

Pursuant to CWC § 13383, the Regional Board directs the City of Agoura Hills to provide information evaluating and documenting (i) the causes of the violations, (ii) remedial actions taken prior to incorporation of the TMDL summer dry weather requirements into the LA MS4 Permit and those taken since, and (iii) the City's plans for additional corrective and preventative actions to bring MS4 discharges into compliance with the bacteria RWLs applicable to the Santa Monica Bay for the upcoming summer dry weather period, beginning on April 1, 2008.

Specifically, the City of Agoura Hills is required to submit reports providing the following information for each of the shoreline monitoring sites, for which it is jointly responsible, where violations have been documented. The reports shall be signed by an authorized signatory for the City of Agoura Hills, under penalty of perjury. The reports shall provide:

1. For sites SMB MC-01, SMB MC-02 and SMB MC-03, which are impacted by discharges from Malibu Creek watershed for which there is a separate bacteria TMDL to address bacteria impairments in Malibu Creek and its tributaries, an evaluation and supporting documentation of whether the sources causing the violations are originating from upstream sources within the Malibu Creek 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 these sites are originating from sources in proximity to the shoreline monitoring location, then the City of Agoura Hills shall provide the information required below.

2. The source(s) of the violations for each shoreline compliance location, including an evaluation of dry weather discharges from the MS4 at each noncompliant shoreline location on the date(s) of the violations. The evaluation shall include, where available:

    a. Details regarding dry weather discharge from the MS4 to each noncompliant shoreline location including, but not limited to storm drain position, volume estimate, flow direction, presence of ponding, and proximity to surf.
    b. Details regarding existing treatment of summer dry weather discharge from the MS4 at each noncompliant shoreline location, and any upstream treatment including, but not limited to type(s) of treatment system(s), operational capability(ies), and operational status on date(s) of violation.
    c. Results of any source investigation(s) of the subwatershed, pursuant to protocols established under CWC § 13178, detailing the locational and/or biological origin of the bacteria causing or contributing to RWL violations.

3. A detailed description of remedial actions taken prior to incorporation of the TMDL summer dry weather requirements into the LA MS4 Permit (i.e., before September 14, 2006) and those remedial actions taken since, and the results thereof.

4. A detailed description of additional corrective and preventative actions that will be taken for summer dry weather discharges from the MS4 to preclude future violations. The report shall include a time schedule designed to achieve full compliance. This timeline shall not be construed as an authorization for any past or future RWL violations.

In addition, should the City of Agoura Hills contend that it is not responsible for one or more of the violations, Agoura Hills 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 Agoura Hills does not discharge dry weather flow into the Santa Monica Bay at the shoreline monitoring site; and
3. Evidence that Agoura Hills' 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.

CIVIL LIABILITY

Pursuant to CWC § 13385(a)(3), the City of Agoura Hills is subject to penalties of up to $10,000 for any violation of the requirements set forth in this Order. These civil liabilities may be assessed by the Regional Board beginning with the date on which a violation of this Order first occurred, and without further warning. The Regional Board may also request that the State Attorney General seek judicially imposed civil liabilities of up to $25,000 for each day in which a violation occurs, or injunctive relief, pursuant to CWC §§ 13385 and 13386. The City of Agoura Hills may also be subject to penalties pursuant to other sections, and other forms of enforcement proceedings, in addition to those described above, if compliance does not timely occur.

RIGHT TO PETITION

Pursuant to CWC § 13320, an aggrieved person may seek review of this Order by filing a petition within 30 days of the date of this Order with the State Water Resources Control Board (SWRCB). The petition must be sent to the SWRCB, P.O. Box 100, Sacramento, CA 95812.

If you have any questions regarding this matter, please contact me at (213) 576-6605, or alternatively, your staff may contact Mr. Carlos Urrunaga at (213) 620-2083.

Sincerely,

Tracy J. Egoscue
Executive Officer

Enclosure: Notice of Violation, dated March 4, 2008

cc: Mr. Michael Levy, Office of Chief Counsel, State Water Resources Control Board
Mr. Bruce Fujimoto, Storm Water Section, State Water Resources Control Board
Mr. Eugene Bromley, U.S. EPA, Region 9

EXHIBIT "B"

TO PETITION TO

STATE WATER BOARD BY

CITY OF AGOURA HILLS

California Regional Water Quality Control Board

Los Angeles Region

Recipient of the 2001 *Environmental Leadership Award* from Keep California Beautiful

Linda S. Adams
Agency Secretary

320 W. 4th Street, Suite 200, Los Angeles, California 90013
Phone (213) 576-6600 FAX (213) 576-6640 - Internet Address: http://www.waterboards.ca.gov/losangeles

Arnold Schwarzenegger
Governor

March 4, 2008

Mr. Ramiro Adeva
City Manager
City of Agoura Hills
30001 Ladyface Court
Agoura Hills, CA 91301

VIA CERTIFIED MAIL

NOTICE OF VIOLATION (ORDER NO. 01-182 AS AMENDED BY ORDER NO. R4-2006-0074 AND ORDER NO. R4-2007-0042, NPDES PERMIT NO. CAS004001, WDID 4B190147001)

Dear Mr. Adeva:

The California Regional Water Quality Control Board, Los Angeles Region (Regional Board) is the state regulatory agency responsible for protecting water quality in Los Angeles and Ventura Counties. To accomplish this, the Regional Board issues permits under the National Pollutant Discharge Elimination System (NPDES) as authorized by the federal Clean Water Act. On December 13, 2001, this Regional Board adopted the Los Angeles County Municipal Separate Storm Sewer System Permit, NPDES Permit No. CAS004001, Order No. 01-182 (LA MS4 Permit), under which the City of Agoura Hills is a Permittee.

BACKGROUND

The LA MS4 Permit includes Discharge Prohibitions, Receiving Water Limitations, and a Monitoring and Reporting Program, among other requirements. Under Part 1, Discharge Prohibitions, the LA MS4 Permit requires that the Permittees "effectively prohibit non-storm water discharges into the MS4 [municipal separate storm sewer system] and watercourses," except under limited circumstances, as specified in Part 1. Under Part 2, Receiving Water Limitations, the LA MS4 Permit prohibits "discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives."

The LA MS4 Permit was subsequently amended on September 14, 2006 by Order No. R4-2006-0074 and on August 9, 2007 by Order No. R4-2007-0042 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. The summer dry weather requirements were incorporated in the LA MS4 Permit as specific Receiving Water Limitations (RWLs) for fecal indicator bacteria in Parts 2.5 and 2.6, and a supporting specific prohibition on discharges from the MS4 that cause or contribute to exceedances of the bacteria RWLs.

The Permittees collectively discharge urban runoff and storm water from the MS4 to the Santa Monica Bay, a navigable water of the United States, under the provisions and requirements of the LA MS4 Permit. These discharges, as demonstrated via shoreline water quality monitoring, contain total coliform, fecal coliform, enterococcus and other pollutants, which degrade water quality and impact beneficial uses of the receiving waters at beaches along Santa Monica Bay. These bacterial indicators are defined as wastes under the California Water Code (CWC § 13000 et seq.).

VIOLATIONS OF RECEIVING WATER LIMITATIONS

The City of Agoura Hills is hereby notified that technical staff has concluded that Agoura Hills is in violation of waste discharge requirements established in Board Order No. 01-182 as amended by Order No. R4-2006-0074 and Order No. R4-2007-0042, and has therefore violated CWC § 13376, and is subject to liability pursuant to CWC § 13385.

The data submitted in the Permittees' shoreline monitoring reports for the summer dry weather compliance periods, beginning on September 14, 2006 through October 31, 2006 and April 1, 2007 through October 31, 2007, reveal violations of the RWLs set forth in Part 2.5 of Order No. 01-182 as amended by Order No. R4-2006-0074 and Order No. R4-2007-0042. These violations occurred at three shoreline monitoring sites located along Santa Monica Bay beaches to which the City of Agoura Hills discharges via the MS4, on 95 days, which included 171 instances where the bacteria water quality objectives set to protect water contact recreation were exceeded. These violations are summarized in Table 1, detailed in the attachments, and incorporated herein by reference. The City of Agoura Hills is jointly responsible for violations at these monitoring sites along with the other Permittees with land area within the watersheds draining to these sites.

CIVIL LIABILITY

Pursuant to CWC § 13385, the City of Agoura Hills is subject to penalties of up to $10,000 for each day in which a violation of RWLs occurs. These civil liabilities may be assessed by the Regional Board beginning with the date that the violations first occurred, and without further warning. The Regional Board may also request that the State Attorney General seek judicially imposed civil liabilities of up to $25,000 for each day in which a violation occurs, or injunctive relief, pursuant to CWC §§ 13385 and 13386. The City of Agoura Hills may also be subject to penalties pursuant to other sections, and other forms of enforcement proceedings, in addition to those described above.

To ensure that the causes of the violations are identified and abated, enclosed herewith, please find an Order directing the City of Agoura Hills to submit a variety of reports pursuant to CWC § 13383. Specifically, these reports shall provide an evaluation and documentation of the causes of these violations, remedial actions to date, and the City's plans for additional corrective and preventative actions to bring discharges from the MS4 into prompt compliance with the bacteria RWLs applicable to the Santa Monica Bay.

If you have any questions regarding this matter, please contact me at (213) 576-6605, or alternatively, your staff may contact Mr. Carlos Urrunaga at (213) 620-2083.

Sincerely,

Tracy J. Egoscue
Executive Officer

Enclosures: Table 1
Attachments 41-43
Order Pursuant to California Water Code Section 13383, dated March 4, 2008

cc: Mr. Michael Levy, Office of Chief Counsel, State Water Resources Control Board
Mr. Bruce Fujimoto, Storm Water Section, State Water Resources Control Board
Mr. Eugene Bromley, U.S. EPA, Region 9

TABLE 1

AGOURA HILLS
SUMMARY OF VIOLATIONS OF BACTERIA
RECEIVING WATER LIMITATIONS FOR SUMMER DRY WEATHER
ORDER NO. 01-182 AS AMENDED BY ORDERS R4-2006-0074 AND R4-2007-0042

Site ID	Single Sample RWL Violations				30-day Geometric Mean RWL Violations			Total RWL Violations by Site	Total Days of Violations by Site
	Total Coliform	Fecal Coliform	Enterococcus	Total Coliform (Fecal:Total Coliform Ratio > 0.1)	Total Coliform	Fecal Coliform	Enterococcus		
SMB MC-01	0	1	0	0	4	1	13	19	14
SMB MC-02	7	25	9	18	28	37	8	132	62
SMB MC-03	0	0	3	1	0	0	16	20	19
Totals	**7**	**26**	**12**	**19**	**32**	**38**	**37**	**171**	**95**

ATTACHMENTS

VIOLATIONS OF BACTERIA RECEIVING WATER LIMITATIONS BY SHORELINE MONITORING SITE

VIOLATIONS OF RECEIVING WATER LIMITATIONS FOR SUMMER DRY WEATHER PERIODS
SEPTEMBER 14, 2006 - OCTOBER 31, 2006 AND APRIL 1, 2007 - OCTOBER 31, 2007
ORDER 01-182 AS AMENDED BY R4-2006-0074 AND R4-2007-0042
SITE ID SMB MC-01, MALIBU COLONY DR

Date of Violation(s)	Single Sample Result (MPN/100 ml)				30-day Geometric Mean Result* (MPN/100 ml)		
	Total Coliform	Fecal Coliform	Enterococcus	Total Coliform (Fecal:Total Coliform > 0.1)	Total Coliform	Fecal Coliform	Enterococcus
Basin Plan Limit	**10000**	**400**	**104**	**1000**	**1000**	**200**	**35**
9/14/2006					2235	222	123
9/15/2006					1442		90
9/16/2006					1442		90
9/17/2006					1442		90
9/18/2006							70
9/19/2006							70
9/20/2006							46
9/21/2006							46
9/22/2006							52
9/23/2006							52
9/24/2006							52
9/25/2006							42
9/26/2006							42
6/4/2007		419					
Total Violations	**0**	**1**	**0**	**0**	**4**	**1**	**13**

Notes: Site ID refers to sites identified in the "Santa Monica Bay Beaches Bacterial TMDLs Coordinated Shoreline Monitoring Plan," dated April 7, 2004.

* Regional Board staff calculated the rolling 30-day geometric mean values presented.

VIOLATIONS OF RECEIVING WATER LIMITATIONS FOR SUMMER DRY WEATHER PERIODS
SEPTEMBER 14, 2006 - OCTOBER 31, 2006 AND APRIL 1, 2007 - OCTOBER 31, 2007
ORDER 01-182 AS AMENDED BY R4-2006-0074 AND R4-2007-0042
SITE ID SMB-MC-02, MALIBU CREEK

Date of Violation(s)	Single Sample Result (MPN/100 ml)				30-day Geometric Mean Result* (MPN/100 ml)		
	Total Coliform	Fecal Coliform	Enterococcus	Total Coliform (Fecal:Total Coliform Ratio > 0.1)	Total Coliform	Fecal Coliform	Enterococcus
Basin Plan Limit	**10000**	**400**	**104**	**1000**	**1000**	**200**	**35**
9/14/2006		1100		6800	1390	242	
9/15/2006		1100		7900	1629	276	
9/16/2006					1827	276	
9/17/2006					2155	297	
9/18/2006					2587	321	
9/19/2006					2341	297	
9/20/2006					2512	300	
9/21/2006					2114	280	
9/22/2006					1904	262	
9/23/2006					1526	236	
9/24/2006					1378		
9/25/2006					1232		
9/26/2006					1132		
9/27/2006					1248		
9/28/2006		500			1414		
9/29/2006		430		2200	1443		
9/30/2006				1400	1304		
10/1/2006					1169		
10/2/2006					1036		
10/3/2006	>13000	6300		>13000	1169		
10/4/2006					1058		
10/5/2006	13000	7300	1400	13000	1128	222	
10/6/2006						216	
10/7/2006		740				241	
10/8/2006						248	
10/9/2006					1006	265	
10/10/2006		1000	530	5500	1091	282	
10/11/2006					1053	272	
10/12/2006					1058	252	
10/13/2006						246	
10/14/2006						228	
10/15/2006						210	
10/16/2006						224	
10/17/2006		1300		6300		246	
10/18/2006			110	1100		238	
10/19/2006						238	
10/20/2006		500				263	
10/21/2006						263	
10/22/2006						283	
10/23/2006					1155	307	38
10/24/2006						283	
10/25/2006		3200	160	3200	1054	319	38
10/26/2006						319	39
10/27/2006		430	110	3400		326	42

VIOLATIONS OF RECEIVING WATER LIMITATIONS FOR SUMMER DRY WEATHER PERIODS
SEPTEMBER 14, 2006 - OCTOBER 31, 2006 AND APRIL 1, 2007 - OCTOBER 31, 2007
ORDER 01-182 AS AMENDED BY R4-2006-0074 AND R4-2007-0042
SITE ID SMB-MC-02, MALIBU CREEK

Date of Violation(s)	Single Sample Result (MPN/100 ml)				30-day Geometric Mean Result* (MPN/100 ml)		
	Total Coliform	Fecal Coliform	Enterococcus	Total Coliform (Fecal:Total Coliform Ratio > 0.1)	Total Coliform	Fecal Coliform	Enterococcus
Basin Plan Limit	**10000**	**400**	**104**	**1000**	**1000**	**200**	**35**
10/28/2006						317	43
10/29/2006						312	47
10/30/2006						314	51
10/31/2006						289	47
4/6/2007		580		3400			
4/7/2007	>13000	1600		>13000			
4/24/2007	11000	740					
4/25/2007	11000	7300		11000			
4/27/2007		430		1600			
5/18/2007		430	190				
5/19/2007		430					
6/2/2007			270				
6/16/2007		8700	310	9600			
10/19/2007		500		1300			
10/20/2007	>13000	830					
10/24/2007	11000	500					
10/30/2007		580	120				
10/31/2007		910		5900			
Total Violations	**7**	**25**	**9**	**18**	**28**	**37**	**8**

Notes: Site ID refers to sites identified in the "Santa Monica Bay Beaches Bacterial TMDLs Coordinated Shoreline Monitoring Plan," dated April 7, 2004.
* Regional Board staff calculated the rolling 30-day geometric mean values presented.

VIOLATIONS OF RECEIVING WATER LIMITATIONS FOR SUMMER DRY WEATHER PERIODS
SEPTEMBER 14, 2006 - OCTOBER 31, 2006 AND APRIL 1, 2007 - OCTOBER 31, 2007
ORDER 01-182 AS AMENDED BY R4-2006-0074 AND R4-2007-0042
SITE ID SMB MC-03, MALIBU PIER

Date of Violation(s)	Single Sample Result (MPN/100 ml)				30-day Geometric Mean Result* (MPN/100 ml)		
	Total Coliform	Fecal Coliform	Enterococcus	Total Coliform (Fecal:Total Coliform > 0.1)	Total Coliform	Fecal Coliform	Enterococcus
Basin Plan Limit	**10000**	**400**	**104**	**1000**	**1000**	**200**	**35**
10/10/2006			422				
10/11/2006							40
10/12/2006							40
10/13/2006							40
10/14/2006							40
10/15/2006							40
10/16/2006							40
10/17/2006							40
10/23/2006							42
10/24/2006							42
10/25/2006							68
10/26/2006							68
10/27/2006							68
10/28/2006							68
10/29/2006							68
10/30/2006							42
10/31/2006							42
6/4/2007			131				
10/29/2007			109	2046			
Total Violations	**0**	**0**	**3**	**1**	**0**	**0**	**16**

Notes: Site ID refers to sites identified in the "Santa Monica Bay Beaches Bacterial TMDLs Coordinated Shoreline Monitoring Plan," dated April 7, 2004.

* Regional Board staff calculated the rolling 30-day geometric mean values presented.

EXHIBIT "C"

TO PETITION TO

STATE WATER BOARD BY

CITY OF AGOURA HILLS

STATEMENT OF POINTS AND AUTHORITIES

Petitioner submits this Statement of Points and Authorities in support of its Petition for Review filed pursuant to Water Code § 13320(a) and 23 Cal. Code Reg. § 2050.

I. Statement of Facts

Petitioner is permittee under the Los Angeles County Municipal Separate Storm Sewer System Permit, NPDES Permit No. CAS004001, Order No. 01-182 ("MS4 Permit"). The 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 ("Regional Board") 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 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"). The County of Los Angeles ("County") and Los Angeles County Flood Control District ("District") challenged the incorporation of the SMBB TMDL on several grounds in a petition filed with the State Board on or about October 16, 2006. That petition is still pending before the State Board.

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 MS4 Permit, the County and the District, alleging violations of Parts 2.5 and 2.6 the 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 the 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 7, 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 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." (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 MS4 Permit. When the Regional Board amended the MS4 Permit to add the SMBB TMDL, the Regional Board adopted a special finding, No. E.37, setting forth the procedure the Regional Board would follow if an exceedance at a monitoring location occurred. Finding E.37 provides 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 or Basins D, E, or F in Marina del Rey Harbor, 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 or Basins D, E, or F in Marina del Rey Harbor 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. Before the vote, then Regional Board Chairman David Nahai asked then Executive Officer Jonathan Bishop the following question and received the following answer:

> CHAIRPERSON NAHAI: . . . Now, in the materials that you've provided to us – Jon, this is a question for you – have you not included certain enforcement, I'll call them protocols, steps that would be taken with respect to a possible violation?
>
> EXECUTIVE OFFICER BISHOP: I've included the procedures that I planned to go through as part of the findings in your documentation.
>
> CHAIRPERSON NAHAI: Okay. And should it be shown that additional time for compliance is necessary, have you not provided for the possibility of time schedule orders or other such devices in order to provide time for compliance should that be necessary?
>
> EXECUTIVE OFFICER BISHOP: That is correct.

Transcript of Meeting of Regional Board, September 14, 2006, page 361, line 14 to page 362, line 2. This procedure applies equally to the MS4 Permit amendment relating to the Marina TMDL, the amendment having been adopted with Finding E.37 already in the Permit.

Nevertheless, the Executive Officer did not follow the protocol 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 the permittees to investigate the cause of the alleged RWL exceedances, nor did the Executive Officer provide the permittees 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 their legal responsibility. The Executive Officer did not, instead of issuing NOVs, issue a cease and desist order to the permittees 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 including (a) identification of the sources of the alleged violations for each shoreline and harbor location; (b) a detailed description of remedial actions taken both before and after incorporation of the SMBB and Marina 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.

The Orders also demanded that certain recipients analyze data from monitoring sites impacted by Ballona Creek and/or Malibu Creek (which are not part of the MS4 subject to a MS4 Permit bacteria limit) to determine whether those water bodies were causing the violation or whether the violations "are originating from sources in proximity to the shoreline monitoring location." If the latter was the case, recipients were required to provide the analysis required above. Order, p. 3-4.

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. 4. The Orders' detailed requirements to submit information can be found in Section B.2 of the Petition for Review.

The Orders further stated that any violation 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. 4.

II. Points and Authorities

A. The Petition is Properly Before the State Board

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 Orders were issued pursuant to that chapter, under authority of Water Code §

13383 and thus are appropriate for challenge under § 13320. Moreover, the Orders themselves provide that they may be challenged under § 13320. As set forth in Section 5, Petitioners are aggrieved persons with respect to the Orders. The Petition is properly before the State Board.

B. In Issuing the Orders and the NOVs, the Executive Officer Did Not Follow the Procedures Set Forth 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 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. E.37 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).

C. The Orders Seek Information Regarding Alleged Violations of Receiving Water Limitations That Were Improperly Established

On September 14, 2006, over the objection of the County and the District, the Regional Board amended the MS4 Permit, adding Part 2.5 to incorporate the numeric limits of the SMBB TMDL. The County and the District have appealed this incorporation through a petition filed with the State Board on or about October 16, 2006. As set forth in that petition, the amendment of the MS4 Permit was unlawful because:

(1) the amendment creates an inconsistency with two other TMDLs adopted by the Regional Board: the Malibu Creek Bacteria TMDL (Regional Board Resolution No. 2004-019R) and the Ballona Creek Bacteria TMDL (Resolution No. 2006-011);

(2) the amendment requires the permittees to strictly comply with the numeric limits set forth in the SMBB TMDL, contrary to the recommendations of the Expert Panel convened by the State Board, without regard to the MS4 Permit's iterative process applicable to all other water quality objectives, and without considering whether and how the petitioners and other permittees can comply;

(3) the amendment unlawfully purports to make petitioners responsible for discharges other than their own by making them jointly responsible for discharges of other permittees, even though they have no authority or control over these discharges; and

(4) the amendment contains internally inconsistent and ambiguous language.

In addition, the Regional Board failed to comply with the provisions of CEQA, failed to make requisite findings, failed to support its findings with substantial evidence, and failed to provide the permittees a proper adjudicative hearing. The action taken by the Regional Board was, among other things, an abuse of discretion and in violation of the Clean Water Act, Porter-Cologne Water Quality Control Act, Government Code, Public Resources Code, California Code of Regulations and due process.

Petitioner refers further to the County/District Petition filed on or about October 16, 2006 and the supporting exhibits, including the Statement of Points and Authorities, and requests that it be incorporated into the record in this Petition.

As a result of this unlawful amendment of the MS4 Permit, Part 2.5 is not lawfully part of the Permit, and cannot provide the basis for NOVs or for a request for information relating to any alleged exceedances of such RWLs.

Moreover, on information and belief, Petitioner alleges that the water quality objectives and beneficial uses giving rise to the RWLs that are at issue in this Petition were established improperly and in violation of the Porter-Cologne Water Quality Control Act as they relate to stormwater.[1] As such, the RWLs cannot be enforced through either the NOVs or form the basis for the information sought in the Orders.

D. The Executive Officer Has Improperly Used Water Code § 13383 As Authority For Information Request in The Orders; The Orders Seek Information That Is Not "Reasonably Required;" and, The Orders Seek Information On Discharges From Third Parties or Watersheds Not Included in the MS4 Permit

1. <u>The Information Sought Under Water Code § 13383 Is Limited to a Permittee's NPDES Discharge</u>

Water Code § 13383 was added to the Porter-Cologne Act in 1987, so as to "assure consistency with the requirements for state programs implementing the Federal Water Pollution Control Act, as amended . . . ." Legislative Counsel's Digest, Senate Bill No. 1486, Chapter 1189 [cite to be fixed]. The intent of the Legislature, thus, was to conform California law to the monitoring and reporting requirements of the Clean Water Act, which are found in 33 U.S.C. § 1318(a).

The intent was not, however, to provide regional boards with a broad investigative tool to probe discharges having no connection with the discharge for which the NPDES

[1] We note here that "storm water" is defined under the federal Clean Water Act regulations to include urban runoff, *i.e.*, "surface runoff and drainage." 40 Code Fed. Reg. § 122.6(b)(13).

permit had been issued. Indeed, the language of the Clean Water Act on which Section 13383 is based refers specifically to the "owner or operator of any point source."

The Orders, by contrast, seek information far beyond the scope of permittees' point source discharges covered by the MS4 Permit, as set forth in Section 2 of the Petition. First, the Orders require the recipients to identify the sources of the violations, without regard to whether the source comes from their own MS4 discharge, and without regard to whether they have that information or could reasonably obtain it. For, example, prior to issuance of the NOVs and Orders, the County voluntarily funded a study to determine the sources of bacteria at one location. The County set aside up to $1 million for that one study. If the recipients are required to perform additional such studies in order to avoid being found in noncompliance with the Orders, they could have to expend up to $29 million, and even then there is no assurance that the source of the violations will be determined.

Second, the Orders seek an "evaluation" of the dry weather discharges from the MS4 at each noncompliant shoreline and harbor location, regardless of whether the recipient is responsible for the discharge. With respect to locations near Ballona and Malibu Creek, the Orders require an evaluation of upstream sources (even though theses Creeks are subject to separate TMDLs, and sources "in proximity" to the shoreline monitoring locations. Order, pp. 3-4. The Orders further demand the production of exculpatory evidence relating to sources of pollution not associated with the recipients' MS4 discharges, even though those sources might be natural (such as birds or other wildlife) or legal responsibility for regulating such sources may lie with some other discharger or the Regional Board itself. Thus, the Orders purport to require the recipient to examine other sources and discharges in order to prove their own discharges could not have caused an exceedance at the shoreline monitoring.

These requests are unwarranted. As noted above, § 13383 was intended to provide a mechanism whereby the Regional Board can obtain information regarding a *permittee's* discharges. The statute was adopted to give the State and Regional Boards the authority to include monitoring and record keeping requirements in NPDES permits, consistent with the Clean Water Act, not to give the Regional Board the power to order NPDES permittees to perform broad investigations of natural causes of pollution or discharges not their own. Instead of asking for information about the recipients' discharges, the Orders appear to require a broad investigation into the exceedances without regard to the recipients' discharges. These Orders go far beyond that which is authorized by § 13383.

2. Any Information Sought Under Section 13383 Must Be "Reasonably Required" by the Regional Board

Section 13383 also requires that when a regional board seeks information from a permittee, such information must be "reasonably required." As noted above, the information required by the Orders seek information on discharges that are not part of the MS4, but are merely "sources in proximity to the shoreline monitoring location." There may be many sources of bacteria near a shoreline monitoring location that are unrelated to discharges from the MS4, including septic systems, animals, water craft and bathers. It is not reasonable for the Executive Officer to require Petitioners to generate information about these sources when that information is not in Petitioner's possession and is unrelated to Petitioner's discharges.

3. The Orders Cannot Require Petitioners to Provide Information on Discharges That Are The Responsibility of Third Parties or as to which There Are No RWLs in the MS4 Permit

Similarly, the Orders require the provision of information that relates to discharges and/or releases of bacteria that are the responsibility of third parties or to RWLs which are not yet incorporated into the MS4 Permit. 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* MS4 Permit Factual Finding E.33.

Moreover, the Orders require the recipients to investigate one monitoring location directly impacted by discharges from the Ballona Creek watershed and three monitoring locations directly impacted by discharges from the Malibu Creek watershed, even though those TMDLs have compliance dates that are in the future and the RWLs associated with discharges from Ballona Creek and Malibu Creek have *not* been incorporated into the MS4 Permit and are therefore not enforceable. Moreover, Malibu Creek is a natural stream and not part of the MS4. Requiring the recipients to investigate and evaluate sources within these watersheds is therefore arbitrary and capricious and seeks information that is not "reasonably required" by Water Code § 13383.

E. The NOVs and Orders are not Factually Supported

The NOVs and Orders are based on alleged exceedances at 29 sampling locations. That data, however, does not establish that Petitioner's MS4 discharges caused any exceedance at issue.

First, as set forth above, the monitoring locations were selected for the purpose of measuring compliance with the SMBB and Marina TMDLs, not assessing the quality of Petitioner's MS4 discharges. All of the sites are the subject of multiple sources, natural and otherwise. Of the 29 sites, only 9 are located in the proximity of a District drain. One of these 9 sites is located at the mouth of Ballona Creek, itself the recipient of many sources other than Petitioner. Three of the 20 sites not located in the proximity of a District drain are at the mouth of Malibu Creek, a natural water course. The sampling data gathered at the 29 monitoring sites was not designed to monitor the nature and quality of Petitioner's MS4 discharges. There is no evidence the alleged exceedances

were caused by Petitioner's discharges. It is arbitrary and capricious for the Executive Officer to so contend.

The Executive Officer also failed to properly calculate the geometric mean that constitutes the basis for many of the purported violations. The method to calculate the geometric mean is set forth in the SMBB and Marina Coordinated Shoreline Monitoring Plans.[2] According to these plans:

> 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 SMBB 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, extrapolating 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.

Contrary to the plan, the Executive Officer apparently used *only* actual summer dry weather data; and did not extrapolate data by filling in dates with no monitoring data with the most recent data result. Additionally, wet weather data was not used in calculating the geometric means and when the data values were qualified with a "<" the

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[2] Permit Finding E. 36 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."

numeric value was used without a qualifier.

The method used by the Executive Officer can result in artificially higher geometric mean values than the data supports. Where the Executive Officer's manner of calculating the geometric means resulted in artificially inflated values, the calculations cannot be used to support allegations of bacteria exceedances. As such, the Executive Officer could not base the NOVs or the Orders on these values.

F. 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.*") (emphasis supplied).

The Orders essentially create a massive new addition to the MS4 monitoring program. The Orders require the recipients to provide information on the sources of exceedances at each of the shoreline and harbor monitoring sites for which they are jointly responsible, provided details regarding dry weather discharge from the MS4 at

each site, and evaluate the sources of exceedances at the Ballona and Malibu Creek monitoring stations, both upstream and in the proximity of the monitoring site.

The Orders, however, were issued without notice and a public hearing. To the extent the Orders require Petitioners to expand their monitoring efforts, the Orders constitute a modification to the MS4 Permit without notice and hearing.

G. The NOVs and Orders Unlawfully Impose on Petitioners Responsibility for the Discharges of Others

The Orders are based on the allegation that the recipients are 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.

H. The Orders represent an Unfunded State Mandate that Cannot Be Imposed Without a Subvention of Funds

The Orders represent an unfunded state mandate. This determination belongs in the first instance to the Commission on State Mandates. Government Code §§ 17551 and 17552. It is unlawful, however, to impose an unfunded state mandate without also providing a subvention of funds.

I. The TMDL Calculations Were to Be Revisited by the Regional Board in July 2007, Which the Board Has Not Done

The timing of the Order and the NOV are improper because the TMDL is due to be reopened in order to examine the efficacy of the reference points. The Order is based upon data collection, assessment, and exccedence criteria that were required to be revisited by the Regional Board in July 2007, four years after formal implementation of the SMB Beaches TMDL. The Board has failed to conduct this reconsideration, and is therefore relying upon admittedly outmoded and inaccurate data and exceedence day criteria. The Regional Board agreed that the SMB Beaches TMDL merited a fundamental reconsideration. As the Board put it in its 2004 Malibu Creek TMDL:

> "The SMB Beaches TMDLs are scheduled to be reviewed in July 2007 (four years from the effective date of the SMB Beaches TMDLs). The review will include a possible revision to the allowable winter, dry-weather and wet-weather exceedance days based on additional data on bacterial indicator densities in the wave wash; to re-evaluate the reference system selected to set allowable exceedance levels; and to re-evaluate the reference year used in the calculation of allowable exceedance days. In addition, the method for applying the 30-day geometric mean limit also will be considered."
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> *Regional Water Board Resol. No. 2004-019R. Attachment "A" Table 7-10 Malibu Creek and Lagoon Bacteria TMDL*, at p. 6 (implementation).

Despite this commitment, the Regional Board has failed to review the SMB Beaches TMDL.

III. Conclusion

For the foregoing reasons, the NOV and Order is unlawful. Petitioner requests that the State Board issue an order either:

(a) setting aside the Regional Board's Executive Officer's Order and NOV in its entirety; or

(b) directing the Regional Board Executive Officer to withdraw the Order and NOV directed to Petitioner.