

STEVEN L. HOCH (State Bar No. 059505)  
CHRISTOPHER G. FOSTER (State Bar No. 119142)  
BROWNSTEIN HYATT FARBER SCHRECK, LLP  
11911 San Vicente Boulevard, Suite 350  
Los Angeles, CA 90049  
Telephone: (310) 500-4600  
Facsimile: (310) 500-4602

MICHAEL G. COLANTUONO (State Bar No. 143551)  
MICHAEL A. MORGUESS (State Bar No. 192838)  
COLANTUONO & LEVIN, P.C  
555 West 5th St., 31st Fl.  
Los Angeles, CA 90013

Attorneys for Petitioner  
CITY OF CALABASAS

## CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

In the Matter of Petition for Review by the City of Calabasas From California Regional Water Quality Control Board, Los Angeles Region, Order (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 4B190157001) Pursuant To Water Code Section 13383

### PETITION FOR REVIEW

[WATER CODE §13320; CAL.  
CODE REGS. TITLE 24 §2050]

REQUESTED TO BE HELD IN ABEYANCE  
23 CAL. CODE REGS. §2050.5

Petitioner, City Of Calabasas ("City"), respectfully requests that the State Water Resources Control Board ("State Board") review the order referenced above, issued by the Regional Water Quality Control Board, Los Angeles Region ("Regional Board) on March 4, 2008. Petitioner also requests that this appeal be held in abeyance pursuant to 23 Cal. Code Regs. §2050.5 while the Petitioner attempts to resolve the dispute with the Regional Board.

1. Name and Address of the Petitioner:

Mr. Tony Coroalles  
City Manager  
City of Calabasas  
26135 Mureau Road  
Calabasas, CA 91302-3172  
818.878.4225/ fax 818.878.4215

2. The Specific Action or Inaction of the Regional Board Which Petitioner Requests the State Water Board to Review:

City requests review of Order pursuant to Water Code §13383 regarding Order No. 01-182 as amended by Order No. R4-2006-0074 and Order No. R4-2007-0042 NPDES Permit No. CAS004001, WDID 4B190190001 issued by the Regional Board to the City. (Order) A copy of the order is attached as Exhibit A.

3. Date of Issuance of Order

The Order was issued on March 4, 2008.

4. The Reasons the Action or Failure to Act was Inappropriate or Improper:

The issuance of the Order was improper because the Order:

(a) Improperly seeks 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 Los Angeles County Municipal Separate Storm Sewer System Permit NPDES Permit No. CAS004001, Order No. 01-182 ("MS4 Permit");

(b) Violates the MS4 Permit's procedures for responding to alleged exceedances of bacteria water quality standards;

(c) Seeks information regarding alleged violation of receiving water limitations established by the Santa Monica Bay Bacteria Dry Weather Total Maximum Daily Loads ("TMDL") program improperly incorporated into the MS4 Permit;

(d) Improperly employs Water Code §13383 as authority to seek such information;

(e) To the extent that the Order was authorized under Water Code §13383, it seeks information that is not "reasonably required" pursuant to that statute;

(f) It seeks information regarding the quality of waters not impacted by MS4 discharges and not in the MS4 system;

(g) It seeks 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 Act;

(i) It seeks information regarding alleged exceedances of water quality standards and objectives as to which the City has no responsibility;

(j) It seeks information without due regard to the individual facts relating to the discharges, if any, of the City;

(k) It seeks information without a showing of substantial facts upon which the Order could be based;

(l) The RWQCB staffs has not adequately determined that Petitioner has contributed to violations of the Receiving Waters Limitations under Part 2.5 of the MS4 Permit; and,

(m) It creates an unfunded mandate.

5. The Manner in Which the Petitioner is Aggrieved:

The City is aggrieved by the Order because it is based on incorrect allegations of violation of the NPDES permit, it is unsupported by substantial facts, it seeks to have the City jointly responsible for possible actions of others, and it imposes an excessive and unnecessary financial burden to prove compliance. Further, the Order purports to make the City 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 City has already spent considerable funds to comply with the bacteria TMDLs both prior and following their incorporation in the MS4 Permit. The failure to comply with the Orders, moreover, subjects the City to further to administrative civil liability, or potentially to judicially imposed civil penalties.

6. The Action That Petitioners Request The State Board to Take:

City request that the State Board issue an order either:

- (a) setting aside the Order in its entirety; or
- (b) directing the Regional Board to withdraw the Order directed to the City

7. Statement of Points of Authorities in Support of Legal Issues Raised in the Petition:

See attached Points and Authorities.

8. 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.

9. 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 was issued by the Regional Board without prior notice or hearing.

## POINTS AND AUTHORITIES

Petitioner City of Calabasas ("City") submit this Statement of Points and Authorities in support of their Petition for Review filed pursuant to Water Code §13320(a) and 23 Cal. Code Reg. §2050.

### I. STATEMENT OF FACTS

Petitioner is a Permittee under the Los Angeles County Municipal Separate Storm Sewer System Permit, NPDES Permit No. CAS004001, Order No. 01-182 ("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")<sup>1</sup>.

On March 4, 2008, the Regional Board issued a Notice of Violation ("NOV") and Order to the City as well as other municipal entities that are also Permittees under the MS4 Permit alleging violations of Parts 2.5 and 2.6 the MS4 Permit's receiving water limitations ("RWLs"). Specifically, all the NOV's 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 NOV issued to the City alleged that these exceedances constituted a violation of Water Code §13376 and rendered the recipients liable under Water Code §13385. The NOV threatened recipients with administratively imposed civil penalties of up to \$10,000 per day of violation or with judicially imposed civil penalties of up to \$25,000 per day of violation.

The monitoring locations at which the alleged exceedances occurred are locations approved by the Regional Board for the purpose of measuring compliance with the SMBB and Marina TMDLs. On or about April 7, 2004, the Regional Board 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 Regional Board 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 certain shoreline locations that were currently monitored by the City of Los Angeles, County Sanitation Districts of Los Angeles, and the Los Angeles County Department of Health Services at the time of adoption of this TMDL by the Regional Board. Further, where there was an existing subwatershed without an existing shoreline monitoring site, there was a requirement for establishment a shoreline monitoring site if there is measurable flow from a creek or publicly owned storm drain to the beach during dry weather.

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<sup>1</sup> City is aware that the County of Los Angeles and the Los Angeles County Flood Control 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.

Prior to issuing the NOV and the Order to the City, the Regional Board failed to follow the protocol set forth in the MS4 Permit for issuing such NOV and Order. (Discussed further below). 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.

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 protocols set forth in Finding E.37 before issuing the NOV or the Order. The Regional Board did not issue an order pursuant to Water Code §13267 or Water Code §13225 requesting Petitioner to investigate the cause of the alleged RWL exceedances, nor did the Regional Board provide Petitioner with an opportunity, prior to issuance of the NOV, to indicate that the alleged exceedances were not the result of discharges from the MS4 or were otherwise not the legal responsibility of Petitioner. The Regional Board did not issue a cease and desist order to Petitioner with or without a time schedule order. Instead, the Regional Board issued NOV and the Order pursuant to California Water Code §13383.

## **II. THE ORDER**

On March 4, 2008, the Regional Board simultaneously issued the NOV and the Order Pursuant to Water Code §13383 to the City. The NOV alleged violations of the MS4 Permit issued to the City based on alleged exceedances of bacteria water quality objectives at monitoring points along Santa Monica Bay.

In summary, the key demands in the Order demands are that by April 21, 2008, the City provides a large amount of detailed information concerning the alleged exceedances, including:

- (a) an evaluation of dry weather discharges from the City's municipal stormwater system "at each noncompliant shoreline and harbor location on the date(s) of the violations;"
- (b) a detailed description of remedial actions taken both before and after incorporation of bacteria 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;"
- (d) an evaluation of potential sources for the exceedances within Topanga Canyon, Malibu Pier, Malibu Colony Drive and Malibu Creek and in general the Malibu Creek Watershed; and
- (e) evidence supporting contentions made by Petitioners that they are not responsible for the violations.

### **III. 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 Order was issued pursuant to that chapter, under authority of Water Code §13383 and, thus, are appropriate for challenge under §13320. Moreover, the Order itself provides that it may be challenged under §13320. As set forth in Section 5 of the Petition, Petitioner is an aggrieved entity with respect to the Order. The Petition is properly before the State Board.

### **IV. CITY BELIEVES THE ORDER IS IMPROPER**

The City finds that the Order is improper on many different grounds. These are individually discussed below.

#### **A. Express Findings in the MS4 Permit have been Ignored**

The Regional Board has made an express finding in the MS4 Permit as to what procedures must be followed by the City (and other 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. 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 an investigation determines that the City's MS4 discharge is not responsible for causing or contributing to the exceedance, or that the discharge was appropriately treated, no enforcement as to the City would follow. However, if after an investigation the Regional Board determines that the City has caused or contributed to violations of receiving water limitations could "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. (Cited above)

This process, which emphasized first determining whether there was liability by the MS4 of the City for exceedances of the bacteria objectives, was completely ignored by the Order under Water Code §13383. 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).

**B. The Issuance of the Order is not does not comport with Water Code §13383**

1. Improper employment of Water Code §13383

The Regional Board has improperly employed Water Code §13383 as authority for the Order. Water Code §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 authorized by the Clean Water Act. Water Code §13383 is clearly designed to provide a mechanism whereby the Regional Board can obtain "monitoring, inspection or entry" information regarding the City'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 the City's individual discharges from the MS4 (the only appropriate subject for inquiry), the Order requires the generation of information not within City's possession or control. It seeks to have the City "jointly responsible" for the data. (See below re: joint responsibility) Further, the Order requires an "evaluation" of "sources," including those "within proximity" of the shoreline many miles from the City's boundaries. Thus, the Order purports to require City 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 Regional Board's authority under Water Code §13383.

2. The Order exceeds the scope of Water Code §13383

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

Water Code §13383 states that a regional board may require a discharger "to provide other information as may be reasonably required."<sup>2</sup> The Order, by contrast, 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<sup>3</sup>, identify the sources of the

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<sup>2</sup> See Water Code §13383(b) (stating that the Regional Board's request must be reasonable.); Water Code §13225(c).

<sup>3</sup> As an example, the Order seeks an "evaluation" of the dry weather discharges from the MS4 at each noncompliant shoreline and harbor location, regardless of whether Petitioners are responsible for the discharge. With respect to locations near Malibu Creek, the Order requires an evaluation of upstream sources (even though Malibu Creek is subject to separate TMDLs, and sources "in proximity" to the shoreline monitoring locations. Order, pp. 3-4.

violations, without regard to whether the source comes from Petitioners' own MS4 discharge<sup>4</sup>, and the provision of exculpatory evidence and other information as well. Such information, in particular in the broad sweep sought, is not "reasonably required" of the City.

Such requests are unwarranted. As noted above, Section 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 requirement in NPDES permits, consistent with the Clean Water Act, not to give the Regional Board the power to order NPDES Permittee to perform broad investigations of natural causes of pollution or discharges not their own. Instead of asking for information about Petitioners' discharges, the Orders appear to require a broad investigation into the exceedances without regard to Petitioners' discharges. These Orders go far beyond that which is authorized by section 13383.

3. There is no technical support for the claims under Water Code §13383

The City asserts that the Petition is without support in relation to the activities of the City for the following reasons. The City of Calabasas will provide specific references as required by the State Board after its review of this Petition:

An insignificant portion (substantially less than one per cent land area) within the far southeast corner of the incorporated area of the City of Calabasas is actually tributary to an equally insignificant percentage of the total tributary drainage area on the fringe of the northwestern portion of the Topanga Canyon. Furthermore, this minor area is essentially all undeveloped hillside with no development or drainage from an MS4 system tributary to Topanga Canyon. Also, during dry weather periods there would be no runoff. Therefore, there is no technological and scientific basis to suggest that there is any controllable source of bacteria in urban runoff from within the City tributary to Topanga Canyon or Topanga Creek and certainly none was presented in the Order to support the claims made therein.

With the exception of the extremely minor area noted above, the remainder of the City of Calabasas drains to Las Virgenes Creek or its tributaries upstream of the confluence with Malibu Creek. The incorporated City occupies slightly less than about 5% of the total drainage area of Malibu Creek, and the southern boundary of the City is approximately 11 creek miles upstream of the mouth of the Creek below the Malibu Lagoon at shoreline. Thus, there is very limited potential for runoff from within the incorporated City to directly impact bacteria conditions at any of the three beach monitoring locations cited in the general vicinity of the outwash from Malibu Creek. Again, there is no there is no technological and scientific basis to suggest that there is any controllable source of bacteria in urban runoff from within the City to Malibu Creek and certainly none was presented in the Order to support the claims made therein.

In further reference to the issues of the Malibu Creek, there is no technological and scientific basis to support any direct link form the City of Calabasas to exceedances of bacteria objectives in the wave wash area at the mouth of Malibu Creek. Certainly no such evidence was presented in the Order to support the claims made therein.

The City of Calabasas is already actively implementing a number of measures to reduce or eliminate dry weather flow or bacteria sources in dry weather flow as part of its commitment under the Malibu Creek Bacteria TMDL Implementation Plan, with a scheduled dry weather

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<sup>4</sup> The Order further demands the production of exculpatory evidence relating to sources of pollution not associated with Petitioners' 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.

compliance date of January 2009 (effectively April 1 - October 31, 2009) and there is no indication in the Order that any of these activities were taken into consideration.

**C. The Order Seeks Information on Waters not Impacted by Discharges from the City's MS4 Discharge Point**

The Order improperly seeks information on waters not impacted by discharges from the MS4, the only discharges for which the City has responsibility under the MS4 Permit. For example, the Order seeks information on exceedances at harbor and shoreline locations which are not in proximity to any the City's MS4 discharge points.

The Order also 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. Lastly, the Order seeks information on waterways, even though such waterways are not part of the MS4. The City 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.

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

There is no evidence the alleged exceedances were caused by Petitioner's discharge. It is arbitrary and capricious for the Regional Board to so contend.

**D. Issue re Receiving Water Limitations**

The Order seeks information regarding alleged violations of receiving water limitations incorporated into the MS4 Permit the summer dry weather compliance periods beginning on September 14, 2006 through October 31, 2006, and April 1, 2007 through October 31, 2007. Those receiving water limitations provide: "During Summer Dry Weather there shall be no discharges of bacteria from MS4s into the Santa Monica Bay that cause or contribute to exceedances in the Wave Wash, of the applicable bacteria objectives". The receiving water limitations were incorporated to reflect the Santa Monica Bay Beaches Bacteria Dry Weather TMDL.

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 for the violations alleged in the Order.

**E. The Order improperly seeks to modify and amend the monitoring program set forth in the MS4**

The MS4 Permit, which is alleged in the Order to have been violated by Petitioners, contains a detailed monitoring program. By requiring the City 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 seeks to modify and amend the monitoring program set forth in the MS4 Permit without notice or hearing, in violation of the Porter-Cologne Water Quality Act.

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 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.")

In essence, the Order creates new additions to the MS4 monitoring program. The Order requires Petitioner to provide information on the sources of exceedances at each of the shoreline and harbor monitoring sites for which it is jointly responsible, provided details regarding dry weather discharge from the MS4 at each site, and evaluate the sources of exceedances at Malibu Creek monitoring stations, both upstream and in the proximity of the monitoring site.

**F. The Order presumes joint responsibility without any basis**

In two locations the Order is based on a supposition that there is some type of joint responsibility that exists among the MS4 Permittees. The Order states as to the City:

The City of Calabasas is *jointly responsible* for violations at these monitoring sites along with the other Permittees with land area within the watersheds draining to these sites. (Page 2) (Emphasis added).

Specifically, the City of Calabasas 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. (Page 2). (Emphasis added).

There is no legal or other support for this claim. To the contrary, Petitioner is not responsible for the discharges of others and neither the Clean Water Act nor the Porter-Cologne Act so provides. Petitioner is responsible solely for its own discharges.

**G. The Order Incorrectly Calculates the Geometric Mean for Alleged Violations of the Santa Monica Bay Beaches Bacteria TMDL**

The Regional Board used a method to calculate the geometric mean that conflicts with the method approved by the Regional Board for the Santa Monica Bay Beaches Bacteria TMDL and may result in higher geometric mean values than the data actually shows. The geometric mean calculations were used to allege violations of Water Code §13376 in the NOV and used as authorization for imposing the Order. Hence, the alleged violations have been inaccurately calculated and therefore there is no basis to prove there are violations of Water Code §13376 and therefore the imposition of liability under Water Code §13385, or establish a monitoring, inspection, entry, reporting, or recordkeeping requirement under Water Code §13383 is incorrect.

In the Order, the Regional Board alleges that the City has violated the waste discharge limits for the Santa Monica Bay established by the LA MS4 Permit (Board Order No. 01-182, as amended by Order No. R4-2006-0074 and Order No. R4-2007-0042). The waste discharge limits are also set forth in the Basin Plan, as adopted by the Regional Board on January 24, 2002, and commonly referred to as the Santa Monica Bay Beaches Bacteria TMDLs. The Bacteria TMDLs were incorporated into the LA MS4 Permit on September 14, 2006, by Order R4-2006-0074.

Under the Santa Monica Bay Beaches Bacteria TMDLs, the responsible agencies within the Malibu Creek (and Ballona Creek) watershed(s) were required to submit a Coordinated Shoreline Monitoring Plan to the RWQCB for approval in late 2003. The Monitoring Plan identifies all monitoring locations, the types of monitoring and the frequency of monitoring to be conducted by the responsible agencies at each site. The Regional Board approved the Coordinated Shoreline

Monitoring Plan on April 28, 2004. The monitoring data collected under the Monitoring Plan is compiled monthly and submitted to the Regional Board. The Regional Board relied on this coordinated shoreline monitoring data to support its allegations in the Order; however, the method used to calculate the geometric mean conflicts with the method that was approved by the Regional Board under the Monitoring Plan and may result in artificially inflated results. The approved Plan illustrates specifically how the geometric mean is to be calculated.

The geometric mean is defined in Webster's Dictionary as "the nth root of the product of n numbers." Thus, the 30-day geometric mean calculation for the Santa Monica Bay Beaches Bacteria TMDLs will be calculated as the 30th root of the product of 30 numbers (the most recent 30 day results). For weekly sampling, the 30 numbers are obtained by assigning the weekly test result to the remaining days of the week. If more samples are tested within the same week, each test result will supersede the previous result and be assigned to the remaining days of the week until the next sample is collected. This rolling 30-day geometric mean must be calculated for each day, regardless of whether a weekly or daily schedule is selected. See Sec. 2.2.1 Rolling 30-day Geometric Mean Limits, Santa Monica Bay Beaches Bacterial TMDL Coordinated Shoreline Monitoring Plan.

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

This method can result in higher geometric mean values than the data shows and these artificially inflated mean values cannot be used to support allegations of bacteria exceedance. Finding No. 36 of MS4 Permit, states, "[c]ompliance with the Receiving Water Limitations shall be determined using monitoring data obtained in conformance with the Santa Monica Bay Beaches Bacterial TMDLs Coordinated Shoreline Monitoring Plan dated April 7, 2004; the Marina del Rey Harbor Mothers' Beach and Back Basins Bacterial TMDL Coordinated Monitoring Plan dated April 13, 2007; and the Monitoring and Reporting Program CI 6948." Compliance with the waste discharge requirements has not been determined in conformance with the Monitoring Plan; hence, the alleged violations have been incorrectly calculated and the Regional Board has not properly proved a violation of Water Code §13376. As such, the Regional Board is not authorized to impose liability under Water Code §13385 or establish a monitoring, inspection, entry, reporting, or recordkeeping requirement under Water Code §13383.

**H. There is an Incorrect Calculation of the Number of Violations Based on an Improper Reliance on Monitoring Data**

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

and winter dry weather. Thus, any citation of multiple violations for the same monitoring day should be stricken.

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

As specified in Table 7-4.3 of Attachment A to Resolution No. 02-004 for dry weather, the responsible jurisdictions and agencies were to select between daily and weekly shoreline sampling when preparing the Monitoring Plan. Accordingly, under section 4.1 Sampling Schedule, the Plan states that, "[t]he proposed compliance monitoring program comprises 67 sites monitored on a weekly basis. All routine samples will be collected on Mondays, and accelerated samples collected on Wednesdays and Fridays." Accelerated sampling is triggered at a monitoring location whenever analysis of a Monday sample indicates that an exceedance has occurred. Weekly sampling resumes for that location once the accelerated sample results demonstrate that bacteria levels no longer exceed the limits. The Monday data set, along with any required accelerated sampling, would be utilized in determining compliance with the TMDL as referenced in Finding E. 32 and in footnote 5 of the Receiving Waters Limitation Provision of the MS4 Permit at the time the permit was reopened on September 14, 2006. However, when the MS4 Permit was reopened to incorporate the Marina del Rey Bacteria TMDL on August 9, 2007, the same finding and footnote were further revised to provide that monitoring data collected through the Monitoring and Reporting Program CI 6948 of the LA MS4 Permit would also be used to assess compliance with the Receiving Waters Limitations. Under CI 6948, additional monitoring on four other days of the week (Tues-Thurs) has been conducted at various monitoring sites throughout the jurisdictional groups. This additional monitoring data should not be used for determining compliance with Santa Monica Bay Beaches Bacteria TMDL/Receiving Waters Limitations provision of the MS4 Permit on dates before the MS4 Permit was amended on August 9, 2007.

**I. The Order Is Unenforceable As It Is Based On Bacteria Tmdls Which Were Developed To Implement Questionable Water Quality Standards**

The relevant portions of the MS4 Permit relied upon for the issuance of the Order were added through amendments adopted in September of 2006 and in August of 2007, so as "to implement the summer dry weather waste load allocations established in the Santa Monica Bay Beaches Bacteria Dry Weather Total Maximum Daily Load (TMDL) and the Marina del Rey Harbor Mothers' Beach and Back Basins Bacteria TMDL" (collectively, "Bacteria TMDLs").

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

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

With respect to the water quality standards in the Basin Plan which were used to develop the Bacteria TMDLs (with the TMDLs then forming the bases for the amendments to the LA MS4 Permit), vis-à-vis "storm water" (which term includes urban and dry weather runoff pursuant to 40 CFR §122.26(b)(13)), such water quality standards have to date not been developed based on a consideration of the Water Code §§13241 and 13000 factors and requirements. Because the water quality standards that are alleged to be violated and are used to support the Order have not been developed through the analysis required under Water Code §§13241 and 13000, with respect to storm water, the Order was wrongly issued.

**J. The Order is Patently Unfair**

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

**V. THE ORDER REPRESENTS AN UNFUNDED STATE MANDATE THAT CAN NOT 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.

To the extent the Order places a burden on Petitioner to inspect areas beyond its jurisdictional control, the Order constitutes an unfunded state mandate. Article III, Section 6 of the State Constitution prevents the state from shifting the cost of government from itself to local agencies without providing a "subvention of funds to reimburse that local government for the costs of the program or increased level of service . . ." State agencies are not free to shift state costs to local agencies without providing funding merely because those costs were imposed upon the state by the federal government. If the state freely chooses to impose costs upon a local agency as a means of implementing a federal program, then those costs should be reimbursed by the state agency. See *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal. App. 4th 898; *Hayes v. Commission on State Mandates* (1992) 11 Cal. App. 4th 1564, 1593-1594. If the state refuses to appropriate money to reimburse a city, the enforcement of the state mandate can potentially be enjoined by a court. See *Lucia Mar Unified School District v. Honig* (1988) 44 Cal. 3d 830, 833-834. This determination belongs in the first instance to the Commission on State Mandates. Government Code §§17551 and 17552. Prior to complying with the Regional Board's requests, the state must provide Petitioner with the appropriate funding.

**VI. CONCLUSION**

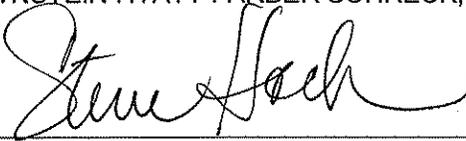
For the foregoing reasons the City contends the Order is clearly unlawful. The City requests that the State Board issue an order either:

- (a) setting aside the Regional Board's Order in their entirety; or
- (b) directing the Regional Board to withdraw the Order directed to City.

Dated: April 8, 2008

COLANTUONO & LEVIN, P.C

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: 

STEVEN L. HOCH  
Attorneys for Petitioner, City of Calabas

**EXHIBIT A**



# 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. Anthony Coroalles  
City Manager  
City of Calabasas  
26135 Mureau Road  
Calabasas, CA 91302-3172

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, W DID  
4B190157001)**

Dear Mr. Coroalles:

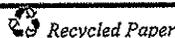
The California Regional Water Quality Control Board, Los Angeles Region (Regional Board) is the state regulatory agency responsible for protecting water quality in Los Angeles and Ventura Counties. To accomplish this, the Regional Board issues permits under the National Pollutant Discharge Elimination 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 Calabasas 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.

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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 Calabasas 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 four shoreline monitoring sites located along Santa Monica Bay beaches to which the City of Calabasas discharges via the MS4, on 105 days, which included 188 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 Calabasas is jointly responsible for violations at these monitoring sites along with the other Permittees with land area within the watersheds draining to these sites.

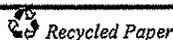
#### **REQUIREMENT TO PROVIDE INFORMATION**

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 Calabasas 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 Calabasas 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 Calabasas 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 Calabasas, under penalty of perjury. The reports shall provide:

***California Environmental Protection Agency***



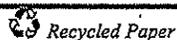
*Our mission is to preserve and enhance the quality of California's water resources for the benefit of present and future generations.*

1. 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.
2. 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.
3. 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.
4. 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 are originating from sources in proximity to the shoreline monitoring location, then the City of Calabasas shall provide the information required in 1 through 3 above.

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

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**CIVIL LIABILITY**

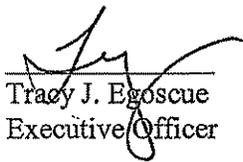
Pursuant to CWC § 13385(a)(3), the City of Calabasas is subject to penalties of up to \$10,000 for any violation of the requirements set forth in this Order. These civil liabilities may be assessed by the Regional Board beginning with the date on which a violation of this Order first occurred, and without 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 Calabasas 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. Alex Farassati, Environmental Services Manager, City of Calabasas  
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

**California Environmental Protection Agency**

