

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 7-7, WHITE POINT COUNTY BEACH

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
4/2/2007			110				
7/30/2007			360				
8/1/2007			140				
10/1/2007			230				
10/17/2007							40
10/18/2007							40
10/19/2007							40
10/20/2007							40
10/21/2007							40
Total Violations	0	0	4	0	0	0	5

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-BC-01, BALLONA 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					1452		
9/15/2006					1225		
9/16/2006					1176		
9/17/2006					1186		
9/18/2006					1180		
9/19/2006					1137		
9/20/2006					1020		
4/24/2007	>13000	4400	190	>13000			
6/15/2007				1900			
6/22/2007	11000						
6/28/2007	11000						
6/30/2007			140		1092		
7/1/2007					1096		
7/2/2007					1191		
7/3/2007					1315		
7/4/2007					1259		
7/5/2007					1423		
7/6/2007					1516		
7/7/2007					1587		
7/8/2007					1512		
7/9/2007					1536		
7/10/2007					1505		
7/11/2007					1307		
7/12/2007					1513		
7/13/2007	13000				1755		
7/14/2007					1817		
7/15/2007					1813		
7/16/2007					1814		
7/17/2007	>13000				1992		
7/18/2007	>13000				2170		
7/19/2007	>13000				2675		
7/20/2007					2161		
7/21/2007	>13000				2746		
7/22/2007					2570		
7/23/2007					2531		
7/24/2007					2599		
7/25/2007					2427		
7/26/2007	13000				2612		
7/27/2007	>13000				2910		
7/28/2007					2650		
7/29/2007					2602		
7/30/2007					2563		
7/31/2007					2482		
8/1/2007	13000				2676		

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 SITE ID SMB-BC-01, BALLONA 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
8/2/2007	>13000				2713		
8/3/2007	>13000	500			3146		
8/4/2007	>13000				3535		
8/5/2007					3427		
8/6/2007					3255		
8/7/2007	13000				3477		
8/8/2007	13000				3691		
8/9/2007					4001		
8/10/2007	>13000				5084		
8/11/2007					5039		
8/12/2007					4817		
8/13/2007					5553		
8/14/2007	11000	1300		11000	5737		
8/15/2007	>13000	6800		>13000	5955		
8/16/2007	>13000	11000		>13000	5955		
8/17/2007	11000	5500		11000	5909	235	
8/18/2007	>13000	13000		>13000	5909	299	
8/19/2007					7315	321	
8/20/2007					7107	336	
8/21/2007					6983	337	
8/22/2007			590		6837	329	
8/23/2007	>13000	1100			7183	374	
8/24/2007	13000				8273	403	
8/25/2007					7647	391	
8/26/2007					7456	426	
8/27/2007					8106	467	
8/28/2007					7618	426	
8/29/2007					6888	391	
8/30/2007					7316	403	
8/31/2007	>13000	1300			7316	461	
9/1/2007		830			7216	502	
9/2/2007					7017	502	
9/3/2007					6803	524	
9/4/2007		500			6852	523	
9/5/2007					6958	491	
9/6/2007	13000	500			6958	499	
9/7/2007					6041	468	
9/8/2007					5723	454	
9/9/2007					5504	460	
9/10/2007					5894	506	
9/11/2007					5679	460	
9/12/2007	>13000	430			5897	458	
9/13/2007	>13000	1800		>13000	5942	465	
9/14/2007	>13000	830			5942	423	

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 SITE ID SMB-BC-01, BALLONA 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
9/15/2007					5598	335	
9/16/2007					5421	293	
9/17/2007					5189	243	
9/18/2007					5220	241	
9/19/2007					4822	227	
9/20/2007					3967	211	
9/21/2007					3948	211	
9/22/2007					3719		
9/23/2007					3482		
9/24/2007					3563		
9/25/2007					3543		
9/26/2007	13000				3781		
9/27/2007					3722		
9/28/2007			140		3879		
9/29/2007			150		3785		
9/30/2007					3547		
10/1/2007					3356		
10/2/2007					3036		
10/3/2007					2753		
10/4/2007					2594		
10/5/2007					2143		
10/6/2007					1821		
10/7/2007					1934		
10/8/2007					1941		
10/9/2007					1753		
10/10/2007					1577		
10/11/2007					1355		
10/12/2007					1203		
10/13/2007					1054		
10/23/2007			110				
10/25/2007			320				
Total Violations	30	15	7	8	113	36	0

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.

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 SEPTEMBER 14, 2006 - OCTOBER 31, 2006 AND APRIL 1, 2007 - OCTOBER 31, 2007
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 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

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 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

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 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.

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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 B

STATEMENT OF POINTS AND AUTHORITIES

Petitioners County of Los Angeles (“County”) and the Los Angeles County Flood Control District (“District”) 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

Petitioners are permittees 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 and 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 of 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 NOV's alleged that these exceedances constituted a violation of Water Code § 13376 and rendered the recipients liable under Water Code § 13385. The NOV's threatened recipients with administratively imposed civil penalties of up to \$10,000 per day of violation or with judicially imposed civil penalties of up to \$25,000 per day of violation.

The monitoring locations at which the alleged exceedances occurred are locations approved by the Executive Officer for the purpose of measuring compliance with the SMBB and Marina TMDLs. On or about April 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 criteria set forth in the TMDLs. 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).

The NOV's and Orders issued to Petitioners cite exceedances at 29 of the SMBB and Marina monitoring locations. Of these 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, which has

its own bacteria TMDL whose compliance dates have not yet occurred, and thus discharges from which cannot be a basis for an alleged violation.

Prior to issuing the NOV's and Orders, the Executive Officer did not follow the protocol set forth in the MS4 Permit for issuing such NOV's and Orders. When the Regional Board amended the MS4 Permit to add the SMBB TMDL, the Regional Board adopted a special finding, 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 Chair 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. A copy of this portion of the transcript is attached to the Declaration of Laurie E. Dods attached hereto. 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's or the Orders. The Executive Officer did not issue an order pursuant to Water Code § 13267 or Water Code § 13225 requesting Petitioners to investigate the cause of the alleged RWL exceedances, nor did the Executive Officer provide Petitioners with an opportunity, prior to issuance of the NOV's, to indicate that the alleged exceedances were not the result of discharges from the MS4 or were otherwise not the legal responsibility of Petitioners. The Executive Officer did not, instead of issuing NOV's, issue a cease and desist order to Petitioners with or without a time schedule order.

Instead, the Executive Officer issued NOV's and Orders pursuant to Water Code § 13383. The Orders demanded that the recipients provide, by April 21, 2008, certain detailed information set forth in the text of the Order including (a) identification of the sources of the alleged violations for each shoreline 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. 3.¹

The Orders also demanded that certain recipients, including the County and the District, 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 of the requirements set forth in the Order would subject recipients to civil penalties of up to \$10,000 or for judicially imposed civil penalties of up to \$25,000 per day, as well as "penalties pursuant to other

¹ The text of the Orders issued to the County and the District was identical, with the exception of the name of the recipient. See Orders attached as Exhibit A to Petition.

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 Section 13320. Moreover, the Orders themselves provide that they may be challenged under Section 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 NOV's, 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 included special finding 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 Executive Officer made no attempt to determine, prior to issuing the NOV's 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 E37 and issued the NOV's 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, 630-31 (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 for review 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 petitioners and other 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 petitioners jointly responsible for discharges of other permittees, even though petitioners have no authority or control over these discharges; and

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

In addition, the petition alleged that 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 petitioners 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, the Porter-Cologne Water Quality Act, the

Government Code, the Public Resources Code, the California Code of Regulations and due process.

Petitioners refer further to the Petition for Review filed on or about October 16, 2006 and the supporting exhibits, including the Statement of Points and Authorities, and request 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, Petitioners allege 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 Act as they relate to stormwater.² 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. The Information Sought Under Water Code § 13383 Is Limited to a Permittee’s NPDES Discharge

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. 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).

² 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).

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 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 Petitioners’ point source discharges covered by the MS4 Permit, as set forth in Section 2 of the Petition. First, the Orders require Petitioners to identify the sources of the violations, without regard to whether the source comes from Petitioners’ own MS4 discharge, and without regard to whether Petitioners have that information or could reasonably obtain it. For example, prior to issuance of the NOV’s 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 Petitioners are required to perform additional such studies in order to avoid being found in noncompliance with the Orders, Petitioners 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 Petitioners are responsible for the discharge. With respect to locations near Ballona and Malibu Creek, the Orders require an evaluation of upstream sources (even though these 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 Petitioners’ MS4 discharges, even though those sources might be natural (such as birds or other wildlife) or the legal responsibility for regulating such sources may lie with some other discharger or the Regional Board itself. Thus, the Orders purport to require Petitioners to examine other sources and discharges in order to prove that their own discharges could not have caused an exceedance at the shoreline monitoring.

These 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 Board 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 permittees 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.

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 Petitioners' possession and is unrelated to Petitioners' 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

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 Finding E.33.

Moreover, the Orders require Petitioners 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 Petitioners 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 Petitioners’ 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 Petitioners’ 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 waterway. The sampling data gathered at the 29 monitoring sites were not designed to monitor the nature and quality of Petitioners’ MS4 discharges. There is no evidence the alleged exceedances were caused

by Petitioners' discharges. It is arbitrary and capricious for the Executive Officer to so contend.

Second, the Executive Officer 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 as follows:³

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 were not used in calculating the geometric means and when the data values were qualified with a "<," the numeric value was used without a qualifier.

³ MS4 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."

The method used by the Executive Officer can result in artificially higher geometric mean values than the data support. 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 NOV's 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 Petitioners 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 the Ballona and Malibu Creek monitoring stations, both upstream and in the proximity of the monitoring site.

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

G. The NOV's and Orders Unlawfully Impose on Petitioners Responsibility for the Discharges of Others

The Orders are based on the allegation that Petitioners are jointly responsible for the alleged exceedances. To the contrary, Petitioners are not responsible for the discharges of others and neither the Clean Water Act nor the Porter-Cologne Act so provides. Petitioners are responsible solely for their 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.

III. Conclusion

For the foregoing reasons, the NOV's and Orders are unlawful. Petitioners respectfully request that the State Board issue an order either:

(a) setting aside the Regional Board's Executive Officer's Orders in their entirety;

or

(b) directing the Regional Board Executive Officer to withdraw the Orders directed to Petitioners.

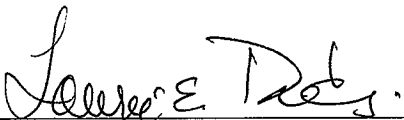
DECLARATION OF LAURIE E. DODS

I, Laurie E. Dods, hereby declare and state as follows:

1. I am a Deputy County Counsel employed in the Office of the County Counsel for the County of Los Angeles. I am one of the attorneys for Petitioners County of Los Angeles and Los Angeles County Flood Control District in this Petition. As such, I have personal and first-hand knowledge of the matter set forth herein and I could, if called upon, testify competently thereto.

2. Attached as Attachment 1 to the Declaration is a true and correct copy of the cover page and relevant portions of pages 361 and 362 of a transcript of a California Regional Water Quality Control Board, Los Angeles Region Board Meeting held on September 14, 2006.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 3rd day of April 2008 at Los Angeles, California.



Laurie E. Dods

BOARD MEETING
STATE OF CALIFORNIA
LOS ANGELES

REGIONAL WATER QUALITY CONTROL BOARD

COPY

THE METROPOLITAN WATER DISTRICT

OF SOUTHERN CALIFORNIA

BOARD ROOM

700 NORTH ALAMEDA STREET

LOS ANGELES, CALIFORNIA

THURSDAY, SEPTEMBER 14, 2006

9:20 A.M.

JAMES F. PETERS, CSR, RPR
CERTIFIED SHORTHAND REPORTER
LICENSE NUMBER 10063

1 question.

2 Next. In the TMDL that we adopted, we posed a
3 July 15th deadline. And the TMDL itself as adopted
4 provides for it to be implemented through the device of
5 the MS-4?

6 MS. DeSHAZO: That's correct.

7 CHAIRPERSON NAHAI: Which is what we're doing
8 here today, correct?

9 MS. DeSHAZO: Yes.

10 EXECUTIVE OFFICER BISHOP: Can I just clarify,
11 that it was a -- three years past the effective date of
12 the TMDL, which turns out to be July 15th.

13 CHAIRPERSON NAHAI: Okay. I understand that.

14 Now, in the materials that you've provided to
15 us -- Jon, this is a question for you -- have you not
16 included certain enforcement, I'll call them protocols,
17 steps that would be taken with respect to a possible
18 violation?

19 EXECUTIVE OFFICER BISHOP: I've Included the
20 procedures that I planned to go through as part of the
21 findings in your documentation.

22 CHAIRPERSON NAHAI: Okay. And should it be shown
23 that additional time for compliance is necessary, have you
24 not provided for the possibility of time schedule orders
25 or other such devices in order to provide time for

1 compliance should that be necessary?

2 EXECUTIVE OFFICER BISHOP: That is correct.

3 CHAIRPERSON NAHAI: I have a question about the
4 wave wash.

5 If the contamination -- if the exceedance is
6 going to be measured at the wave wash, what does that do
7 with respect to discharges that contaminate the beach but
8 don't reach the wave wash? And under what regime are you
9 going to deal with that situation?

10 EXECUTIVE OFFICER BISHOP: This issue was
11 discussed at the time that the TMDL was adopted. And to
12 try and recall and answer that question, the beneficial
13 use that we are protecting with the TMDL was actually in
14 the receiving water. And so we felt it was the most
15 appropriate to set the compliance point at the wave wash.
16 That does allow in some circumstances that there will be a
17 flowing storm drain that never reaches the ocean, but has
18 some contaminated water in it.

19 This TMDL -- or this amendment and the TMDL that
20 was brought up doesn't directly address that. But there
21 are other provisions that would address that.

22 CHAIRPERSON NAHAI: All right.

23 SENIOR STAFF COUNSEL LEVY: In like regard, Mr.
24 Chair, Mr. Tahir from the City of Inglewood asked a
25 question about whether or not this amendment would apply