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November 8, 2006

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Our File Number: 0WBB-124538

VIA ELECTRONIC MAIL

Bruce H. Wolfe
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San Francisco Bay Region
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Re: Draft Municipal Regional Permit for Phase I MS4s and Unresolved Issues List

Dear Mr. Wolfe:

On behalf of the Home Builders Association of Northern California, we write to provide comments on the working draft Municipal Regional Permit for Phase I MS4s ("draft Permit" or "MRP") and on the list of unresolved permit issues produced by Board staff. We appreciate the opportunity to comment on these documents and to fully participate in the development of this important permitting strategy. The Association's members are committed to the development and implementation of effective and efficient storm water control measures. As members of the regulated community who have extensive experience in on-the-ground implementation of stormwater controls and to a large extent, bear the burden of carrying out many of the programs under the permit, our members are in a unique position to provide insight regarding the impacts of various stormwater programs. We look forward to working with the Board and staff to develop practicable storm water programs, based on sound science, that result in improved water quality throughout the region.

I. General Comments

At the outset, we urge the Board and Board staff in addressing the issues related to regulation of municipal stormwater discharges to consider first the regulatory strategy provided in the Clean Water Act ("CWA") and under the California Water Code ("CWC"). In enacting the CWA, Congress recognized that controlling pollutants in stormwater presents particular challenges due to the diffuse nature of the pollutants found in such waters and the highly variable quality, quantity and timing of stormwater discharges. It was this recognition that led the Environmental Protection Agency to create the Maximum Extent Practicable

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("MEP") standard for regulating stormwater discharges rather than the established numeric effluent limitation standards placed on other point source discharges.

In determining what is the MEP for the MRP, the Board needs to expressly consider whether proposed control measures are technically and economically feasible, that is practicable. As is discussed below, we believe that a number of the draft permit conditions may not meet this feasibility test and we request that Board staff specifically address both the need for and the feasibility of these provisions.

Further, a number of the draft permit provisions appear to go beyond that which is required under federal law. Although the Board may have the authority to impose such conditions, they are not required under CWA or the EPA's implementing regulations. Under California law, such provisions can only be established following a thorough analysis of economic considerations, the need for developing housing within the region, and the other consideration listed in CWC Section 13241. We request that the Board staff complete such an analysis, which should then be made available for public review and comment.

Based on discussions at several of the Stormwater Subcommittee meetings, we understand that staff believes that many of the new provisions included in the draft MRP are necessitated by the Superior Court's ruling in the *San Francisco Bay Keeper v. Regional Water Quality Control Board*, Consolidated Case No. 500527 (S.F. Sup. Ct., Nov. 14, 2003) that invalidated portions of the Contra Costa and San Mateo Counties' MS4 permits. The actual findings of the Court, however, are limited. Specifically, the Court found that the challenged MS4 permits were deficient in only three respects. First, the MS4 permits did not include specific monitoring provisions as required by federal law. Second, the Court found that the permits did not provide adequate public participation, as required by federal law, because they allowed for modifications to substantive provisions without public notice and comment. Finally, the Court found that the permits unlawfully delegated Board authority to the Executive Officer and the Permittees by allowing changes to substantive provisions of the permit without review and approval of the Board.

Significantly, the Court upheld the fundamental treatment control measures included in the permit. Specifically, the Court found that numeric limitations are not required in stormwater permits. Further, the performance standards included in the Permit, requiring that discharges implement best management practices to reduce pollutants to the MEP, were adequate. Accordingly, while we agree that the provisions relating to the required monitoring programs and the procedures whereby modifications to the substantive requirements of the permit can be adopted must be amended as a result of the Court Order, we do not agree that the basic permitting strategy adopted in the existing Phase I MS4 permits needs to be altered.

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II. Draft Municipal Regional Permit

In adopting the most recent Phase I MS4 permits over the last several years, the Regional Board established new, significantly more stringent regulations for municipal dischargers. These permits required municipalities to establish broad new programs for regulating stormwater and to increase monitoring and reporting requirements. These programs are still in their infancy and the impact of these programs on the state's water quality cannot yet be meaningfully assessed. In the draft Permit, Board staff proposes to once again substantially revise the municipal stormwater regulatory program, and includes significant new regulations applicable new development and redevelopment projects as well as new regulations for construction projects. We do not believe that a basis has been established for requiring these new or more stringent programs under state or federal law. We urge the Board to allow the current programs to be implemented for a sufficient period of time to allow for an evaluation of the need for and feasibility of any new or alternative programs prior to imposing any such requirements shown to be necessary. Our specific comments on the draft provisions of the C3 and construction monitoring programs are provided below.

A. New Development and Redevelopment Performance Standards (C3 Program)

1. New Development and Redevelopment Performance Standards

Draft Permit Provision: The draft Permit requires that Permittees undertake a number of tasks in relation to approval of new development and redevelopment projects. The draft Permit requires that these tasks be fully implemented upon adoption of the MRP based on a conclusion that such tasks were previously required in the Permittee's existing permits.

Comment: We urge the Board staff to review the task list as compared to the existing permits. It appears that some of the provisions, such as the need to demonstrate a legal authority to ensure that all developers (not just those regulated under the General Construction Permit) implement effective erosion and sediment control measures, are not in the existing permits. Further, it is unclear in the draft Permit whether the described "Performance Standards" are applicable to all development and redevelopment projects or as is the case under the existing permits, only those that meet the threshold requirements in the Regulated Projects provisions (as defined in Provision C3(b)).¹ We request that the Board consider

¹ If Board staff intends the Performance Standards to apply to all development and redevelopment projects, we do not believe that such standards are technically or economically feasible and we request that the Board staff analyze the feasibility of any such provisions. Further, such standards are not required under federal law and therefore the economic impact of such a provision would need to be analyzed under CWC § 13241.

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whether such new provisions are necessary to meet the MEP standard and to protect the water quality of the region. Should it be determined that such provisions are necessary and feasible, the MRP should allow adequate time for the Permittees to comply with any new provisions.²

2. Definition of Regulated Projects

Draft Permit Provision: The draft Permit requires that all projects that create or replace 10,000 square feet or more of impervious surface comply with specific treatment provisions at the time of adoption of the MRP. Beginning the fourth year after MRP adoption, the threshold is lowered to 5,000 square feet.

Comment: Under the existing MS4 Permits, the Permittees have recently begun to regulate new and redevelopment projects that create or replace 10,000 square feet or more of impervious surfaces. We urge the Board to allow the Permittees adequate time to establish these programs and to then evaluate their effectiveness. Lower thresholds should only be implemented if it is determined that such standards are necessary to meet the MEP standard and protect designated beneficial uses. If the lower thresholds are implemented, the considerable regulatory and implementation cost will be born both by the Permittees and the regulated community. Such costs should only be imposed if there is a basis for determining that they are necessary and that the environmental benefits that will flow from such implementation justify the associated cost. We do not believe that there is currently a basis for establishing that a lower threshold of 5,000 square feet is required or feasible.

3. Single-Family Homes

Draft Permit Provision: Under the draft Permit, all single-family homes that create and/or replace 5,000 square feet or more of impervious surface are required to implement one or more stormwater Best Management Practices from a list of BMPs included in an appendix to the Permit. The draft Permit does not currently include the referenced appendix. Permittees are required to implement these provisions within three years of adoption of the MRP.

² Moreover, in the existing permits, the Permittees were allowed to propose for approval by the Regional Board an alternative definition for Group 2 Projects (those creating or replacing 10,000 square feet of impervious surface). To the extent that such an alternative definition would no longer be acceptable, Permittees should be given adequate time to amend their existing programs to comply with the new requirements.

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Comment: We do not understand the basis for imposing such conditions on single-family homes as we are not aware of any study or evaluation that has been completed that documents the water quality impacts associated with such projects. We anticipate that this program would create burdens on the Permittees and the regulated community not in proportion to the environmental benefits that would accrue. Because the list of BMPs was not provided in the draft Permit, we are not currently able to assess the full impact of this provision.

We urge the Board to allow the regulatory regime established in the existing permits to be implemented for a sufficient period of time to allow for meaningful evaluation of its effectiveness and to determine whether additional protections are necessary. Further, because regulation of runoff from single family homes is not required under federal law, the Board must analyze the economic, housing and other impacts associated with such a provision under CWC § 13241 if it determines that such regulation is necessary under state law.

4. Numeric Sizing Criteria

Draft Permit Provisions: The draft permit contains numeric sizing criteria for storm treatment systems that is largely equivalent to the existing permits for volume capacity and flow capacity treatment systems. For treatment systems that use a combination of flow and volume capacity, however, the draft permit requires that such facilities be sized to treat a minimum of 80% of the total runoff over the life of the project. In such cases, the total runoff must be determined using continuous simulation modeling with a minimum of 30 years of rainfall data.

Comment: Our members have found that meeting the numeric sizing criteria established in the existing permits is extremely costly and often difficult to implement. This is particularly true where onsite treatment is required. Given that the proposed treatment requirements would, during the cycle of the draft Permit, apply to smaller projects, we anticipate that the difficulties associated with compliance will be even greater. We again urge the Board to consider maintaining the current thresholds and evaluating the effectiveness of such a program over the five year permit cycle, prior to including any more stringent regulations.

With regard to the sizing criteria, we do not understand the basis for requiring a different runoff calculation for combination flow and volume design treatment facilities. The development of new and innovative treatments, which may rely on both flow and volume design, should be encouraged. Requiring a continuous

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simulation model based on 30 years of rainfall data would create an unjustifiable burden on projects proposing to use such methods.

5. Operation and Maintenance of Stormwater Treatment Systems

Draft Permit Provision: The draft Permit requires Permittees to implement an Operation and Maintenance Verification Program. The program must be fully implemented within one year of adoption of the MRP.

Comment: In the existing permits, the Board recognized that the Permittees may be required to obtain approvals from state and federal agencies to maintain stormwater treatment measures. If the Permittee worked diligently and in good faith to obtain such permits, but maintenance approvals were not granted, the Permittee would be deemed in compliance with this provision. We urge the Board to incorporate such a provision in the MRP as the Permittees and regulated dischargers should not be liable if situations beyond their control prevent them from undertaking or requiring necessary maintenance activities within the permits timeframes.

6. Limitation on Increase of Stormwater Runoff Discharge Rates and Duration (Hydromodification Management)

Draft Permit Provision: The draft Permit indicates that Permittees will need to comply with hydromodification management requirements and references specific requirements for each covered County. The draft Permit does not include the referenced hydromodification plans nor does it reference the standards that shall be used.

Comment: Because the specific hydromodification plans are not included in the draft Permit, we are unable to comment on this provision. We urge the Board, however, to carefully evaluate the need for and the practicability of any proposed hydromodification standard. As was recognized in the existing permits, the impact of hydromodification varies greatly depending on the amount of water discharged, the timing of the discharge, the condition of the receiving waters, the relationship of the discharge point to downstream areas, and the habitat present in the vicinity. Given the extremely high cost associated with such control measures, such measures should only be required where it can be demonstrated that they are necessary to protect beneficial uses. It is critical that these factors be thoroughly evaluated in considering the need for hydromodification controls and the type of any necessary controls.

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7. **Alternative Compliance with Requirement to Install Stormwater Treatment Systems**

Draft Permit Provision: The draft Permit allows Permittees to adopt an Alternative Compliance Program under which regulated projects may meet the permit's treatment requirements in alternative ways. The proposed Alternative Compliance Program allows for off-site treatment only where onsite treatment is shown to be impracticable and no approved Regional Project is available. To demonstrate impracticability, the project proponent must demonstrate that the cost of the treatment measures will exceed 2% of the total project cost. Off-site treatment must provide equivalent treatment or environmental benefits of the specified onsite treatment. Certain redevelopment, brown field, low- or moderate-income or senior-housing, or transit villages that can demonstrate that onsite treatment is impracticable are not required to provide equivalent offsite treatment. Such projects can meet the requisite standards by providing as much onsite treatment as possible.

Comment: The proposed provision goes against what should be the primary goal of the permit, that is, to provide the maximum amount of water quality protection in the most efficient manner. By requiring dischargers to first demonstrate that onsite treatment³ is "impracticable" (as narrowly defined in the draft provision), the permit precludes the use of equivalent or even superior treatment measures that could be provided more cost effectively. We do not see any basis for such a blanket prohibition as there is nothing inherently superior in providing treatment onsite. We believe that such alternative measures, where they provide equal or superior treatment, should in fact be encouraged. As drafted, the permit would have the unintended consequence of requiring additional expenditures on water quality treatment without any additional environmental benefit.

The impact of the draft provision would be most severely felt by infill, redevelopment and brownfield projects as such projects are generally located on sites with significant land use constraints. As was previously recognized by this Board in adopting the existing MS4 permits, such developments are likely to provide reduced water quality impacts and/or other environmental benefits in their own right. Given this finding, we fail to see any justification for this provision and urge the Board and Board staff to reconsider it.

³ We note that the draft Permit does not define "onsite" treatment. To the extent that this provision is adopted, it should be modified to clarify that "onsite" can include an entire planning area owned by different landowners when the area shares infrastructure or is part of a common development plan.

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B. Construction Site Stormwater Pollution Management

1. Legal Authority for Effective Site Management

Draft Permit Provisions: The draft Permit requires Permittees to establish that they have adequate legal authority to obtain effective stormwater pollutant control on all construction sites, regardless of size.

Comment: The draft Permit fails to describe the relationship between the General Construction Permit which regulates stormwater discharges from construction sites disturbing at least one acre or more and the MRP's construction program. We are concerned that the permit provisions could lead to duplicative and potential inconsistent regulation of construction sites, without concomitant benefit to water quality. Because the State Board has determined that federal law only requires regulation of construction site disturbing one acre or more, the Regional Board should consider the economic consequences as well as impact to regional housing of regulation of smaller construction sites as required by CWC § 13241 prior to adopting any such provision.

2. Minimum Required Management Practices

Draft Permit Provision: The draft Permit provides that the Permittees will be required to ensure that all construction sites implement specified minimum management practices. The draft Permit does not include a proposed list of such practices.

Comment: We question whether there is a need for the MRP to address the minimum standards required for large construction sites as such sites are all ready required to meet the MEP standard included in the General Construction Permit and to implement best management practices. For smaller construction sites, we request that the Board specifically evaluate whether such standards are permissible and necessary under state law. We are unable to provide substantive comments on this provision as the draft Permit did not include a proposed list of minimum management practices.

3. Frequency of Inspection

Draft Permit Provision: The draft Permit requires Permittees to inspect construction sites at regular intervals and includes a proposed inspection schedule. Under this schedule, large construction sites would be inspected monthly during the dry season (including full walk through of the site to ensure compliance with minimum required management practices) and once before onset of rainy season.

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During the rainy season, the draft Permit provides that Permittees conduct stormwater specific site inspection once a month and visit large sites three times per week for other inspections that also include some review of stormwater management practices.

Comment: We believe that the inspection schedule included in the permit is excessive and would result in significant costs to the Permittees without an equivalent water quality benefit.

III. Unresolved Issues

The Board's list of unresolved issues appears to accept in many respects that the requirements included in the draft MRP represent the minimum necessary to meet state and federal requirements and then suggests consideration of potentially more stringent provisions. As described above, we do not agree that many of the draft Permit provisions are necessary to fulfill the requirements of the CWA or to protect the state's resources. Following please find a list of additional issues that should be considered and addressed in drafting the MRP.

A. General Unresolved Issues

- 1. Specify provisions necessary to satisfy the requirements of the CWA and the EPA's implementing regulations;**
- 2. Specify requirements necessitated by California law and analyze provisions that go beyond the federal requirements under CWC § 13241.**
- 3. Specify provisions necessary to respond to the *Baykeeper* decision.**

B. Unresolved Issues for Development and Redevelopment Projects

- 1. Threshold Considerations**
 - Specifically identify and evaluate the need for lower thresholds;
 - Consider the practicability, both economically and technologically, of including smaller projects in program (both as it impacts the regulated community and the Permittees charged with oversight and enforcement); and
 - Demonstrate that lower thresholds are required by federal law or evaluate economic considerations and impacts on housing of lowering thresholds as required under CWC § 13241.

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2. Hydromodification Plans

- Identify and evaluate need for hydromodification controls;
- Identify areas where hydromodification is unlikely to impact water quality or designated beneficial uses and establish methods for designating areas where hydromodification controls are necessary to meet federal and state requirements;
- Consider exempting certain types of projects, such as brownfield developments, infill or redevelopment projects; low-, moderate- or senior housing, or transit oriented developments that are likely to be located in urbanized areas and/or result in other significant environmental benefits;
- Evaluate technical and economic feasibility of implementing hydromodification controls and evaluate it against likely water quality benefits; and
- Conduct CWC § 13241 analysis.

3. Single-family Homes

- Consider and evaluate need for regulation of single-family homes;
- Evaluate practicability of regulating single-family homes; and
- Conduct CWC § 13241 analysis.

4. Operation and Maintenance

- Address issue regarding consequences of Permittees failure to obtain necessary permits for operation and maintenance of stormwater treatment facilities despite using best efforts to secure such approvals.

5. Alternative Compliance Programs

- Encourage development of the most efficient and effective water quality treatment standards;
- Develop method for assessing whether offsite treatment will provide equal or superior water quality benefits as compared to on site measures;
- Consider specific site limitations, including level of development in project vicinity, site soils, and other factors in assessing desirability of onsite treatment options;

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- Provide special consideration for projects which provide other significant environmental benefits such as infill, redevelopment, transit oriented or brownfield developments to encourage implementation of such projects; and
- Consider exemptions for low- and moderate-income housing.

C. Unresolved Issues for Construction Inspection Program

1. Relationship Between MS4 Provisions and General Construction Permits

- Identify need to regulate large construction sites under MRP as such projects are regulated under General Construction Permit;
- If need to regulate such projects is identified, minimize duplicative and/or inconsistent regulation of large projects;
- Specify that compliance with terms of General Construction Permit meets requirements of MS4 provisions;
- Identify need to regulate small (under one acre) construction sites; and
- Because regulation of small construction sites not required by federal law, complete CWC § 13241 analysis.

2. Minimum Required Management Practices

- Specify that, for larger construction sites (over one acre), compliance with General Construction Permit requirements also satisfies MRP requirements; and
- If smaller construction sites are regulated, include recognition that the need for stormwater controls will depend on specific site conditions.

3. Use of Numeric Limitations

- Board should continue to rely on BMPs to meet the MEP standard and not incorporate numeric limitations as requested by the Baykeepers. As is thoroughly discussed in the attached letter to the State Water Resources Control Board, numeric effluent limitations are not feasible for stormwater discharges.

IV. Conclusion

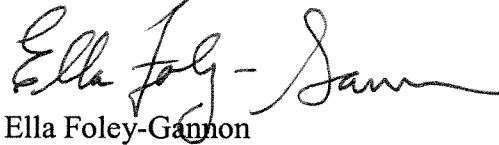
We appreciate having the opportunity to comment on the working draft MRP permit. We are hopeful that the cooperative process now established by the Board to consider

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these important issues will result the identification of effective and cost efficient storm water controls that ensure protection of the beneficial uses of the waters of the State. We look forward to participating in the upcoming working session.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Ella Foley-Gannon".

Ella Foley-Gannon

for SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

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cc: Paul Campos, Home Builders Association of Northern California



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VIA FACSIMILE AND E-MAIL

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Re: Findings of the Storm Water Panel of Experts

Dear Ms. Her:

We write on behalf of the Home Builders Association of Northern California ("Home Builders") to provide comments on how the State Water Resources Control Board ("State Board") should use the recommendations contained in the Storm Water Panel on Numeric Limits Report ("the Report") to improve the National Pollutant Discharge Elimination System Storm Water program. The Home Builders is a nonprofit association representing the interest of over 900 members active in the homebuilding industry in the greater San Francisco Bay Area, as well as the interest of individuals and families seeking to purchase new homes at prices they can afford. Our members are committed to improving water quality and working with the State Board and Regional Water Quality Control Boards ("Regional Boards") to implement programs that are scientifically sound and practicable.

The potential use of numeric limits in storm water permits is a critical issue for our members as the implementation of such limits would result in enormous compliance and regulatory costs. Such costs could be born not only by the building industry, but by homebuyers and the public at large. With the critical housing shortage that exists in California and the significant role that the homebuilding and construction industries play in the California economy, we urge the State Board to carefully evaluate the scientific basis for any such proposal and the benefits which would flow from the use of such standards. As is described below, we believe that implementation of such limits could well result in diverting significant funds from programs that could actually benefit the quality of the waters of the state to monitoring,

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enforcement and litigation expenditures that will have no such direct benefit. Based on the current information available, however, we did not believe that the imposition of numeric limits in storm water permits is needed.

The Storm Water Panel on Numeric Limits ("the Panel") determined that, while it is currently not feasible to establish numeric effluent limits for municipal storm water discharges, it is technically feasible to establish numeric effluent limits for some construction discharges. As is discussed below, we believe that Panel's feasibility analysis for construction discharges represents a gross oversimplification of extremely complex issues and that the determination of "feasibility" can not be supported as it does not involve the consideration of cost or practicability. We urge the State Board to reject the Panel's conclusion with regard to construction related discharges.

I. REGULATORY BACKGROUND

Since the beginning of regulation of storm water discharges under the federal Clean Water Act, Congress and the federal Environmental Protection Agency have recognized that storm water discharges are fundamentally different from other point source discharges in that, *inter alia*, the flow, pollutant types, and constituents are largely uncontrollable, variable, and episodic. It was this recognition that led to the creation of the Maximum Extent Practicable ("MEP") standard for regulating storm water discharges rather than the established numeric effluent limitations standards placed on other point source discharges. The EPA has consistently found that numeric limitations are not necessary or feasible for regulating storm water discharges and in its guidance documents, has recommended the use of Best Management Practices ("BMPs") in lieu of effluent limits. *See Approach for Water Quality Based Effluent Limits in Storm Water Permits* (EPA, Aug. 1996). Further, the EPA regulations specifically allow for the use of BMPs in lieu of numeric effluent limitations. *See* 40 CFR § 122.44(k)(2)&(3) Courts have universally upheld the determination that numeric effluent limitations are not required in storm water permits under federal law. *See, e.g., Communities for a Better Environment v. State Water Resources Control Board* (2003) 109 Cal. App.4th 1089, *rehearing denied* 2003 Cal. LEXIS 7251.

As numeric limitations are not required under federal law, such limitations can only be established following analysis of economic considerations, the need for developing housing within the region, and the other considerations listed in California Water Code Section 13241. *See City of Burbank v. State Water Resources Control Board* (2005)35 Cal.4th 613. Such an analysis has not been completed to date.

The State Board has previously considered whether numeric limitations should be included in municipal, industrial or construction storm water permits and has consistently determined that such limits are unfeasible. This determination has been based on the fact that: (1) the compliance cost associated with established numeric limitations would be substantial

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while the benefits would "be difficult to predict accurately and reasonably;" (2) storm water discharges are inherently variable; and (3) the intermittent and irregular nature of storm water discharges "make it exceedingly difficult to formulate an appropriate numeric effluent limitation which would bear a reasonable relationship to established ambient water quality standards and criteria." SWRCB Water Quality Order No. 91-03, 52-54; *see also* Order No. 91-04. In all subsequently issued storm water permits, the State Board has reiterated its position that it is not feasible to establish numeric limits. *See* Order No. 97-03-DWQ (Industrial General Permit) & Order No. 99-08 (Construction General Permit).

An administrative agency must clearly disclose and adequately sustain grounds for its actions, and further, must "cogently explain why it has exercised its discretion in a given manner." *Motor Vehicle Mfrs Ass'n of the United States v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 49 (1983); *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 94 (1942). Where the agency changes its prior position, it must present a reasoned analysis for doing so. *Motor Vehicle Mfrs.*, 463 U.S. at 57. Should the State Board decide to depart from its consistent and long established determination that numeric limits are not feasible for storm water permits, it needs to provide a clear explanation for its departure and demonstrate that its changed position is based on reasoned analysis.

II. GENERAL COMMENTS ON THE REPORT

We understand that the State Board is currently seeking comments *only* on how it should respond to the recommendations contained in the Report and will not at this time consider any comments on the Report itself. In order to meaningfully respond to the recommendations, however, we believe that it is necessary to provide some comments on the basic structure of the analysis contained in the Report. We look forward to having the opportunity to review the support for the Report's conclusions and to comment on the analysis contained therein.

A. **The Question of the Feasibility of Setting Numeric Limitations Cannot Be Divorced from the Need to Establish Such Limitation.**

The primary question the Panel was asked to address is whether it is technically feasible to establish numeric effluent limitation for municipal, industrial and storm water permits. We believe that this is the wrong starting point for developing a cogent state policy for addressing storm water issues. Rather, the starting point should be an in-depth analysis of whether additional actions are necessary to protect the beneficial uses of the waters of the state and if such actions could be accomplished through the existing storm water permitting programs. It appears that the Panel began with the assumption that additional regulations are required and that the current BMP/MEP program is incapable of providing adequate protection. As described above, the State Board has a long established policy that numeric limitations are not feasible and to date, there is no basis for determining that the well articulated reasons for that finding have changed.

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We question the validity of many of the observations regarding the efficacy of the existing storm water permits included in the Report. For example, it is not accurate to state that "permitting agencies are not accountable for the performance of BMPs." As is evidence by a review of enforcement actions taken by the Regional Boards over the last several years, when adverse conditions result from failure of BMPs, the Regional Boards now frequently take action against not only the developer/owner of the facilities, but also the municipality with jurisdiction over such facilities. It is critical that the State Board accurately analyze the efficacy of the existing permitting strategy before taking any regulatory action to change the existing programs.

Over the last few years, the State Board and the Regional Boards have entered into a second generation of storm water permitting. The most recently issued permits have included significant new regulatory requirements and programs which address many of the "problems with existing effluent limit approach" identified in the Report. For example, the MS4 permits issued over the last several years consistently require thorough documentation of the selection and design of BMPs for new development and significant redevelopment, include prohibitions on hydromodification where such modification could adversely effect downstream uses, require long-term maintenance, funding and monitoring of BMPs, and include an iterative process which must be implemented whenever established water quality standards are exceeded. Similarly, as amended in December of 2002, the General Construction Permit now requires significant new monitoring programs and corrective actions should runoff from a regulated site cause or contribute to the exceedance of an established water quality standards.

Because these second generation permits, which have imposed significant cost on new development and storm water agencies, are still in the infancy, it is not yet possible to evaluate their effectiveness. Therefore, we believe it is premature to consider revisions to the program at this time.

B. The Question of Technical "Feasibility" Cannot Be Assessed without Consideration of Economic Factors.

The Report correctly acknowledges that "technical practicalities and cost-effectiveness" may impact the "feasibility" of addressing pollutants associated with storm water. The Report, however, does not include any specific evaluation of the technical practicability or cost-effectiveness of treatment technologies determined to be "feasible." Without such an analysis, it is impossible to assign meaning to the finding of "feasibility." For example, while it may be possible to remove all or nearly all of a particular constituent of concern from storm water runoff through the use of a certain treatment, we question whether such a treatment can meaningfully be classified as "technically feasible" if the cost associated with it would render it impossible to implement.

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C. The Technical Basis for the Report's Conclusions and Recommendations Is Not Clearly Articulated and The State Board Should Provide the Public with the Data Relied on to Formulate the Report.

The Report does not describe the data on which its analysis is based. This is a critical issue as the need for and feasibility of numeric limits is dependent on such data. Only with accurate data can problems in receiving waters be accurately assessed and causation factors of any such problems be identified. It appears that the primary source of data was the National Stormwater Quality Database. Because of the unique and highly variable conditions found in California, it is questionable whether this dataset is applicable here.

III. REPORT'S RECOMMENDATIONS FOR MUNICIPAL PERMITS

Recommendation: It is not feasible to establish enforceable numeric effluent limitations criteria for municipal BMPs and in particular urban dischargers.

Response: We agree with the Reports conclusions that it is not feasible to establish legally enforceable numeric effluent limits for municipal storm water discharges. As explained by the Panel, this is true because, *inter alia*, the variability in water quality, the diffuse sources of pollutants, the difficulty in determining the level of control needed to protect beneficial uses in specific water bodies, and the problems associated with monitoring and enforcement.

Recommendation: There should be a focus on the selection and design of BMPs.

Response: We agree that there should be an increased focus on the selection and design of BMPs. We encourage the State Board to consider the experience of our members and members of other regulated industries in assessing and identified appropriate BMPs. Our members have decades of on-the-ground experience in designing and implementing storm water controls and can provide information critical to the identification of the most effective and cost-efficient means of achieving regulatory compliance and protecting beneficial uses.

It is important to consider, however, that storm water treatment BMPs are constantly evolving and the development of new and more efficient treatments should be encouraged. We believe that establishing specific selection or design criteria may have the unintended consequence of discouraging such innovation.

Recommendation: Action Levels should be established for catchments not treated by structural or treatment BMPs.

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Response: As was noted above, the most recent storm water permits for municipal systems and construction activities include iterative processes that must be followed whenever a discharge causes or contributes to the exceedance of a water quality standard. These iterative processes are designed to address problem areas in an efficient, effective and collaborative process. We believe that these processes should be allowed to develop before implementation of an alternative means of addressing "bad actor" catchments. Unless data demonstrates that the iterative processes are incapable of addressing such situations, the State Board should not impose additional regulatory regimes.

IV. REPORT'S RECOMMENDATIONS FOR CONSTRUCTION PERMITS

Recommendation: Active treatment technologies make numeric limits technically feasible for pollutants commonly associated with storm water discharges from construction sites for larger construction sites.

Response: The Report concludes that numeric limitations are "feasible" for large construction sites because active treatment technologies produce consistent effluent quality. This is a gross oversimplification of an extremely complex problem. While we agree that active treatment technologies are capable of removing pollutants commonly associated with construction storm water discharges, we do not believe that the mere existence of such technology is a sufficient basis to determine that numeric limitations are feasible. As discussed above, the feasibility of numeric limitations must consider the cost and practicalities associated with implementation of the measures.

The Report discusses a number of concerns and reservations regarding the use of numeric limits for construction storm water permits. These concerns go directly to the question of the feasibility of implementation of such standards and until addressed, render the use of such limits technically infeasible. For example, the Report recognizes that regulated construction sites vary greatly in area of disturbance, the size of the drainage areas, the timing of construction activities, and the quality of the receiving waters and that these factors may influence the practicability and cost-effectiveness of establishing numeric limits. Further, the Report recognizes that there may be negative, unintended environmental consequence of wholesale implementation of active treatment technologies, including unknown impacts associated with the use of chemicals in such systems and the possibility of starving some receiving waters where active treatment systems result in turbidity and TSS levels well below natural levels. We believe that these reservation highlight the great uncertainties inherent in wholesale adoption of active treatment systems and that therefore the mere existence of such systems should not be the basis for establishing numeric limitations.

The Report appears to assume, without providing any support, that it is economically feasible to utilize active treatment systems on large construction sites. Based on our members field experience, we do not believe that this is accurate and request that the Board

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thoroughly study this issue. If the cost associated with implementation of such systems would exceed that which can be born by most construction projects, as we believe to be the case, we do not believe that such systems can be found "feasible."

Recommendation: Technical practicalities and cost-effectiveness may make active treatment technologies less feasible for smaller sites, including small drainages within large sites.

Response: We agree that technical practicalities and cost-effectiveness will render active treatment technologies infeasible on smaller construction sites. We further believe that these same considerations render such technologies infeasible on most large construction sites as well.

Recommendation: The State Board should address whether the issue of numeric limits is prudent, practicable or necessary to more effectively achieve nonpoint pollution control as that question is not address in the Report.

Response: We agree that the State Board needs to fully consider these issues prior to taking any regulatory action. Further, these issues relate directly to the "feasibility" of numeric limitations and therefore should be part of the consideration of this issue.

Recommendation: Where Numeric Limits are not feasible or where they would not apply during designated season or site conditions, the Panel recommends that the Board consider the concept of Action Levels for sites where only traditional erosion and sediment controls are applied or construction sites are considered "stabilized" for the runoff season.

Response: As discussed above, the current General Construction Permit includes an iterative process that must be implemented whenever runoff from a construction site causes or contributes to a violation of a water quality standard. This process addresses the situation where BMPs fail to adequately treat runoff. We do not believe that an additional regulatory program, such as the proposed Action Levels, is required to address adverse conditions associated with discharges of construction storm water. Such an additional program would likely increase regulatory cost without a concomitant water quality benefit.

Recommendation: The Board should consider Numeric Limits or Action Levels for other pollutants of relevance to construction sites.

Response: As discussed above, we do not believe that there is currently a basis for determining that numeric limits or action levels for any pollutants are either desirable or feasible.

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Recommendation: The Board should consider the phased implementation of Numeric Limits and Action Levels, commensurate with the capacity of the dischargers and support industry to respond.

Response: Should the State Board determine that numeric limits or action levels should be established, we concur that there should be a phased implementation.

Recommendation: The Board should set different Action Levels that consider the site's climate region, soil condition, and slopes, and natural background conditions as appropriate and as data is available.

Response: As this recommendation reflects, the need for and feasibility of any treatment method on a particular construction site will be dependent on a number of region and site specific factors. The Report suggests that such factors are not relevant to the establishment of numeric limits because the discharge quality from active treatment systems is "relatively independent of these conditions." However, these factors directly speak to the need for any such treatment and therefore must be considered in establishing numeric limits as well.

Recommendation: The Board should consider whether the Numeric Limits or Action Levels should differ between receiving waters that are water quality limited with respect to turbidity, sediment or other pollutants associate with construction, from those water bodies that are not water quality limited.

Response: Because the goal of the storm water program is ultimately to protect the beneficial uses of the waters of the state, we believe that any effluent limit or action level must consider the quality of the receiving water. Where beneficial uses could be adversely impacted by a certain level of discharge, it may be appropriate to require additional, feasible and efficient treatments. Where there is no such impact, however, there is no regulatory basis for requiring such treatment unless such treatment is need to meet established water quality standards..

Recommendation: The Panel recommends that Numeric Limits and Action Levels not apply to storms of unusual event size and/or pattern.

Response: We agree with this recommendation.

Recommendation: The Board should set Numeric Limits and Action Levels to encourage loading reductions as appropriate as opposed to only numeric limits.

Response: Because the Report's conclusion that numeric limits are feasible is based only on the fact that available active treatment technologies can treat certain constituents of concern, we do not understand the basis for this recommendation. If the Panel considered the

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feasibility of establishing numeric limits to encourage loading reductions, their analysis should be made available for review.

Recommendation: The Panels is concerned that the monitoring of discharges to meet either Action Levels or Numeric Limits may be costly. The Panel recommends that the Board consider this aspect.

Response: We agree that the cost associated with monitoring discharges to evaluate compliance with action levels or numeric limits will be extremely high and must be considered by the State Board in determining the overall feasibility of any such limits. We are further troubled by the fact that expenditures directed towards such monitoring programs are likely to come at the expense of programs designed to treat storm water. Sampling and monitoring will not result in cleaner water.

Recommendation: The difficulty in determining natural background concentrations/levels for all areas of the state could make the setting of numeric limits or action levels impractical from an agency resource perspective.

Response: We fully concur that the State Board must establish natural background concentration prior to establishing any numeric limits or action levels for regulated construction sites. Without such data, the site operator could be made to treat pollutants not related to any construction activity.

V. RECOMMENDED NEXT STEPS

In order to identify practicable, scientifically sound methods for improving the storm water NPDES programs, we encourage the State Board to undertake the following actions:

- Determine that it is not currently feasible or desirable to establish numeric effluent limits for storm water discharges and adopt a policy directing the Regional Boards to not include any such provision in storm water permits.
- Allow sufficient time for the recent revisions to the municipal storm water and construction permits to be implemented and assess the effectiveness of such programs. Only if such programs are not meeting water quality standards should the State Board consider imposing additional requirements.
- Collect and study state and region specific data to allow for an adequate evaluation of the impact associated with storm water runoff and the efficacy of treatment controls.

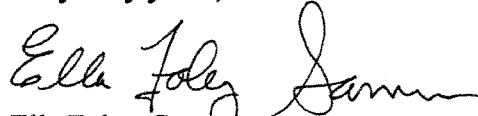
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- Continue to encourage the development of new and efficient storm water treatment controls and provide funding for development of such programs through State Board grants.
- Prior to establishing any new regulatory mechanisms, thoroughly evaluate the cost associated with implementation and the benefit derived from implementation.
- Allow for full public participation in any change to the long-established policy regarding appropriate effluent limitations for storm water permits.
- Should any new policy be adopted, phase in implementation and compliance schedules to allow the regulated community sufficient time to respond to any new requirements.

VI. CONCLUSION

The Home Builders appreciate the opportunity to comment on the recommendations included in the Report and our members look forward to working with the State Board to identify and implement effective and cost efficient storm water controls, sufficient to protect the beneficial uses of the waters of the State.

Very truly yours,


Ella Foley-Gannon

for SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

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cc: Paul Campos, HBANC