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VIA FACSIMILE AND E-MAIL

Ms. Song Her
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State Water Resources Control Board
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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 Boards to implement programs that are scientifically sound and practicable.

The potential use of numeric limits to measure compliance with storm water permits is a critical issue for our member as the implementation of such measure 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 such a system. 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, enforcement and litigation expenditures that will have no such direct benefit. Based

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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 water quality standards. *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 limitations are not feasible for storm water permits, it needs to provide a clear explanation for its departure or demonstrated 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* 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 Reports 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 scientific 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 improving storm water. Rather, the starting point for this analysis 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 permitting approaches. It appears that the Panel began with the assumption that additional regulations are required and that the current BMP/MEP program is incapable of meeting 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 decision have changed.

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C. The Technical Basis for the 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 it based its analysis. This is a critical issue as the need for and feasibility of numeric limitations is dependent on such data. Only with accurate data can problems in receiving be accurately assessed and causation factors of any such problems be identified. It appears that the primary source of data is the National Stormwater Quality Database. Because of the unique and highly variable conditions found in California, it is questionable whether this dataset is applicable.

III. REPORT'S RECOMMENDATIONS FOR MUNICIPAL PERMITS

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

Response: We agree with the Reports conclusions that it is not feasible to establish legally enforceable numeric effluent criteria 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 monitoring and enforcement problems.

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 other regulated communities 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.

Response: As was noted above, the most recent generation of storm water permits for municipal systems and construction activities includes an iterative process that must

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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 for smaller construction sites. We further believe that these same considerations render such technologies infeasible for 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 Level, 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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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 would 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 limitations 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.