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August 30, 2006

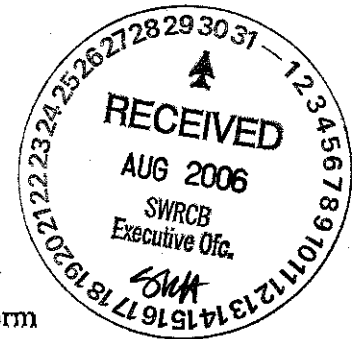
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CLIENT/MATTER NUMBER  
054423-0103

VIA FACSIMILE AND U.S. MAIL

State Water Resources Control Board  
Attention: Song Her, Clerk to the Board  
P.O. Box 100  
Sacramento, California 95814

Storm Water Panel Report  
Deadline: 9/1/06 5pm



Re: Comments Regarding the Use of the Storm Water Panel ("Panel") Recommendations entitled, "The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities" ("Report")

Dear Board Members:

On behalf of the Coalition for Clean Water and a Healthy Economy ("Coalition"), Foley & Lardner LLP offers the following comments on the above referenced Report to the California State Water Resources Control Board ("State Board"). The Coalition represents a diverse range of business interests throughout the greater San Diego region. Members of the Coalition include the San Diego Regional Chamber of Commerce, the Carlsbad Chamber of Commerce, the San Diego Economic Development Corporation and the North Economic Development Council.

**1. The Report Can And Should Be Used As A Starting Point For The Formation Of A Consistent State-Wide Approach To The Development and Use of Numeric Effluent Limitations.**

The Coalition appreciates this opportunity to comment on the Panel's Report and believes that the Report can and should be used as a starting point for the development of a policy that would establish a consistent approach to the development and use of numeric effluent limits in storm water permits. The Coalition is particularly concerned about the varying advantages and disadvantages to businesses in different regions of the State based on differing approaches among the Regional Water Quality Control Boards ("Regional Boards") to this issue. A consistent State-wide policy, grounded in sound technical, economic and legal analysis, would reduce the varying impacts resulting from differing approaches to the application of numeric effluent limitations.

**2. Many Questions Raised By the Panel Require A Considerable Amount Of Further Study And Analysis Prior To Incorporation Into The Regulatory Regime.**

While the Panel's Report can and should be used a starting point for the development of a State-wide policy, many questions raised by the Panel require a considerable amount of further study and analysis prior to incorporation into the regulatory regime. In particular, the use of best

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management practices (BMPs) such as hydromodification and active treatment technologies raises, among others, technical, safety and legal concerns. These BMPs require further study and analysis before their use can be relied upon in developing and establishing numeric effluent limitations.

By way of example, the San Diego Regional Board incorporated "advanced treatment" into its tentative municipal storm water permit (Tentative Order No. R9-2006-001, NPDES No. CAS0108758)<sup>1</sup>. At a staff workshop held on April 29, 2006, the San Diego County Building Industry Association ("BIA") Storm Water Legal Subcommittee requested that staff define the types or characteristics of coagulants the San Diego Regional Board believes are permissible as part of an advanced treatment system.

In response, the San Diego Regional Board<sup>2</sup> stated, in pertinent part, "Chitosan, modified starches, alum, electro-coagulation, carbonic acid, ferric chloride, polyacrylamides, and other organic or inorganic polymers are some of the coagulants and flocculants that may be able to meet this standard with proper implementation and subsequent filtration or post-treatment depending on each construction site's unique characteristics."

The BIA researched these coagulants and flocculants and was unable to identify any literature describing the use of modified starches, electro-coagulation, carbonic acid, ferric chloride or other organic or inorganic polymers as coagulants or flocculants for the treatment of silt and sediment in storm water runoff at construction sites. The three remaining flocculants are Chitosan, alum, and anionic polyacrylamides ("PAM"). Only Chitosan, a patented proprietary product, demonstrated any practical success when used for this purpose. While alum has been demonstrated to be effective in removal of suspended solids and nutrients from lakes and detention ponds, it is not cost effective for drainage areas less than 50 acres. PAM has been shown to be highly effective in controlling soil erosion and sediment on construction sites with soils containing high amounts of fine silt, clay or colloidal soils. However, even the highest grade PAM has residual acrylamide monomers (which is known to the State to cause cancer) in excess of 500 parts per million. Thus, the use of PAM for the treatment of storm water runoff at construction sites would appear to constitute a violation of Proposition 65.

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<sup>1</sup> After conducting a public hearing on the tentative municipal storm water permit on June 21, 2006, the San Diego Regional Board asked its staff to revise and reissue the tentative permit. The revised tentative permit is expected to be re-issued in late August or early September.

<sup>2</sup> It is unclear whether the May 22, 2006 Preliminary Responses to Questions ("Preliminary Responses") represents the opinion of staff or of the San Diego Regional Board itself. However, the preamble to that document states, "This document contains the California Regional Water Quality Control Board San Diego Region's (Regional Board's) preliminary responses to questions raised by the Building Industry Association of San Diego County (BIA) in their April 26, 2006 letter." Based on this statement, it is our understanding that these responses were reviewed and approved by the San Diego Regional Board after having been prepared by staff.



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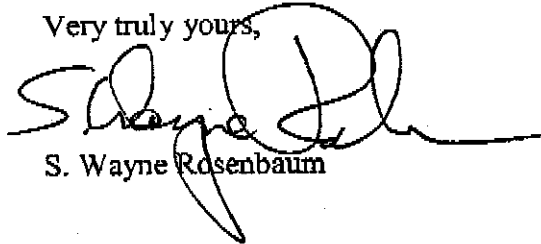
Thus, while multiple coagulants and flocculants may *technically* work in an advanced treatment system, only one has been identified which is demonstrated to be safe, effective and feasible. The imposition of such a BMP on a construction site appears to constitute a facial violation of Section 13360 of the California Water Code which prohibits the issuance of waste discharge requirements which specify the design, location, type of construction, or particular manner in which compliance may be had.

This example highlights the need for further study, analysis and input from stakeholders before best management practices such as advanced treatment systems and hydromodification are used as a basis for the development and establishment of numeric effluent limits.

We recommend that the State Board direct the Regional Boards not to take further action as to any of the Report's conclusions until the State Board has an opportunity to act on them. This will reduce inconsistencies between the Regional Boards with regard to the development and use of numeric effluent limits in storm water permits as well as the potential for litigation that those differing approaches may create.

Thank you for your consideration of our comments. We look forward to future dialogue on this important issue.

Very truly yours,



S. Wayne Rosenbaum

SWR:aao