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September 15, 2011

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VIA Email and Overnight Express Delivery

Chair
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814
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Clerk of the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Re: Board Meeting, September 19-20, 2011
Agenda Item # 9
Consideration of a proposed Resolution adopting emergency regulations revising the core regulatory fee schedules contained in Title 23, Division 3, Chapter 9, Article 1, Sections 2200 and 2200.6, and adding Section 2200.7 of the California Code of Regulations.

Comments on Proposed Fee Adjustments and the "Storm Water Fee Rebalance" Proposal

Dear Chair and Honorable Members of the State Water Resources Control Board:

On behalf of the California Building Industry Association ("CBIA"), we appreciate the opportunity to submit the following comments on the proposed adjustments of the Board's regulatory fee schedules for FY 2011-12. CBIA recognizes the Board's concern for establishing regulatory fees that do not exceed the recoverable costs of necessary program activities as prescribed by Water Code Section 13260.

In this regard, we particularly note that the Staff Report for this item (p. 5) states that the Storm Water Program collected approximately \$22 million in fee revenues in excess of the amounts incurred for program expenditures between FY 2004-05 and FY 2009-10. The confirmation of these excess collections calls for an accounting of the surplus revenues and for timely application of the surplus to the credit of the fee payors. The current proposals for revisions to the regulatory fee schedules should demonstrate compliance with statutory requirements that the Board account for such excess collections in the adjustment of fees. The Staff Report apparently recognizes that such excess fee collections may not be transferred or used for general revenue purposes nor continually carried forward indefinitely as part of "the large reserve balances carried in the Waste Discharge Permit Fund."

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As the Supreme Court recently made clear:

Thus, permissible fees must be related to the overall cost of the governmental regulation. They need not be finely calibrated to the precise benefit each individual fee payor might derive. **What a fee cannot do is exceed the reasonable cost of regulation with the generated surplus used for general revenue collection.** An excessive fee that is used to generate general revenue becomes a tax. (*California Farm Bureau Federation v. State Water Resources Control Board* (2011) 51 Cal.4th 421, 438; see also, Water Code § 13260(f)(1).)

Accordingly, CBIA respectfully requests additional information regarding the proposed application of these excess fee collections as part of the proposed new revisions to the fee schedules, and confirmation that this confirmed \$22 million surplus balance will in fact be applied as a credit for the benefit of the community subject to requirements for payment of these regulatory fees in the course of the proposed adjustments to the Board's fee schedules.

We note with appreciation the inclusion of a "Storm Water Fee Rebalance" option as part of the Staff Report. CBIA would be pleased to support such an approach – applying the surplus fee collections as a credit against the amount of the fees that would otherwise be proposed. The Staff Report, however, does not make clear how much of the reported \$22 million surplus would be involved in its suggestion of the "Rebalance" option. We would respectfully request that further clarification be provided and that the Board provide an accounting for the proposed disposition of the entire \$22 million excess fee collections.

The Staff Report also states that the Board's regulatory fee schedules must be revised and increased substantially, in order to generate additional fee revenues to address an anticipated 37% increase in expenditures for the various WDPF programs. The bases for these dramatic increases in planned expenditures, however, are not detailed in the Staff Report, and further information or justification should be provided.

Accordingly, CBIA respectfully requests that the Board additional information to demonstrate that the proposed new fee schedules include appropriate credit for the confirmed \$22 million excess fee collections, to fully account for that surplus balance, and to continue to monitor and adjust the fee schedules to reflect any other accumulated excess fee collections. It is also requested that additional information be provided regarding the bases for the increased program expenditures, to continue to demonstrate the reasonable relationship between the proposed new fee schedules and the increased program expenditures.

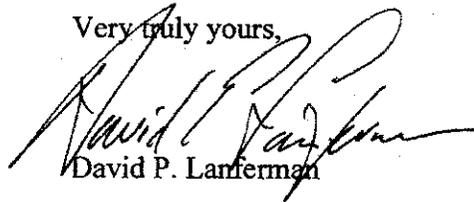
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In the event that the requested additional information and accounting for excess fee collections is provided prior to the Board's action on the proposed new fee schedules, CBIA would look forward to supporting the revised fee schedules. However, CBIA also respectfully reserves its rights, and the rights of its members, to question, appeal, or to seek judicial review of any new regulatory fee schedules that may be enacted without full accounting for surplus fee collections or without additional information demonstrating the appropriate application of those excess collections and the required reasonable relationships between program costs and the eventual new fees.

Thank you for your consideration of these comments and requests.

Very truly yours,



David P. Lanferman

for SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

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cc: California Building Industry Ass'n