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VIA E-MAIL and U.S. MAIL (mrp@waterboards.ca.gov)

MRP Tentative Order Comments
Attn: Dale Bowyer
S.F. Bay Water Board
1515 Clay Street, Suite 1400
Oakland, CA 94612

Re: Comments on Revised Tentative Order

Dear Mr. Bowyer:

The Home Builders Association of Northern California (HBANC) appreciates the opportunity to comment on the Revised Tentative Order (RTO). HBANC has participated extensively in the RTO development process and its members have a significant interest in ensuring that the final Municipal Regional Permit (MRP) is effective, equitable, and legally defensible. We would first like to recognize the time you and other staff members have made available to discuss the initial draft of the TO, and your responsiveness to some of our comments and suggestions.

HBANC has carefully reviewed the RTO and finds it represents a significant improvement from the draft TO in important respects. That said, there are some very important modifications that we continue to believe are warranted. Most relate to concerns that we have previously discussed with you, and are as follows:

1. **The “grandfather” language does not reflect common land use practices and needs to be modified.**

Provision C.3.c.ii would grandfather development projects that “have received final, major, staff-level review and approval for adherence to applicable local, state, and federal codes and regulation before July 1, 2010.” It goes on to define “Final, major, staff-level discretionary review and approval” as “decisions by a public agency’s or governmental body’s *staff* that require the exercise of judgment or deliberation to approve or disapprove a particular development project.” (emphasis added).

One significant problem with this language is the that the event which demarks the universe of projects that would be grandgathered is a not a defined point in any land use decision making process that we are familiar. HBANC is not aware of any local governmental agency in which staff is authorized to approve or disapprove development projects of the kind that would be subject to C.3.c.ii (with the possible exception of single family construction or additions—and these are invariably subject to appeal to a planning commission or city council). With respect to discretionary permits of the type identified on page 23, footnote 2, of the RTO (e.g., tentative maps, development permits, site plan permits), common practice is for agency staff to review an application for completeness and make a recommendation to either the planning commission or city council/board of supervisors to approve, conditionally approve, or deny. Staff, however, does not make any *final* decision on these types of permits nor does it take any action which can be qualified as approving or disapproving such permits. Further, the inclusion of the qualifier "final" in the trigger is itself problematic. In some instances, courts have interpreted grading permits—and even building permits—as discretionary approvals. Clearly, these approvals arise much later in the development process and could therefore subject projects that are on the verge of commencing construction to the new provisions. It is our understanding that this is not the result the RTO intends. Finally, the reference to local agency determination of “adherence to applicable local, state, and federal codes” is vague and impracticable. Again, there is no defined point in any land use approval process with which we are familiar that calls for such a determination to be made.

The inconsistency between the RTO's grandfather language and standard local government land use practice, as well as the reference to determining local, state, and federal law compliance, would give rise to extensive confusion and probably litigation to resolve the conflicts and provide clarification. We also anticipate that it would lead to inconsistent application and potentially inequitable results. Based on our discussions with staff and the *Comments and Responses Summary – Municipal Regional Stormwater Permit (MRP) – November 2007 Tentative Order*, we understand that staff's concern is that utilizing the standard "application deemed complete" trigger for grandfathering projects allows projects that have been deemed complete under the Permit Streamlining Act and have not undergone any review to be exempt from the new MRP requirements. Staff explained that this situation is particularly problematic where such projects do not go forward for a significant period of time. We believe that these issues can adequately be addressed by inserting the following language into Provision C.3.c.ii:

For development projects for which an application has been deemed complete before July 1, 2010, the requirements of Provision C.3.c.i shall not apply so long as the project proponent is diligently pursuing the project. Diligent pursuance may be demonstrated by submittal of further applications, plans, or other documents required for any necessary approval(s) of the project by the Discharger. If in any twelve (12) month period following July 1, 2010, the applicant fails to take any action to obtain necessary approvals from the

Discharger, the Project will then be subject to the requirements of Provision C.3.c.1. For public projects for which funding has been committed and construction is scheduled to begin by July 1, 2011, the requirements of Provision C.3.c.i shall not apply.

We believe that this language would meet the dual goals of ensuring that projects which have undergone design and review are not unfairly subject to a new set of regulations that could require significant revisions while at the same time ensuring that the exemption is limited to projects which are being actively reviewed and considered by one of the local jurisdictions. If the Board does not concur that this language is adequate to ensure that exempted projects are far enough along in the permitting process to warrant exemption, we request that the MRP utilize recognizable point in stand land use approval practices as the trigger. Following is language which we believe, while not including all projects that have undergone sufficient work to warrant being exempted, would allow for consistent and clear application and would avoid the problems described above:

For development projects on which an application has been deemed complete and a public notice has been issued or public hearing considering the merits of the project has been held before July 1, 2010, the requirements of C.3.c.i shall not apply. For public projects for which funding has been committed and construction is scheduled to begin by July 1, 2011, the requirements of Provision C.3.c.i shall not apply.

2. **The projects eligible for alternative compliance pursuant to C.3.e.i(2) should be expanded.**

The RTO effectively limits the projects that may use alternative compliance, such as participation in a regional facility. As we read the RTO, a project must either be Infill, Redevelopment, or a non-Infill/Redevelopment project that is adjacent to another non-Infill/Redevelopment project. For the latter projects, the alternative compliance is limited to a joint facility with one adjacent project. We believe this limitation is too limited and insufficiently supportive of regional—or even watershed based—solutions, and is therefore inconsistent with language in State Board precedential Order WQ 2001-15 suggesting that MS4 permits must allow sufficient flexibility to promote regional solutions. HBANC suggests that the limitation on the type of projects that can utilize regional or watershed solutions be removed and instead the RTO should define a set of procedures and criteria under which a project may receive approval to utilize a regional or watershed solution.

3. **The requirement for active treatment in C.4 should be eliminated.**

The provisions regarding requirements for active treatment in C.4 involve issues currently being discussed at the State Board in the context of the reissuance of the State General Construction Permit. That discussion has raised several potentially significant unintended

environmental consequences of this requirement. HBANC believes the Regional Board should not move forward with this requirement while the issue is before the State Board. We do not believe active treatment provision is required to make the MS4 permit legally adequate and there are sound policy reasons for not including it in the RTO.

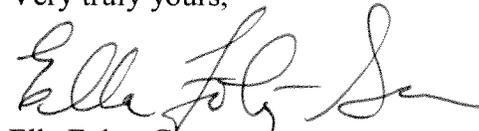
4. Technical corrections.

The following technical corrections are necessary to achieve internal document consistency:

- On p. 30, in the second line of (e), “as practicable” should be added after “runoff”
- On p.34, in **the** last line of (1), “as possible” should be replaced with “as practicable”

Again, we appreciate the considerable effort that staff have devoted to developing this MRP and we thank you for the continued opportunity to comment on this permit.

Very truly yours,



Ella Foley-Cannon

for SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

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cc: Paul Campos, HBANC