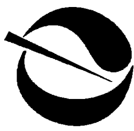

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Item 10
Supporting Document No. 1.C

TO: Mr. David King, Presiding Officer for Prehearing Proceedings
Tentative Cleanup and Abatement Order No. R9-2010-0002

Honorable San Diego Water Board Members

FROM: Christian Carrigan
Senior Staff Counsel
State Water Resources Control Board
Office of Enforcement

San Diego Regional Water Quality Control Board Cleanup Team

DATE: July 9, 2010

SUBJECT: CALIFORNIA ENVIRONEMNTAL QUALITY ACT ANALYSIS FOR SHIPYARD SEDIMENT PROJECT; TENTATIVE CLEANUP AND ABATEMENT ORDER R9-2010-0002

I. ISSUES PRESENTED.

A. Under the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.; "CEQA"), may the San Diego Water Board, as lead agency, use a categorical exemption for adopting Tentative Cleanup and Abatement Order R9-2010-0002 (the "CAO Project") when it differs in scope and detail from the class of projects ordinarily within the category, and when there is substantial record evidence that the CAO Project may have significant adverse environmental impacts?

B. Under CEQA, may the San Diego Water Board defer environmental review and preparation of an environmental impact report ("EIR") for the CAO Project until after it has approved the CAO Project and prepared a specific Remedial Action Plan?

II. SHORT ANSWERS.

A. Because the CAO Project presents unusual circumstances both with respect to its scope and unique characteristics, and because substantial evidence in the record indicates the CAO Project may cause potentially-significant adverse environmental impacts, it is not categorically exempt from CEQA.

B. Because the CAO Project has specific enough detail to prepare an adequate project description for an EIR under CEQA, and because waiting until the Remedial Action Plan is formulated to undertake environmental review could foreclose the San Diego Water Board's and the public's consideration of project modifications, project alternatives and the development of feasible mitigation measures, the San Diego Water Board should prepare the CAO Project EIR now, rather than wait for a specific Remedial Action Plan to be developed.

III. LEGAL ANALYSIS.

A. The Shipyard Sediment Cleanup and Abatement Order Is Not Categorically Exempt from CEQA.

CEQA requires an EIR to be prepared whenever it can be fairly argued on the basis of substantial evidence in the record that a project may have a significant effect on the environment. (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75.) Public Resources Code section 21084(a) authorizes the Secretary of Resources to develop a list of classes of projects that are to be categorically exempt from the requirement to prepare environmental documents under CEQA after a determination that such classes of projects ordinarily will not have a significant effect on the environment. The Secretary's list includes, in pertinent part: (1) actions by regulatory agencies for the protection of natural resources; (2) actions by regulatory agencies for the protection of the environment; and (3) enforcement actions by regulatory agencies. (14 Cal. Code Regs., §§ 15307, 15308, 15321, respectively.) As Designated Party BAE Systems accurately points out in its January 21. 2010 comment letter, the San Diego Water Board has routinely used these categorical exemptions when taking regulatory actions, including when it issues cleanup and abatement orders. (1/21/10 BAE letter, p. 1.) However, a lead agency may not use a categorical exemption if there is a reasonable possibility that the project will have a significant effect on the environment due to unusual circumstances. (14 Cal. Code Regs., § 15300.2(c); *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52

Cal.App.4th 1165, 1198-1199.) The two-part test for when a categorical exemption may not be used articulated by the *Azusa* court is whether the circumstances of a particular project differ from the general circumstances of the projects covered by a particular categorical exemption, and whether those circumstances create an environmental risk that does not exist for the general class of exempt projects. (*Id.*, at 1207.)

For the Shipyard Sediment Cleanup and Abatement Order Project (the "CAO Project"), over 140,000 cubic yards of contaminated sediments will be removed from San Diego Bay with dredge buckets. This type of physical disturbance to the environment, including, but not limited to, sediment movement, air quality impacts from diesel emissions from dredging equipment, and potential impacts to traffic patterns and noise from equipment operations in the area where the sediments will be dewatered and from which they will be transported, differs considerably from the typical agency enforcement action or action to protect natural resources or the environment. In fact, the Cleanup Team is informed and believes that this CAO Project will be larger in scope than all previous San Diego Bay sediment dredging cleanups combined. As the San Diego Water Board is no doubt well-aware, the "typical" cleanup and abatement order commands a responsible party to develop a plan to clean up its wastes from waters of the state, or from where they are likely to be discharged to waters of the state, and does not contain a specific method for achieving this objective. The CAO Project is considerably different in scope and detail, and the potential for significant impacts to the physical environment from CAO Project activities is manifest, and documented in the December 22, 2010, Draft Technical Report and the Cleanup Team's December 22, 2009 Initial Study. Accordingly, an EIR should be prepared for the CAO Project.

B. CEQA Analysis Must Occur **Before** The San Diego Water Board Can Approve The CAO Project.

The requirement to prepare an EIR is the "heart" of CEQA. (*San Franciscans for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal.App.3d 61, 72; 14 Cal. Code Regs., § 15003(a).) The EIR serves as an "environmental alarm bell" alerting the public and its responsible officials about a proposed project's potential impacts to the physical environment "**before** they have reached the ecological point of no return." (*City of Carmel-By-The-Sea v. Board of Supervisors* (1986) 183 Cal.App.3d 229, 241, emph. added.) The purpose of CEQA is to compel government to make decisions with environmental consequences in mind. (*Bozung v. Local Agency Formation Commission* (1975) 13 Cal.3d 263, 282.) As the California Supreme Court has held, "EIR's [sic] should be prepared as early in the planning process as possible to enable environmental consequences to influence project, program or design." (*Id.*, at 283-284.) Indeed,

the Legislature has commanded that "information relevant to the significant effects of a project, alternatives, and mitigation measures which substantially reduce the effects shall be made available as soon as possible by lead agencies[.]" (Pub. Resources Code, § 21003.1(b).)

San Diego Coastkeeper and Environmental Health Coalition argue in their June 24, 2010 Response to Cleanup Team's Motion to Extend Discovery Deadlines ("Coastkeeper/EHC 6/24/10 Response"), that "the hearing on the Tentative CAO must move forward before the environmental analysis CEQA requires can be completed." (Coastkeeper/EHC 6/24/10 Response, p. 4, emph. original.) Coastkeeper/EHC go on to quote BAE's January 21, 2010 letter, arguing that "'there must be a clear and definite description of the project to be analyzed'" in the EIR, and that project description "will be developed *after* the Regional Board adopts the Tentative CAO[]" in the form of the Remedial Action Plan. (*Ibid.*, emph. original.) Neither Coastkeeper/EHC nor BAE cite any legal authority for this remarkable argument, and it is not only inconsistent with Coastkeeper/EHC's stated objective to "see the bay cleanup start as soon as possible" (6/24/10 Response, p. 6.), but also flawed.

First, the consultants interviewed by the Cleanup Team have estimated it will take 40 weeks to complete the environmental review process for the CAO Project. Simple mathematics indicates it will be comparatively faster to begin that 40-week process now, and to allow it to run concurrently with the public review period for the Tentative CAO itself, than it will be to complete public review on the Tentative CAO, hold a hearing on and adopt the CAO, prepare a Remedial Action Plan, and then begin to undertake environmental analysis under CEQA. Even if starting the cleanup "as soon as possible" were the only objective, which it is not, it would still be better to begin preparation of the EIR now, rather than to wait six months or more until hearings can be held and a Remedial Action Plan can be prepared before beginning environmental review.

Second, when directly asked by the Cleanup Team whether a specific project description could be prepared for the CAO Project EIR based on the current Tentative CAO and Draft Technical Report, all the CEQA consultants responded affirmatively. It should also be noted that the California Department of Toxic Substances Control, California State Lands Commission, California Native American Heritage Commission and the Sierra Club all submitted comments to the San Diego Water Board on its Notice of Preparation of EIR for the CAO Project, and none suggested that there is an insufficient basis for preparing a project description for the CAO Project EIR. Moreover, the Secretary's CEQA Guidelines caution that a project description "should not supply extensive detail beyond that needed for evaluation and review of the environmental impact." (14 Cal. Code

Regs., § 15124.) This guidance is consistent with CEQA's command that environmental review should shape a project.

Finally, and perhaps most importantly, when the CEQA process works properly, it often results in project changes and/or the adoption of mitigation measures that reduce the severity of environmental impacts. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 736-737.) Environmental analysis under CEQA requires that a project be open for public discussion and subject to modifications **before** it is approved. (*Concerned Citizens of Costa Mesa, Inc. v. 32nd District Agricultural Association* (1986) 42 Cal.3d 929, 936.) A remedial action plan is a very specific document. For example, it is likely to specify a precise location for sediment dewatering, whether sediment will be disposed of at a landfill or in a confined aquatic disposal facility, the method of transporting sediments to their ultimate disposal location and many other details. Waiting until the Remedial Action Plan for the CAO Project is prepared to undertake environmental review could foreclose public participation in, and the San Diego Water Board's consideration of, the development and analysis of project alternatives, project modifications, and the development and analysis of feasible mitigation measures with respect to all of these and even unforeseen details. (*See e.g., Kings County Farm Bureau, supra,* 221 Cal.App.3d at 736-737 ["new and unforeseen insights may emerge during investigation, evoking revision of the original proposal."].) The better approach to environmental review is to enable the EIR on the CAO Project to influence the design of the Remedial Action Plan, consistent with *Bozung's* instruction that project approvals should be made "with environmental consequences in mind." (*Id.*, at 282.)

The Cleanup Team believes, consistent with *Bozung* and *City of Carmel-By-The Sea*, that the San Diego Water Board should sound "the environmental alarm bell" and prepare the EIR now – early in the planning process – so that the public can participate in the consideration and development of project alternatives, project design and mitigation measures, and so that the CAO Project's environmental consequences can influence the Project and its design as appropriate. If CEQA review is deferred until the Remedial Action Plan is prepared, the San Diego Water Board already may have reached the "ecological point of no return."