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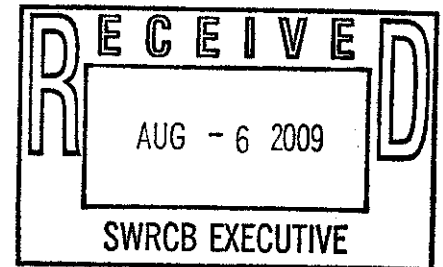
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August 6, 2009

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**VIA OVERNIGHT MAIL AND EMAIL**

Honorable Members, State Water Resources Control Board  
c/o Ms. Jeanine Townsend, Clerk to the Board  
State Water Resources Control Board  
1001 I Street, 24th Floor [95814]  
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Re: Petition of Ken Berry and California Citizens for Environmental Justice (Cleanup and Abatement Order No. R2-2008-0095 for City of Richmond, United States Department of Defense, Department of the Navy, Former Point Molate Naval Fuel Depot, Richmond, Contra Costa County)/Comments to A-1972, September 1, 2009, Board Workshop

Dear Honorable Board Members:

On behalf of the City of Richmond ("City"), we appreciate the opportunity to submit written comments on the proposed draft order in the above-referenced matter ("Draft Order"). We have reviewed the Draft Order as well as the July 31, 2009 comments on the Draft Order filed by the San Francisco Bay Regional Water Quality Control Board ("Regional Board").

As the City previously indicated in its Response to Petition A-1972, filed by Petitioners Ken Berry and California Citizens for Environmental Justice, the City is named (in addition to the Navy) as a discharger in the Regional Board Cleanup and Abatement Order ("CAO") No. R2-2008-0095, and thus is an interested party in this proceeding. The City is named in the CAO as a result of its ownership of approximately 373 acres of Point Molate that were transferred to the City in September 2003 and that includes petroleum underground storage tank sites which have not yet received closure from the Regional Board. The remaining approximately 40 acres of Point Molate still owned by the Navy are being considered for early transfer with privatized remediation, whereby title to the 40 acres would be transferred from the Navy to the City prior to completion of the ongoing remediation of hazardous substances and petroleum contamination, in conjunction with a grant from the Navy of \$28.5 million to the City to complete the cleanup of both the 40 acres to be transferred and the acreage already owned by the City.

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The issuance of the CAO is one of the critical components in completing this transaction, and the City therefore strongly supported the CAO's issuance and the City being identified as a named discharger.

The issue presented by Petition A-1972 is whether the Regional Board was required under the California Environmental Quality Act ("CEQA"), Cal. Pub. Res. Code §§ 21000 et seq., to conduct environmental review of the 2008 Order at the time of its adoption. In its proposed Draft Order granting the Petition, the State Board concludes that because the Former Point Molate Naval Fuel Depot ("Site") is included in the "Cortese List," *see* Cal. Pub. Res. Code § 21084(c); 14 C.C.R. § 15300.2(e), it is not eligible for a categorical exemption under CEQA, Draft Order at 4. As a result, the Regional Board's finding that its CAO was categorically exempt under 14 C.C.R. § 15321 "is not proper and violates CEQA." *Id.*

However, the Draft Order goes on to state that "[w]hile the Site's placement on the Cortese List precludes the use of categorical exemptions, it does not preclude the use of statutory exemptions or the preparation of environmental documents in order to comply with CEQA." *Id.* Accordingly, "[u]pon remand, the San Francisco Bay Water Board may determine that the CAO's adoption is eligible for a statutory exemption or may prepare an environmental document." In a footnote the Draft Order adds:

"In its response to this petition, the San Francisco Bay Water Board asserts that 'even if the categorical exemption does not or cannot apply, the CAO falls within the general common sense exemption that CEQA applies only to projects which have the potential for causing a significant effect on the environment.' While this assertion may or may not be correct, the State Water Board is not in a position to make that determination. Because of the narrow legal grounds upon which the petition was filed, the administrative record was not requested by the State Water Board. No party objected to this procedure."

*Id.* at 4 n.18.

In its July 31, 2009 comments, the Regional Board correctly explains that the common sense exemption, *see* 14 C.C.R. § 15061(b)(3), is not, as a technical matter, a statutory or categorical exemption under CEQA. *See* Regional Board Comments at 2-3 (citing *Murphy Ranch Co. v. Solano County Airport Land Use Comm'n*, 41 Cal. 4th 372, 380 (2007); 1 Kostka & Ziscke, *Practice Under the California Environmental Quality Act*, § 5.3 (Cont. Ed. Bar 2d ed. 2008)). Thus, by stating that the Regional Board "may determine that the CAO's adoption is eligible for a statutory exemption or may prepare an environmental document," the State Board appears to have eliminated as a possibility the Regional Board's assertion of the common sense exemption for its CAO.

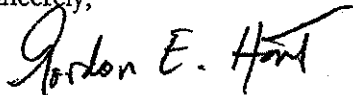
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We do not believe the State Board intended this result. In their comments on Petition A-1972, both the Regional Board and the City argued that the common sense exemption applies to the CAO. For its part, the Regional Board argued that "even if the categorical exemption does not or cannot apply, the CAO falls within the general common sense exemption that CEQA applies only to projects which have the potential for causing a significant effect on the environment." Similarly, the City explained that "[a] project that does not qualify for a statutory exemption or a categorical exemption nonetheless may be found exempt under a provision in the CEQA Guidelines known as the "common sense exemption," and that the CAO was such a project.

In its Draft Order, the State Board acknowledges these arguments and expressly declines to rule on them. *See* Draft Order at 4 & n.18. Indeed, the only exemptions the Draft Order prohibits the Regional Board from asserting are "categorical exemptions." *Id.* at 4. As a result, *both* statutory exemptions *and* the common sense exemption are available to the Regional Board on remand, despite the Draft Order's reference to "statutory exemptions" and "environmental documents." *Id.* And, as the Regional Board explains in its July 31, 2009 comments, the common sense exemption does indeed apply to the CAO.

To clarify this confusion, the City respectfully requests that the Draft Order be amended to state that the Regional Board's assertion of the Section 15321 categorical exemption is vacated and remanded for compliance with CEQA. This more general statement will, as the Regional Board requests, allow the Regional Board to exercise any of its available options for complying with CEQA. Alternatively, and at a minimum, the City requests that the Draft Order be amended to state that the Regional Board may, on remand: (1) assert the argument that its adoption of the CAO is not a "project" under CEQA, (2) assert one or more statutory exemptions *and/or* the common sense exemption, or (3) prepare environmental documents.

Sincerely,



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of PAUL, HASTINGS, JANOFSKY & WALKER LLP