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BEFORE THE

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

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| IN THE MATTER OF CLEAN WATER ACT SECTION 401 WATER QUALITY CERTIFICATION AND ORDER FOR THE LOWER NEWPORT BAY CONFINED AQUATIC DISPOSAL CONSTRUCTION PROJECT (SARWQCB WDID # 302021-09)<br><br>PETITONER<br><br>PACIFIC TREASURE FOUNDATION | PETITION FOR RECONSIDERATION, AND RESCISION OF THE APPROVAL OF THE WATER QUALITY CERTIFICATION 302021-09 BY THE REGIONAL WATER QUALITY CONTROL BOARD, SANTA ANA REGION |

Pursuant to California Water Code section 13320, subdivision (a) and California Code of Regulations, title 23, section 2050, et seq. Pacific Treasure Foundation respectfully petitions the State Water Resources Control Board for review of a Clean Water Act Section 401 Water Quality Certification And Order For The Lower Newport Bay Confined Aquatic Disposal Construction Project (SARWQCB WDID # 302021-09) and issued by the Executive Officer of the California Regional Water Quality Control Board, Santa Ana Region.

1. **Name, address, and telephone number of petitioner.**

Thomas Napoli on behalf of Pacific Treasure Foundation and certain residents of the City of Newport Beach and Orange County
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2. **The action or inaction of the Regional Water Board being petitioned, including a copy of the action being challenged or any refusal to act, if available.**

On August 26, 2012 The City of Newport Beach (Permittee, or City) submitted an application requesting Clean Water Act (CWA) section 401 Water Quality Certification action

and Order (Order) for the Lower Newport Bay Confined Aquatic Disposal (CAD) Construction Project (Project). On September 24, 2021 Santa Ana Regional Water Quality Control Board staff (Regional Board staff) issued a Notice of Incomplete Application (NIA). On October 26, 2021 the Permittee submitted additional material responding to the NIA. On December 31, 2021. The application was deemed complete by Regional Board staff. However, on April 25, 2022 Regional Board staff requested additional information "necessary to supplement the contents of the complete application" and the Permittee responded on April 25, 2022. On September 30, 2022 the Santa Ana Regional Water Quality Control Board (Regional Board) issued a Clean Water Act Section 401 Water Quality Certification and Order for the Lower Newport Bay Confined Aquatic Disposal Construction Project (SARWQCB WDID # 302021-09) (See Exhibit A).

**3. The date the Regional Water Board acted, refused to act, or was requested to act.**

On September 30, 2022 the Regional Board issued a Clean Water Act (CWA) Section 401 Water Quality Certification and Order for the Lower Newport Bay Confined Aquatic Disposal Construction Project (SARWQCB WDID # 302021-09), which is the subject of this Petition to Reconsider and Rescind.

**4. A statement of the reasons the action or inaction was inappropriate or improper.**

See the Statement of Points and Authorities, number 7 below.

**5. How the petitioner is aggrieved.**

The Petitioners are residents of the City of Newport Beach (City) as well as residents of the County of Orange, California surrounding communities. The Petitioners utilize the Newport Bay (Bay or Harbor) for recreational purposes that involve direct contact with the water and

sediments in the Bay as well as consuming fish caught within the Bay. As detailed more fully in the following Memorandum of Point and Authorities provided below, the Regional Board water quality certification impermissibly authorizes the disposal of contaminated sediments, including sediments that may possibly meet characteristics of California Hazardous Waste, to an unpermitted solid waste disposal facility in the Bay in violation of the conditions of the City of Newport Beach's legislative submerged and tidelands grant (Land Grant). Also, the United States Army Corps of Engineers (Corps) failed to follow proper procedures in granting the Clean Water Act section 404 individual permit to the City. As such, Petitioner may come in contact with persistent bioaccumulative substances that pose a risk to Petitioner's as well as a risk to the environment.

**6. The action the petitioner requests the State Water Board to take.**

Petitioner requests that, consistent with Sections 3869(a)(3)-3689(a)(4), the State Water Resources Control Board (State Board) reconsider and rescind the above listed action until such time as the Santa Regional Board or Permittee can demonstrate that the Project complies with the requirements of the California Health and Safety Code and Title 22 of the California Code of Regulations regarding the management of Hazardous Waste, and until the Santa Ana Board and Permittee can demonstrated the City has authority under its Land Grant to build a Solid Waste Disposal facility within the Harbor and lastly, that the Permittee and Corps has properly conducted studies required for the development of a CAD within a recreational harbor in California.

**7. A statement of points and authorities for any legal issues raised in the petition, including citations to documents or hearing transcripts that are referred to.**

As stated previously, the City submitted an application to the Corps or an individual permit under Section 404 of the Clean Water Act to allow the City to construct a Confined

Aquatic Disposal (CAD) facility. The City also submitted an application to the Regional Board for a CWA section 401 certification for the Project. Petitioners submitted verbal and written comments throughout the multiple public comment periods during the 401-certification process and voiced concerns over the Corps decision to allow the use of a recreational harbor as what amounts to a Solid Waste Disposal site. This site would sit under submerged lands within Newport Harbor in the City of Newport Beach. The petitioners have 3 reasons why we believe that reconsideration or recission of the Santa Ana Regional Water Quality Control Board Clean Water Act Section 401 and Order is warranted. First, the sampling conducted by the City though its contractor, Anchor QEA (Anchor), was inadequate to correctly characterize the extent of contaminated sediments sought to be disposed of in the CAD. Second, the City obtained ownership of the lands underneath the Harbor through a submerged lands legislative grant that does not expressly provide for the use of the harbor as a solid waste disposal facility, and the use of the Harbor for a solid waste disposal facility conflicts with express provisions of the City's submerged lands grant and may also run afoul of prohibitions against the gift of public funds. Third and finally, the levels of mercury found in the limited sampling conducted by the City and its consultant create an inference that the mercury levels contained in the sediments may meet or exceed levels requiring regulation as Hazardous Waste. The following detail our concerns.

I. First, the sampling conducted by the City was insufficient to reasonably characterize the sediments, and the mistaken assumption that the CAD would be uncapped for only three months, when in fact it would remain uncapped for two years, resulted in a skewed and unrealistic characterization of the Sediments.

Petitioners participated during multiple phases of the Corps DMMT process and the Regional Board CWA 401 process (See Exhibit B). Petitioners have expressed concerns over the sampling design that was used to characterize contaminated sediments in the Harbor. (See

attached comment letters). CAD specific sampling design and quality assurance plans were not posted during the 401-certification review. However, there are technical manuals available online that govern how the Corps and EPA are to develop a sampling plan and quality assurance project plan and those consulted by Petitioner.

Two documents used by the Corps and EPA for sampling plan design and quality assurance are Environmental Protection Agency (EPA) Guidance on Choosing a Sampling Design for Environmental Data Collection for use in Developing a Quality Assurance Project Plan, EPA QA/G-5S. (See https://www.epa.gov/quality/guidance-choosing-sampling-design-environmental-data-collection-use-developing-quality), which will be referred to as the "EPA Sampling Design Guide", and the EPA Evaluation of Dredged Material Proposed for Ocean Disposal, Test Methods, referred to as "Green Book". Both of these manuals detail how to prepare robust sampling and analysis plans, including quality assurance measures. According to the EPA, "The sampling design is a fundamental part of data collection for scientifically-based decision making. A well-developed sampling design plays a critical role in ensuring that data are sufficient to draw the conclusions needed." (EPA Sampling Design Guide). When looking to develop a sampling plan, "There are two main categories of sampling designs: probability-based designs and judgmental designs. **Probability-based sampling designs** apply sampling theory and involve random selection of sampling units" and "**Judgmental sampling designs** involve the selection of sampling units on the basis of expert knowledge or professional judgment" *id.* "When using **probabilistic sampling**, the data analyst can draw quantitative conclusions about the sampled population" but when "When using **judgmental sampling**, statistical analysis cannot be used to draw conclusions about the target population" *id.* It appears that the Corps and the City used judgmental sampling to prepare the sampling and quality assurance plan for the CAD project, and no reasonable qualitative conclusions can be drawn from the analysis. The exact location, depth and lateral extent

of contaminate levels cannot be determined based on the discreet samples taken within the bay. Those samples are only representative of themselves.

The Green Book also emphasizes the importance of sample design: "A well-designed sampling plan is essential when evaluating the potential impact of dredged material discharge upon the marine environment. Before any sampling is initiated, the sampling plan has to be tailored to meet clearly defined objectives for individual dredging operations". The Green Book also notes that "The method of dredging, the volume of sediment to be removed, and the horizontal and vertical heterogeneity of the sediment are key to determining station locations and the number of samples to be collected for the total dredging operation and for each project segment."

The record contained no information on the source of the contaminants, or how the contaminants entered the Bay, and how much and when the deposition occurred. Sampling has been based on screening level review of sediment contaminations in the Harbor. The project proponents have used this data to identify areas that may have contaminants of concern. The exact location of contaminated sediments in the bay cannot be known, only guessed at, until the sources of the contaminants are identified and movement of the contamination through the harbor can be estimated.

Petitioners and those working with Petitioners have repeatedly voiced concerns over the insufficiency of the sampling that was done to characterize the lateral and vertical extent of contamination in areas that have been shown, through prior testing, to have high levels of contamination. The sediment testing dataset only consisted of roughly one core sample every 400 ft., and with the exception of the Turning Basin, only 1 to 2 cores in the SC-DMMT determined contaminated areas. Petitioners voiced concerns over the potential for significant sediment contaminant heterogeneity within areas of contaminated material, due to the nature of the source of the contaminants and the dates and amounts of deposition of these contaminants into the Bay.

In addition to the lack of spatial representation, there was a lack of vertical characterization. Core data was not split (i.e., divided) along strata or sections of the dredge depths (dredge vs over dredge) to identify where in the sediment column the contaminants exist. This data is critical to the understanding of the source of contamination and if it is from recent or historical activities in the Bay. Split analysis also helps identify potential disposal alternatives through dual management options which may be realized only after higher resolution sampling of the areas of unsuitability.

There were unsuitable areas that were analyzed, and these areas represent places in the Bay where the sediment is too 'dirty' to be disposed of offshore, therefore more information on what is being exposed by dredging needed to be collected and analyzed by the City. Sediment data on the newly exposed bottom surface layer (i.e., Z-layer) also requires evaluation. While samples of the Z-layer were taken in 2019, they were never analyzed as part of this project, even after a determination of unsuitability was made. Questions as to the quality of the newly exposed bottom is still unanswered or analyzed. The decision to not test the Z-layer samples was singularly made by the City. Failure to address the quality of the newly exposed Bay bottom will negate any protections and management improvements provided by the state issued sediment TMDL, which names the City as the responsible party.

The Petitioners are also concerned over a statement made by the City that "*The composite sample from the Turning Basin represents the most contaminated material proposed for placement within the CAD site, with the highest mercury and PCB concentrations compared to any other material that was unsuitable for ocean disposal. All this material is proposed for placement within the CAD site and was tested independently of any material that was determined*

*suitable for ocean disposal. This material represents the worst-case scenario, and it was not blended with suitable material for testing.*"

This approach is not consistent with any testing guidance for CAD, open ocean, or nearshore placement. The sediment testing data from the Turning Basin is not representative of the material from the Main Channel or Newport Channel, and disposal suitability cannot be determined based on proxy analysis of sediment from other areas in the Bay. Moreover, the Turning Basin also suffers from a severe lack of sampling and only has 5 samples over a more than ½ mile area, which results in a single sample per 500-ft.

This City doesn't know what the worst-case scenario is, because they have not conducted adequate sampling. Recent samples collected by City homeowners have shown 4 times the concentration of mercury in proposed CAD sediments than those presented by the City as the 'worst-case' analysis. After the City evaluated the homeowners data, City staff admitted that 'Mercury concentrations were shown to be even more variable than the City's data suggested'.

At best, the Corps and the City can rely on its data to only describe the area in very close proximity to each sample. Four hundred feet is basically one sample per football field. This is unreasonable based on the lack of information on the source of the pollution in the Bay, and timing of the events that deposited the contaminants into the Harbor.

The City did not reference or address the Army Corps Guidance for Subaqueous Capping of Dredged Material, Technical Report DOER-1 during design of the CAD, *June 1998.* The Manual describes the types of tests that would be required to protect human health and the Environment. According to the Manual, "Chemical characterization of contaminated sediment may include a sediment chemical inventory and standard elutriate test results. The chemical

sediment inventory is useful in determining contaminants of concern and in the development of appropriate chemical elements of a monitoring program to determine capping effectiveness. Elutriate data are used in estimating the potential effects on water quality due to placement of the contaminated material. Biological characterization may include water column bioassays, benthic bioassays, and bioaccumulation tests. The results of these biological tests are useful in determining potential water column effects during placement and acceptable exposure times before placement of the cap begins." The manual further states that "The contaminant release is predicted by an elutriate test, and results are compared with applicable water-quality criteria or standards as appropriate." Unfortunately, the City has used a different elutriate approach than that recommended by the Manual.

The substitution of the Bioassay elutriates as performed by the City is not appropriate here for three reasons:

First, the Bioassay elutriates for 80% of the material slated for CAD disposal is based on composite sediment tests and include a significant portion of 'clean' material. Because of this, the resulting concentrations of the composite bioassay elutriate is not representative of the approximately 9% of unsuitable material proposed for CAD placement only, rather indicative of the total volume of sediment tested, in which a large portion (>90%) is suitable for offshore. This missing analysis is inconsistent with the CTM, which states, "If water column effects during placement of the contaminated material are of concern, an evaluation of the suitability of the material from the standpoint of water column effects **must** be performed."

Second, the Bioassays' Elutriate results are not a substitute here because the correct testing guidance specifically states you cannot substitute other guidance for the evaluation of water quality effects. More specifically, "Capping as a control measure is normally considered only

after sediment to be dredged is found to be contaminated. In order to make such a determination, some chemical and biological characterization of the contaminated sediment is normally performed as a part of the overall evaluation for suitability for open-water placement (EPA/USACE 1991; EPA/USACE 1998). It should be noted that even though capping is being considered because of a determination of potentially unsuitable benthic effects, the data necessary for evaluation of potential water column effects are still required." All testing and analysis was focused on open water (or nearshore) placement, as the City has said, "As part of the City's sediment characterization process, the City analyzed the sediment within the federal channels with the primary objective to determine suitability of dredge material for ocean disposal at LA-3 ODMDS." Therefore, the characterization of the contaminated material only, determined unsuitable by the regulatory process for either the nearshore or ocean, has not been done. There has yet to be a focus sediment characterization on just the contaminated material determined unsuitable. Additional sampling is therefore required in order to collect enough sediment to fulfill the testing requirements of the Capping manual. Through data omission and proxy anlaysis, the intent and direction provided by the Capping manual has been overlooked and not addressed by the City.

Third, the bioassay testing is inappropriate is because the contaminated areas were not tested individually, and because the City does not have this data, they are incorrectly relying upon on the Turning Basin testing data, as a surrogate for all the materials to go to the CAD. Using proxy testing results for a project that has the type of contaminant variability as Newport Bay, is inconsistent with SC-DMMT precedent and sediment management procedures regionally. Further, the Turning Basin is not the primary contributor of material to the CAD, and only contributes about 5-10% of the material proposed for CAD placement.

Petitioners are also concerned that the City has stated "this testing fully complies with the USACE guidance, however, to further evaluate water column impacts during placement, a USACE developed model (i.e., STFATE) was also used to predict compliance with applicable water quality criteria."

The question of the STFate model applicability has been focused on whether the open-water STFate model was the appropriate measure to address the potential water quality impacts in an enclosed bay or estuary. An open water model is not appropriate for the Project, especially when the City is proposing to dispose of contaminated materials where children play and near beaches and homes.

As per the Capping manual, which requires standard elutriate testing in the event of possible water quality impacts, it also includes a discussion of the STFate model below the discussion of standard elutriate testing.

As a point of fact, there is no language or provision within the discussion of the STFate model in the Capping guidance that allows for or implies substitution of the STFate model for elutriate analysis within the sediment disbursement section of the guidance. Further, specifically relating to impacts from sediment dispersion and analysis of water quality, while other sediment testing manuals may allow STFate substitution for other direct measures (i.e., elutriate testing), the Capping manual does not. It recommends the STFate model (or other site-specific model) as a continuance of the water quality analysis, not as a replacement.

Because the City lacks the necessary standard elutriate data from the contaminated areas only and is relying on other areas which were tested for different disposal purposes, the STFate model and simulation outputs are calculated incorrectly, and likely underestimate the water quality impacts from CAD material disposal into a REC-1 system.

As described in the CTM appendix relevant to the STFate and as cited by the City, there are two critical pieces of information needed for properly running the STFate model: the sediment chemistry data, and the contaminated elutriate concentration. As the input data for the CAD portion of the STFate modeling calculations are not provided for independent verification with respect to water quality in the EIR, it is impossible to check the accuracy of the calculations. What is known, is that even when using non-representative data and a single core sample, there were exceedances of chronic water quality numeric objectives for DDT and derivatives (collectively DDX).

What is not mentioned is how the City integrated the existing ambient condition into the model as a baseline assumption. This is critical to the assessment of water quality impacts critical, because as per the City, "it is noted that the chronic condition water quality standard for total DDx was exceeded during disposal events of all material types. However, the existing background water quality is also greater than this standard and predicted total DDx concentrations are expected to be at or near background concentrations within four hours of dredging."

Since the STFate model lacks a summary table for review, the model input data is not clearly provided in City's EIR, therefore, there is a genuine concern that the City modeling may not have incorporated ambient concentrations in the waters of the Bay, and therefore produced the correct outputs. That said, even if the STFate model was identified as an allowable substitution by the CTM (which it is not), the modeling would need to include only data from the unsuitable material, using both contaminated core chemistry and contaminated material elutriate results from the same contaminated areas. In pragmatic terms, the STFate modeling comes after the standard elutriate testing of the regulatory determined contaminated material, not before, and

the City's approach and integration of mixed sampling data is inconsistent with the Corps and EPA manual/guidance appropriate to the action.

II. The City's grant of ownership of the lands underneath the Harbor does not expressly provide for the use of the Harbor as a solid waste disposal facility, and this use conflicts directly with express provisions in the City's Land Grant, as well as impermissibly confers a gift of public funds and or lands to private individuals in violation of the Grant and prohibition of the gift of public funds.

The City of Newport Beach acquired title to the land under Newport Harbor through a 1919 Legislative Act (1919 Act) (See Exhibit C). The 1919 Act was subsequently repealed and in 1978 another legislative grant was provided to the City (1978 Act). The 1978 Act provides that Newport Harbor is to be held in trust for:

1. The establishment, improvement, and conduct of a public harbor; and for the construction, maintenance, and operation thereon of wharves, docks, piers, slips, quays, ways, and streets, and other utilities, structures, and appliances necessary or convenient for the promotion or accommodation of commerce and navigation.
2. For the establishment, improvement, and conduct of public bathing beaches, public marinas, public aquatic playgrounds, and similar recreational facilities open to the general public; and for the construction, reconstruction, repair, maintenance, and operation of all works, buildings, facilities, utilities, structures, and appliances incidental, necessary, or convenient for the promotion and accommodation of any such uses.
3. For the preservation, maintenance, and enhancement of the lands in their natural state and the reestablishment of the natural state of the lands so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and

habitat for birds and marine life, and which favorably affect the scenery and climate of the area.

The City of Newport Beach does not hold Fee title to the land and acts merely as trustee for the general public ensuring the preservation and enhancement of public trust resources within the Harbor (*City of Berkeley v. Superior Court, 26 Cal.3d 515, 162 Cal.Rptr. 327 (Cal. 1980)*. The placement of the proposed CAD facility or any solid waste disposal facility beneath the submerged lands of the Harbor is not listed as a use or structure in the 1978 Act. The placement of the CAD in the center of the Harbor will restrict and alter the navigational commercial and public use of the Harbor. Anchoring within the Harbor is already restricted to a few areas. The CAD proposal by the City includes restriction on the use of the area as an anchorage site. Loss of this area as a public anchorage represents a loss of a significant percentage of anchoring space within the harbor. Further, once built, the depth of the Harbor at the CAD site will not be able to be increased, limiting the potential usefulness of the harbor for navigation and commerce to those vessels with a draft greater than 40 feet. Lastly, the CAD is being built under the assumption that private landowners along the bay will be allowed to deposit contaminated sediments dredged from under and around their docks into the CAD. This type of use of public lands for private benefit seems to violate the provision in the 1978 Act which states that "Except as otherwise provided in this section, the city or its successors shall not, at any time, grant, convey, give, or alienate the lands, or any part thereof, to any individual, firm, or corporation for any purposes whatever".

For the above reasons, it is unclear if City has the right under its legislative land grant to place the CAD within the submerged lands of the Harbor. Petitioners request that the Santa Ana

Regional Water Quality Control Board Order be reconsidered until such time as the Water Board can clarify if the bay can be legally be used for the placement of the CAD.

III. The level of mercury found in the limited sampling conducted by the City and its consultant may meet or exceed levels requiring regulation as Hazardous Waste, and the Regional Boards granting of permit under Section 401 of the Clean Water Act, to dispose of the material in the CAD exceeds the Board authority under its 401 program.

Sampling of the sediments within the Harbor has been conducted by both the City and the Harbor (See Exhibit D). These samples were tested to determine the total levels of contaminants present. The samples showed that mercury, DDT, PCBs and other contaminants are contained within the sediment in the Harbor. These substances are regulated under multiple statutes including the CWA and the Resource Conservation and Recovery Act (RCRA) and their California law counterparts. Though the City and the Corps did conduct tests to determine how to manage this sediment under the CWA they did not conduct the necessary tests to determine if the sediments are required to be managed under RCRA and California Hazardous Waste Control laws and regulations.

In California the Department of Toxic Substances Control (DTSC) is the agency tasked with implementing portions of RCRA and the State's Hazardous Waste Control Laws and regulation. DTSC has guidance and training material online that helps individuals, companies, cities and agencies determine which wastes are required to be managed under California's Hazardous Waste laws and regulations (https://dtsc.ca.gov/responsibility-for-determination/ ). The public record for this project has no information that the City or the Corps actually followed the guidance provide by the DTSC, or why they are not subject to hazardous waste laws. Further, the City's EIR for the project does not appear to have been circulated to DTSC, and it appears that the City and the Regional Board never consulted with DTSC on this project.

Following the DTSC guidance, a series of questions should have been asked and answered by the Regional Board and the City ensure that the dredge waste is not hazardous waste under California Law and that hazardous wastes are not being discharged impermissibly under a Clean Water Act 401 and 404 permit. These questions that should have been asked and answered by the Regional Board and the Permittee are: 1) Is the Material a Waste? 2) Is the waste Excluded/Exempted? 3) Is the waste Listed as Hazardous? 4) Is the waste Listed in Appendix X? and 5) Does the waste exhibit Characteristics of Hazardous Waste? (See Exhibit E) Petitioners have tried to apply these questions to the available public information on the Project. Our analysis indicates that the contaminated dredge material is properly characterized as a hazardous Waste until such time as the City can demonstrate through testing that the waste is not hazardous.

1) Is the dredge material being collected and disposed of at the CAD a waste?

Under California law a waste is defined as any **discarded** material (in any form, such as solid, liquid, semi-solid, or contained gas) that is not excluded by 22 CCR section 66261.4(a) or 66261.4(e) or HSC section 25143.2(b) or 25143.2(d) (Cal. Code Regs. Tit. 22, § 66261.2(a)) A material is discarded if it is relinquished by being disposed of (Cal. Code Regs. Tit. 22, § 66261.2(b))

As part of the proposed project, the City will be collecting contaminated sediments and disposing of them in the Solid Waste Disposal facility called a "Contaminated Aquatic Disposal" facility located under submerged lands with the Bay. Thus, the dredge material would be deemed a waste.

2) Is the waste Excluded/Exempted?

Under federal law, dredged material that is subject to the requirements of a permit that has been issued under 404 of the Federal Water Pollution Control Act (33 U.S.C.1344) or section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972 (33 U.S.C. 1413) is not a hazardous waste. (40 CFR 261.4(g))

However, California has not adopted the complete exemption for dredged wastes found in 40 CFR 261.4(g). Under California law wastes that are listed in article 4.1 of Chapter 11 of Division 4.5 of Title 22 of the California Code of Regulations , or exhibit a characteristic of a hazardous waste as set forth in Article 3 Chapter 11 of Division 4.5 of Title 22 of the California Code of Regulations are hazardous wastes even if they are dredged material (Cal. Code Regs. Tit. 22, §66261.4(b)(2)).

According to the DTSC, "the Federal hazardous waste system recognizes more hazardous waste exclusions than California recognizes. Additionally, California's hazardous waste criteria differ from the Federal criteria. California recognizes the federal hazardous waste exclusions unless the wastes exhibit characteristics of hazardous waste according to California criteria. In other words, California regulates federally excluded hazardous wastes that exhibit characteristics of a California hazardous waste." (https://dtsc.ca.gov/hazardous-waste-exclusions/ accessed on 10/27/2022).

Article 4.1 of Chapter 11 of Division 4.5 of Title 22 of the California Code of Regulations lists mercury-containing products such as light switches and relays as hazardous waste when discarded. It is possible that in the present case some of the Mercury contamination in the bay

was derived from products listed in Article 4.1 and as such may be hazardous under the derived from rule. (Cal. Code Regs. Tit. 22, §66261.50)

Article 3 Chapter 11 of Division 4.5 of Title 22 of the California Code of Regulations describes characteristics of waste that would result in regulation under California Hazardous Waste Laws (Cal. Code Regs. Tit. 22, §66261.20 to §66261.24.)

The City and The Corps only tested the waste using a TTLC or total concentration test method. They never determined if the waste would meet any of the characteristics under Article 3. Also, total levels of mercury are high enough that it is possible that some of the sediment would exceed the toxicity criteria found in Cal. Code Regs. Tit. 22 66261.24. So, at this point it can't be determined if the dredge waste meets the characteristics of a hazardous waste under Article 3. Petitioner believes that the City and Corps need to provide test data to determine if the dredge sediments have mercury levels that would require management as a hazardous waste.

3) Is the waste Listed as Hazardous?

According to DTSC a waste is hazardous if it:

1. Is not excluded from classification as a waste.
2. Exhibits a characteristic in Article 3;
3. Is listed in Article 4 (Not applicable to the dredge waste at issue here.)
4. Is listed in Article 4.1;
5. Is listed in, or contains chemicals listed in, Appendix X, unless the waste is determined to be non-hazardous

The requirements of numbers 1-4 of this section have been discussed above. Item 5 states that if a substance is listed in Appendix that the waste would be considered Hazardous unless it has been determined that the waste is non-hazardous.

Appendix X contains a list of 791 chemicals and 66 common names of wastes. If a waste is listed or contains a listed chemical in Appendix X, it creates a presumption that the waste *may be* hazardous due to the presence of that chemical. (See https://dtsc.ca.gov/q4-is-the-waste-listed-in-appendix-x/) (22 CCR Div. 4.5 Ch. 11 App. X) Mercury-containing wastes are listed in Appendix X and this creates a presumption that the mercury-containing sediment in the Harbor may be hazardous when collected and disposed of by into the CAD by the City (See Exhibit F)

In summary, unless the City and the Corps complete the requisite testing under Title 22, then the wastes being dredged and disposed of in the CAD would meet the definition of a Hazardous Waste. The RWCB's authorization of the disposal of these wastes under Section 401 of the Clean Water Act may be impermissible, and the SWRCB needs to ensure that the dredge wastes are being managed in compliance with California and Federal Hazardous Waste Laws. Petitioners request that 401 certifications be rescinded or reconsidered to ensure compliance with California Hazardous Waste Laws.

**8. A statement that copies of the petition have been sent to the Regional Water Board and to the discharger, if different from the petitioner.**

Copies of this petition have been provided to the Sana Ana Regional Water Quality Control Board, the City of Newport Beach, and the Army Corp of Engineers on October 28, 2022. In addition, a request has been sent to the Santa Ana Regional Water Quality Control Board to maintain and prepare, if necessary, the Regional Board Staff records on this matter on October 28, 2022

**9. A statement that the issues raised in the petition were presented to the regional board before the regional board acted, or an explanation of why the petitioner could not raise those objections before the regional board.**

Petitioners submitted numerous and verbal comments outlining their concerns over the CAD project. (See attached copies references in various sections of this Petition). Claims related to the characterization of the Waste were raised generally by comments suggesting that the sampling done was not adequate. Also, the claim that the Regional Boards may have impermissible permitted the disposal of Hazardous Wastes through issuance of the 401 Water Quality Certification goes to the core of the jurisdiction of the State Board and Regional Board the State Board should raise the issue sua sponte. Similarly, the claim that the City lacks sufficient ownership over the Submerged Lands under the Harbor also relate the lack of authority of the Regional Board to issue a permit that authorizes a trespass on the State's Submerged Lands, and Petitioners believe that the Water Boards should also consider this issue sua sponte.

DATED: October 28, 2022

Thomas Eugene Napoli, Esq.

By: _____

Thomas Eugene Napoli
Attorney for Petitioner