

**STATE WATER RESOURCES CONTROL BOARD  
BOARD WORKSHOP SESSION – OFFICE OF CHIEF COUNSEL  
SEPTEMBER 1, 2009**

**ITEM 9**

**SUBJECT**

WORKSHOP TO SOLICIT PUBLIC COMMENTS ON A PROPOSED ORDER VACATING AND REMANDING A CLEANUP AND ABATEMENT ORDER (CAO) TO THE SAN FRANCISCO BAY WATER BOARD IN THE MATTER OF THE PETITION OF KEN BERRY AND CALIFORNIA CITIZENS FOR ENVIRONMENTAL JUSTICE (CAO 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). **SWRCB/OCC FILE A-1972.**

**DISCUSSION**

On November 12, 2008, the San Francisco Bay Regional Water Quality Control Board (San Francisco Bay Water Board) issued Cleanup and Abatement Order (CAO) No. R2-2008-0095 to the City of Richmond and the United States Department of Defense, Department of the Navy concerning the Point Molate Naval Fuel Depot (Site). The Site is a former Navy facility adjacent to San Francisco Bay in the City of Richmond and is comprised of approximately 413 acres. The CAO requires the submission of a number of studies, plans, and reports, but does not require any specific cleanup actions.

On December 8, 2008, Mr. Ken Berry and California Citizens for Environmental Justice (Petitioners) filed a timely petition requesting review by the State Water Resources Control Board (State Water Board). The Petitioners contend that the San Francisco Bay Water Board's adoption of the CAO violated the California Environmental Quality Act (CEQA) by stating that adoption of the CAO was categorically exempt from CEQA's requirements. The Petitioners claim that the use of a categorical exemption is unlawful because CEQA prohibits the use of categorical exemptions for projects that take place on sites included on the Cortese List.

The draft order agrees with the Petitioners' contention, vacates the CAO, and remands the matter to the San Francisco Bay Water Board.

**POLICY ISSUE**

Should the State Water Board adopt the draft order vacating and remanding the CAO?

**FISCAL IMPACT**

The San Francisco Bay Water Board will need to expend staff resources resulting from the proposed remand.

**REGIONAL BOARD IMPACT**

Yes, San Francisco Bay Water Board.

## **STAFF RECOMMENDATION**

This is a workshop item only. The purpose of the workshop is to solicit comments and suggestions from stakeholders and the public regarding the proposed order. The State Water Board will not take any action on the proposed order at this meeting.

State Water Board action on this item will assist the Water Boards in reaching Goal 6 of the Strategic Plan Update: 2008-2012 to enhance consistency across the Water Boards, to ensure our processes are effective, efficient, and predictable, and to promote fair and equitable application of laws, regulations, policies, and procedures.

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

**ORDER WQ 2009-**

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In the Matter of the Petition of

**KEN BERRY AND CALIFORNIA CITIZENS FOR ENVIRONMENTAL JUSTICE**

For Review of Cleanup and Abatement Order No. R2-2008-0095 for City of Richmond,  
U.S. Department of Defense, Department of the Navy, Former Point Molate Naval Fuel Depot  
Issued by the  
California Regional Water Quality Control Board,  
San Francisco Bay Region

***SWRCB/OCC FILE A-1972***

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BY THE BOARD:

On November 12, 2008, the San Francisco Bay Regional Water Quality Control Board (San Francisco Bay Water Board) issued Cleanup and Abatement Order (CAO) No. R2-2008-0095 to the City of Richmond and the United States Department of Defense, Department of the Navy concerning the Point Molate Naval Fuel Depot (Site). Mr. Ken Berry and California Citizens for Environmental Justice (Petitioners) filed a timely petition requesting review by the State Water Resources Control Board (State Water Board). In this Order, the State Water Board grants the petition and remands the matter to the San Francisco Bay Water Board.

**I. BACKGROUND**

The Site is a former Navy facility adjacent to San Francisco Bay in the City of Richmond and is comprised of approximately 413 acres. Residual contamination from former military operations has been found at concentrations that necessitate remedies involving a combination of source removal, groundwater monitoring, and adoption of institutional controls to assure that the cleanup is consistent with the intended reuses of the Site and protective of human health and the environment. At one time, the Site had twenty underground storage tanks, each of which had a capacity to store approximately two million gallons of fuel and oil.

Because of historical releases of hazardous materials at the Site, the Site appears on the Cortese List maintained by the California Environmental Protection Agency.<sup>1</sup>

The San Francisco Bay Water Board adopted the CAO at its meeting on November 12, 2008. The CAO requires the submission of a number of studies, plans, and reports, but does not require any specific cleanup actions. The CAO also prohibits the discharge of waste, pollution migration to waters of the state, pollution migration associated with the cleanup and any investigation, and the creation of a condition of nuisance as a result of cleanup activities.

**II. ISSUE AND FINDING**

The Petitioners' sole contention is that the San Francisco Bay Water Board failed to comply with the requirements of the California Environmental Quality Act<sup>2</sup> (CEQA). The Board found that the adoption of the CAO "categorically exempt" from the requirements of CEQA.<sup>3</sup> Government Code section 65962.5 requires the State Water Board to compile a list of certain sites "that concern the discharge of wastes that are hazardous materials."<sup>4</sup> This list is commonly referred to as "the Cortese List."<sup>5</sup> The Petitioners claim that the use of a categorical exemption is unlawful because CEQA prohibits the use of categorical exemptions for projects that take place on sites included on the Cortese List.

CEQA was enacted in 1970 with the intent that all state agencies that regulate activities found to affect the quality of the environment, do so giving major consideration to preventing environmental damage.<sup>6</sup> As such, CEQA is to be interpreted to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.<sup>7</sup>

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<sup>1</sup> Cortese List Data Resources <<http://www.calepa.ca.gov/SiteCleanup/CorteseList/>> [as of Jul. 2, 2009] and see, e.g., <[https://geotracker.waterboards.ca.gov/profile\\_report.asp?global\\_id=T10000001149](https://geotracker.waterboards.ca.gov/profile_report.asp?global_id=T10000001149)> [as of Jul. 2, 2009] [identifying open underground storage tank case at the site, among 24 other tank cases at the Site].

<sup>2</sup> Pub. Resources Code, § 21000 et seq.

<sup>3</sup> The Petitioners' contention is identical to the contention raised in SWRCB/OCC File A-1973. However, due to factual differences, the two petitions have not been consolidated.

<sup>4</sup> Gov. Code, § 65962.5, subd. (c)(3).

<sup>5</sup> The author of the original legislation was Assemblyman Cortese.

<sup>6</sup> Pub. Resources Code, § 21000, subd. (g).

<sup>7</sup> *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259.

However, courts have noted that, like all laws, CEQA's provisions should be given a reasonable and practical construction.<sup>8</sup>

CEQA's statutory framework sets forth a series of analytical steps intended to promote the goals and purposes of environmental review: information; participation; mitigation; and accountability. CEQA's implementing guidelines establish a three-tiered process to ensure that these goals are carried out.<sup>9</sup> The first tier is jurisdictional, requiring an agency to conduct a preliminary review to determine whether an activity is subject to CEQA. An activity that is not a discretionary "project" is not subject to CEQA.

A "project" is defined as "the whole of an action, which has a potential for resulting in a direct physical change in the environment, or a reasonably foreseeable, indirect physical change in the environment. . . ."<sup>10</sup> Keeping in mind the purposes of CEQA, the issue of when to start the environmental review process is crucial. Environmental review must occur late enough in the development process to contain meaningful information, but early enough so that whatever information is obtained can practically serve as input into the decision-making process.<sup>11</sup> Environmental review that occurs too early cannot identify specific physical changes – direct or indirect – and would result in sheer speculation. If a specific agency action does not fit within the definition of "project," CEQA is not applicable and no further environmental review is required.

The second tier of the CEQA review process concerns exemptions.<sup>12</sup> If a project fits within an appropriate exemption, no further CEQA review is necessary. There are two types of exemptions – statutory and categorical. Because CEQA is statutory rather than constitutional in origin, the Legislature may create exemptions from CEQA's requirements, regardless of their

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<sup>8</sup> *Bowman v. City of Berkeley* (2004) 122 Cal.App.4th 572, 593.

<sup>9</sup> *Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, 379-380 (quoting *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 74).

<sup>10</sup> Cal. Code Regs., tit. 14, § 15378, subd. (a).

<sup>11</sup> See *Id.*, § 15004, subd. (b); *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 129-130 (quoting *No Oil, Inc. v. City of Los Angeles*, *supra*, 13 Cal.3d 68, 77).

<sup>12</sup> The third tier applies only if the agency determines substantial evidence exists that the project may cause a significant effect on the environment. This third tier is not relevant to this petition and will not be discussed.

potential for adverse environmental consequences.<sup>13</sup> These legislatively created exemptions are statutory exemptions.

Categorical exemptions represent those classes of activities that the Secretary of the Natural Resources Agency has determined do not have a significant effect on the environment.<sup>14</sup> The Legislature has identified certain projects that may not use categorical exemptions to avoid CEQA review. The relevant exception is the “Cortese List” exception. Under CEQA, any project located on a site found on the Cortese List is not eligible for a categorical exemption.<sup>15</sup>

The San Francisco Bay Water Board’s adoption of the CAO was a discretionary action that constitutes a project under CEQA. It found that this action was categorically exempt from CEQA’s requirements. One of the CAO’s findings stated that “this action is categorically exempt from [CEQA] pursuant to Section 15321 of the CEQA Guidelines.”<sup>16</sup> Because the Site is currently found on the Cortese List, the use of a categorical exemption is not proper and violates CEQA.

While 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<sup>17</sup> in order to comply with CEQA. Upon 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.<sup>18</sup>

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<sup>13</sup> *Napa Valley Wine Train, Inc. v. P. U. C.* (1990) 50 Cal.3d 370, 376.

<sup>14</sup> Pub. Resources Code, § 21084, subd. (a).

<sup>15</sup> *Id.*, subd. (c).

<sup>16</sup> San Francisco Bay Water Board Order No. R2-2008-0095, Finding No. 22. Section 15321 of the CEQA Guidelines exempts projects that are “actions by regulatory agencies to enforce or revoke a lease, permit, license, certificate, or other entitlement for use issued, adopted, or prescribed by the regulatory agency.”

<sup>17</sup> “Environmental documents” is a defined term under CEQA and refers to Initial Studies, Negative Declarations, draft and final Environmental Impact Reports. (Cal. Code Regs., tit. 14, § 15361.)

<sup>18</sup> 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.” (Response to Petition SWRCB/OCC File A-1972, p. 3.) 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.

# **D R A F T**

July 2, 2009

## **ORDER**

IT IS HEREBY ORDERED that the CAO is vacated and remanded to the San Francisco Bay Water Board. Upon remand, the San Francisco Bay Water Board shall make a CEQA determination consistent with this Order.

## **CERTIFICATION**

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on September 15, 2009.

AYE:

NO:

ABSENT:

ABSTAIN:

**DRAFT**

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Jeanine Townsend  
Clerk to the Board