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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: August 2, 2010

SUBJECT: CLEANUP TEAM'S COMMENT ON THE APPLICABILITY OF A CEQA CATERGORICAL EXEMPTION FOR; AND WRITTEN RESPONSE TO NASSCO MOTION REQUESTING DETERMINATION THAT SHIPYARD SEDIMENT PROJECT, TENTATIVE CLEANUP AND ABATEMENT ORDER R9-2010-0002, IS EXEMPT FROM CEQA

Pursuant to Presiding Officer David King's July 27, 2010 Order Requesting Responses to Motion of NASSCO Requesting a Determination that Tentative Cleanup and Abatement Order R9-2010-0002 is Exempt from the California Environmental Quality Act (the Motion) the Cleanup Team hereby submits the following jcomments on the applicability of a categorical exemption to the Shipyard Cleanup and Abatement Order Project and response to NASSCO's Motion:

I. INTRODUCTION AND SUMMARY OF ARGUMENT

NASSCO argues that the Shipyard Cleanup and Abatement Order Project (the "Project") is categorically exempt from the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.; "CEQA"), under Class 7, Class 8 or Class 21 because it is not an unusual "dredging" or "sediment remediation and dredging" project. (Motion, 7:14-16; 8:7-9.) However, none of the cited classes of categorical exemptions

exempt "dredging" or "sediment remediation and dredging" projects from CEQA. This sediment dredging project is not a typical regulatory agency action for the protection of the environment or a natural resource, and is not a typical regulatory agency action to enforce a law or standard because it is the largest sediment remediation project in the history of San Diego Bay and because it has the potential to create significant adverse environmental air quality and geologic impacts. NASSCO does not dispute that the Project may cause significant adverse environmental impacts, but pins its hopes for a categorical exemption on the argument that the Cleanup and Abatement Order Project is a typical regulatory agency action. It is not.

To prevail, NASSCO must show that this dredging and sediment remediation project, through which over 140,000 cubic yards of sediment will be dredged from San Diego Bay, dewatered and potentially disposed of at a landfill, is not distinguishable from a "garden variety" Class 7 (regulatory agency action to assure the maintenance, restoration or enhancement of a natural resource), Class 8 (regulatory agency action to assure the maintenance, restoration or enhancement or protection of the environment), or Class 21 (action by regulatory agency to enforce a law, rule or standard) categorical exemption.[1] Each of these Classes of categorical exemptions exempts general types of actions taken by regulatory agencies, and none specifically addresses sediment dredging projects. The Legislature's guiding principle for categorical exemptions is that the Secretary of the Resources Agency was to make a determination that certain types of projects have been determined "not to have a significant effect on the environment." (Pub. Resources Code, § 21084(a). The Secretary made no such determination with respect to dredging projects. NASSCO's argument, taken to its logical conclusion, is that the Secretary of Resources made a determination that large-scale dredging projects do not usually have a potential for significant adverse environmental impacts. The Cleanup Team does not believe this was the Secretary's determination when it promulgated the Class 7, Class 8 and Class 21 categorical exemptions.

Most critically, NASSCO's Motion fails to advise the San Diego Water Board that categorical exemptions are to be construed narrowly. (See *California Farm Bureau Federation v. California Wildlife Conservation Board* (2006) 143 Cal.App.3d 173, 179 ["In keeping with general principles of statutory construction, exemptions are construed narrowly and will not be unreasonably expanded beyond their terms. Strict Construction (of categorical exemptions) allows CEQA to be interpreted in a manner affording the fullest possible environmental protections within the reasonable scope of the statutory language."].) NASSCO argues that the scope of the Class 7, Class 8 or Class 21 categorical exemptions should be expanded beyond their terms to include large-scale dredging projects where some potentially significant adverse environmental impacts to

[1] As Executive Officer David Gibson testified before this Board at a July 14, 2010 hearing, this Cleanup and Abatement Order Project will result in more dredging and removal of sediments from San Diego Bay than all previous Cleanup and Abatement Orders combined.

air quality and geology/soils have already been identified and are not in dispute. Accepting this argument would be inconsistent with longstanding rules of statutory construction, and with the California Supreme Court's command that CEQA must be interpreted in a manner affording the fullest possible environmental protections within the reasonable scope of the statutory language. (See *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259.) NASSCO's Motion must be denied.

II. **ARGUMENT.**

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 [Class7], 15308 [Class 8], 15321 [Class 21], respectively.)

NASSCO argues that the San Diego Water Board has routinely used these categorical exemptions when taking regulatory actions in the past, including when it issues cleanup and abatement orders. (Motion, 6:3-25; Carlin Decl., *passim*; see also 1/21/10 BAE letter, p. 1.) However, the San Diego Water Board's prior use of categorical exemptions for cleanup and abatement orders is not necessarily relevant to the inquiry at hand. NASSCO makes no effort to analogize the potentially significant environmental impacts from prior cleanup and abatement orders with this Project. In fact, this Project differs considerably from a typical CAO where a discharger is ordered to develop a plan to clean up pollution because the plan to cleanup up pollution here is already largely defined. Nevertheless, as NASSCO acknowledges, the governing legal rule is that a lead agency may not use a categorical exemption unless there is **no 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.)

Keeping in mind that categorical exemptions must be narrowly construed (*California Farm Bureau Federation, supra,* 143 Cal.App.3d at 179) the two-part test for when a categorical exemption may not be used articulated by the *Azusa* court is (1) whether the circumstances of a particular project differ from the general circumstances of the projects covered by a particular categorical exemption, and (2) whether those

circumstances create an environmental risk that does not exist for the general class of exempt projects. (*Id.*, at 1207.)

Class 7 categorical exemptions are for regulatory agency actions taken to assure the maintenance, restoration, enhancement or protection of a natural resource. In making the determination that this category of projects is categorically exempt from CEQA, the Secretary excluded "construction activities" form its ambit. (14 Cal.Code. Regs., §15307.) The Secretary also determined that "construction activities" undertaken in the context of a project otherwise subject to a Class 8 categorical exemptions for regulatory agency actions to assure the maintenance, restoration, enhancement or protection of the environment, or a Class 21 categorical exemptions for regulatory agency actions to enforce a law or standard, are to eviscerate the exemption. (14 Cal.Code Regs., §§ 15308, 15321.) The Shipyard CAO Project includes construction activities such as dredging and the construction of a dewatering facility. Importantly, the Secretary's exclusion of construction activities from these classes of categorical exemptions indicates an intent to apply then only to regulatory actions that do not result in large-scale modifications to the physical environment. But the Shipyard Sediment Cleanup and Abatement Order Project will result in large-scale modifications to the physical environment.

One of the Project's heretofore unmentioned large-scale modifications to the physical environment will be the destruction of eel grass habitat caused by dredging. Although the Project specifies that eel grass habitat will be mitigated for and replaced, such mitigation measures cannot be considered by a lead agency when making a categorical exemption determination. (See *Save Hollywood Specific Plan v. City of Los Angeles* (2008) 161 Cal.App.4th 1168, 1182.) As the *Azusa* Court stated; "If a project may have a significant effect on the environment, CEQA review must occur and only then are mitigation measures relevant. (*Id.,* at 1199-2000 [holding mitigation measures may support a negative declaration determination –but not a categorical exemption].) Thus, a categorical exemption determination would be improper here since eel grass habitat will be destroyed by the Project. Under applicable case law, the fact that eel grass habitat will be restored and its loss mitigated for is only properly accounted for as the Project moves through environmental review under CEQA.

III. **CONCLUSION.**

For the Shipyard Sediment Cleanup and Abatement Order Project, over 140,000 cubic yards of contaminated sediments will be removed from San Diego Bay with dredge buckets. Eel grass habitat will be scooped up and removed from San Diego Bay during the dredging process. This type of physical disturbance to the environment, including, but not limited to, sediment movement, eel grass destruction, 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.

The answer to the first question under Azusa's two-prong test regarding whether this is an unusual project, is yes. 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 that objective. This Shipyard Sediment Project is considerably different in scope and detail.

NASSCO does not dispute that the Project may have significant adverse environmental effects and the answer to the second prong of the *Azusa* test is also a resounding "yes." 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, the San Diego Water Board should order the preparation of an Environmental Impact Report.[2]

[2] Presiding Officer King's July 27, 2010 Order asks whether the San Diego Water Board has the authority to issue a determination at this time that the CAO is exempt from CEQA. As the Cleanup Team argued in its July 14, 2010 Memorandum directed to this Board, the time for CEQA review is now and it must take the form of an Environmental Impact Report. For the sake of brevity, we will not repeat the arguments in our July 27 Memorandum here.