



# California Regional Water Quality Control Board

## San Francisco Bay Region



Linda S. Adams  
Secretary for  
Environmental Protection

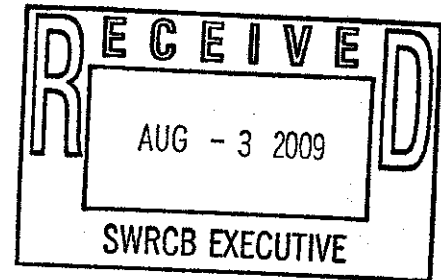
1515 Clay Street, Suite 1400, Oakland, California 94612  
(510) 622-2300 • Fax (510) 622-2460  
<http://www.waterboards.ca.gov/sanfranciscobay>

Arnold Schwarzenegger  
Governor

July 31, 2009  
2119.1057(GVL)  
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*VIA EMAIL*

Honorable Board 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]  
P.O. Box 100  
Sacramento, CA 95812-0100



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 Board Members:

The San Francisco Bay Regional Water Quality Control Board ("Regional Water Board") appreciates the opportunity to submit written comments on the proposed draft order in the above-entitled matter ("Draft Order"). We have reviewed the Draft Order and, while we do not object to the remand to correct the Regional Water Board's reliance on an inapplicable California Environmental Quality Act ("CEQA") categorical exemption when it adopted the above referenced cleanup and abatement order ("CAO") for the former Point Molate Fuel Depot property ("Property"), we do have serious concerns about the narrow options the Draft Order gives to the Regional Water Board in ultimately complying with CEQA on remand.

The Draft Order states that on remand, the Regional Water Board may determine that the adoption of the CAO is statutorily exempt or it may prepare an environmental document. There are no statutory exemptions (at Public Resources Code §§ 21080(b), 21080.01-21080.09, 21080.8-21080.33 and reiterated at Cal. Code Regs., tit. 14, §§ 15260-15285) that apply to the adoption of the CAO in this case. This means that under the Draft Order, the Regional Water Board is left with the sole option of preparing an environmental document under CEQA. There are, however, two problems with this that significantly hamper regional water boards from speedily adopting cleanup and abatement orders.

First, the Draft Order does not provide the Regional Water Board the option of finding that the adoption of the CAO is not a project subject to CEQA. An activity is not subject to CEQA if, among other reasons, it will not result in a direct or reasonably foreseeable indirect physical change in the environment or the activity is not a "project" as that term is defined in Cal. Code Regs., tit. 14, § 15378.1 Cal. Code Regs., tit. 14, § 15060 (c).

Here, the CAO does not prescribe any actions that will have a physical impact on the environment, because it does not approve any cleanup plans. Rather, the CAO is a first-cut order requiring the submittal of cleanup plans on how the discharger proposes to clean up the Property, after which the Regional Water Board will review and approve of such plans after compliance with CEQA. At this time, the Regional Water Board does not know what the specific cleanup proposals will be for it to meaningfully evaluate physical impacts to the environment. Those proposals are precisely what the CAO requires. If the Regional Water Board were compelled to prepare a CEQA document at this juncture, it is unclear what that document would even say, given the unknown nature of the cleanup proposals.

Moreover, a lead CEQA agency for the transfer, cleanup, and redevelopment of the Property (i.e., the entire project, or the whole of an action under CEQA) already exists, and it would be the height of governmental inefficiency for the Regional Water Board to have to duplicate the tasks of the lead agency. Specifically, the City of Richmond, one of the dischargers named under the CAO, is the entity responsible for undertaking CEQA review of the entire project, including the cleanup. As stated in Finding 22 of the CAO, the City will prepare an environmental document that includes an evaluation of the environmental impacts of the cleanup of the Property. When it comes time for the Regional Water Board to review and act on approving the cleanup plans submitted as required under the CAO, it will, as the responsible agency, look to the lead agency's (i.e., the City's) CEQA document to ensure that all environmental impacts of the cleanup have been analyzed, evaluated, and mitigated as appropriate. This is the most practical, efficient, and legal means by which to proceed, and the Regional Water Board should not be hamstrung into undertaking the hollow exercise of preparing a CEQA document at this point in time, especially when another agency is tasked with preparing it.

Second, the Draft Order's limited remedies available to the Regional Water Board ignore the "common sense" exemption under CEQA. In addition to statutory exemptions and categorical exemptions under CEQA, there exists the general rule that "CEQA only applies to projects which have the potential for causing a significant effect on the environment," also known as the

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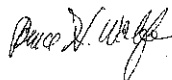
<sup>1</sup> Project is defined in terms of physical impacts to the environment, i.e., "the whole of an action, which has the potential for resulting in either a direct physically change in the environment, or a reasonably foreseeable indirect physical change in the environment, and that is any of the following: (1) An activity directly undertaken by a public agency . . . . (2) An activity undertaken by a person which is supported in whole or in part through public agency contracts, grants, subsidies, loans . . . . (3) An activity involving the issuance to a person of a lease, permit, license, certificate, or other entitlement . . . ." Cal. Code Regs., tit. 14, § 15378(a).

“common sense” exemption. Cal. Code Regs., tit. 14, § 15061(b)(3); see also *Muzzy Ranch Co. v. Solano County Airport Land Use Commission*, (2007) 41 Cal.4th 372, 380 (“A project that qualifies for neither a statutory nor a categorical exemption may nonetheless be found exempt under . . . the “common sense” exemption. . . .”) and 1 Kostka & Zischke, *Practice Under the California Environmental Quality Act* (Cont. Ed. Bar 2d ed. 2008), *Distinction Between Statutory Exemption, Categorical Exemption, and the Common Sense Exemption*, § 5.3.

For the reasons given above, adoption of the CAO does not have the potential for causing a significant effect on the environment, since the essence of the CAO is a listing of document submittal requirements on how to cleanup the Property. The Draft Order, in footnote 18, acknowledges the existence of the common sense exemption (yet does not give the Regional Water Board the option of using this exemption), but declines to find that it applies in this case because the State Water Board did not request the administrative record for this matter. The Regional Water Board believes that this finding can be made by looking at the CAO only, and urges the State Water Board to make such a finding so as to avoid a future petition on this matter. Should it decline to do so, we respectfully request that the State Water Board at least leave the option for the Regional Water Board to invoke the common sense exemption on remand.

In closing, we urge the State Water Board to revise the Draft Order so that the Regional Water Board will be able to invoke all of the options it has at law for complying with CEQA, and to not compel the Regional Water Board to the single option of preparing an environmental document that another agency is already preparing.

Sincerely,



Digitally signed  
by Bruce Wolfe  
Date: 2009.07.31  
17:13:00 -07'00'

Bruce H. Wolfe  
Executive Officer

cc: (all via email)  
Ken Berry  
Gordon Hart