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Exempt from fees per Gov't code 6103
To the benefit of the City of San Diego

6 Attorneys for Defendant
7 CITY OF SAN DIEGO

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 COUNTY OF SAN DIEGO, CENTRAL DIVISION

10 VALERIE O'SULLIVAN,

11 Plaintiff,

12 v.

13 CITY OF SAN DIEGO, a municipal entity, and
14 FOES 1 through 500, inclusive,

15 Defendant.

) Case No. GIC 826918

) CITY OF SAN DIEGO'S REPORT
) REGARDING PERMITS NECESSARY
) TO COMPLY WITH THE COURT'S
) INJUNCTION AND PROPOSED PLAN
) FOR FULL COMPLIANCE

) Dept.: 60
) I/C Judge: Hon. Yuri Hofmann
) Cmplt Filed: March 12, 2004

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20 I. INTRODUCTION

21 At the conclusion of a court trial in this case, Superior Court Judge William Pate found
22 for the Plaintiff, Valerie O'Sullivan. Judge Pate's August 26, 2005 order states the following:

23 Therefore, in order to protect the rights of the people of California to the full use
24 and enjoyment of a unique asset, the Children's Pool, the City, as trustee of the
25 Children's Pool, is hereby ordered to employ all reasonable means to restore the
26 Pool to its 1941 condition by removing the sand build-up and further reduce the
level of water contamination in the Pool to levels certified by the County of San
Diego as being safe for humans. Likewise, the City is ordered to maintain the
beach sand so that it does not pose a health hazard to humans.

27 Injunction at page 31: 6-13. Although the injunction sets a deadline of six months to dredge the
28 beach, it also provides that, "Nothing contained in this order shall be construed as requiring the

1 City to violate any law, rule or regulation of any federal, state or county government.”

2 Injunction at page 31: 14-16.

3 The City unsuccessfully appealed the injunction to the California Court of Appeal and the
4 California Supreme Court. At the inception of the appeal, Judge Pate, over the strenuous
5 objection of O’Sullivan’s counsel, ruled that the injunction was stayed by operation of law while
6 the case was on appeal. Remittitur was issued on December 3, 2007 thus triggering the City’s
7 six-month window for dredging and compliance with all federal, state and county laws necessary
8 for dredging.

9 The City filed a notice of compliance with the order on January 18, 2008 which set forth
10 the City’s position that it had to obtain permits from the United States Army Corps of Engineers
11 (“Corps”), the California Coastal Commission, and the California Regional Water Quality
12 Control Board before dredging could commence. Copies of the voluminous documents
13 comprising the City’s pending applications for permits before those agencies were also filed with
14 this Court. The City requested that this Court extend the deadline for dredging based on the
15 City’s conclusion that it would be impossible to comply with the regulatory requirements for
16 obtaining the permits, including the California Environmental Quality Act, Public Resources
17 Code Section 3000 *et seq* (“CEQA”). The City estimated that it will take 1.5 to 3 years before
18 dredging could commence.

19 Plaintiff O’Sullivan, who now permanently resides in New Zealand, vigorously opposed
20 the City’s motion to extend the deadline for dredging. Plaintiff accused the City of foot dragging
21 and argued that only a permit from the Corps was necessary. Her lawyer contended that because
22 the State of California stipulated before the court trial to be bound by this Court’s judgment, the
23 State had waived the permitting requirements for dredging. Plaintiff argued that it was
24 unnecessary for the City to obtain permits from the Coastal Commission and the Water Quality
25 Control Board and also unnecessary for the City to comply with the CEQA. Plaintiff also moved
26 this Court to impose sanctions against the City, including jailing Mayor Jerry Sanders.

27 Although this Court declined the request to sanction the City, it did render an order
28 denying the City’s request for an extension of time for compliance. (Order of September 11,

1 2008). The Court stated that the City's requested amount of time for compliance was
2 unreasonable. In the Court's order, this Court stated:

3 The Court directs the City to make a determination of what permits are required to
4 comply with the Judgment and present that determination to the Court on October
5 24, 2008, at 1:30 p.m. Additionally, the Court will require proof that the City
6 initiated the permitting process. Finally the Court must submit a plan that sets out
7 the means by which full compliance with the Judgment will be reached.
8 Additionally, the parties are required to propose what sanctions may be
9 appropriate for future non-compliance. The parties shall come to the hearing
10 prepared to set future hearings in that regard.

11 The City submits this report in compliance with the Court's September 11th order. This
12 report includes the following attachments: 1) letter of David J. Castanon, Chief, Regulatory
13 Division, Los Angeles District, United States Department of the Army Corps of Engineers
14 (Exhibit A); 2) Declaration of Chiara M. Clemente, a Senior Environmental Scientist, with the
15 California Regional Water Quality Control Board (Exhibit B); 3) Brief of the State Lands
16 Commission and California Coastal Commission and Declaration of Lee McEachern (Exhibit
17 C)¹; and 4) the Declaration of Kristen Schelch, an aquatic biologist and regulatory specialist
18 (Exhibit D).

19 II. REPORT

20 In a good faith effort to verify the accuracy of the information to be included in this
21 report, the undersigned counsel, City representatives, and the City's experts met with
22 representatives of the Corps and Water Quality Board on October 10, 2008. As a result of that
23 meeting, the Corps agreed to provide the letter found at Exhibit A regarding its regulatory
24 requirements and the Water Quality Control Board agreed to provide the Declaration at Exhibit
25 B regarding its regulatory requirements. The Coastal Commission and States Land Commission
26 recently filed their brief on their own initiative. The City bases this report on all of this
27 information and the expert opinion of its regulatory expert, Kristen Schelch.

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¹ Both parties were served with these documents, but it is uncertain whether these pleadings will be filed in time before the hearing. City includes these documents to ensure this Court's consideration of the State of California's position.

1 A. NECESSARY PERMITS

2 Cutting to the chaste, the Corps takes the following position on what is needed before it
3 will issue a permit to dredge: "No Corps permits may be issued until the applicant provides the
4 Corps with a) a copy of the Regional Water Quality Control Board's CWA Section 401 Water
5 Quality Certification, or evidence that the certification has been waived, and b) the proposed
6 project is with the Coastal Zone or may affect Coastal Zone resources, a copy of the California
7 Coastal Commission's concurrence that the proposed activity is consistent with the Coastal Zone
8 Management Act of 1972." (Exhibit A, page 4). Thus, the Plaintiff's claim that neither a coastal
9 development permit nor a 401 Water Quality Certification from the Water Quality Control Board
10 is necessary is clearly erroneous.

11 The City again believes that the following permits are necessary:

- 12 A. An individual permit from the Corps for authorization under Section 404 of the
13 Clean Water Act and the Section 10 of the River and Harbors Act of 1899;
- 14 B. A coastal development permit from the California Coastal Commission; and
- 15 C. A Section 401 certification from the California Regional Water Quality Control
16 Board.

17 The City and the Federal Government were recently sued in federal court by the La Jolla
18 Friends of the Seals. *La Jolla Friends of the Seals, et al. v. NOAA, et al.*, Case No. 08cv1847
19 WQH POR (S.D. Cal.). Plaintiffs in that case seek an order enjoining the City from removing
20 the seal colony at Children's Pool without a "harassment permit" from the Federal Government.
21 (See Complaint at Exhibit E). The United States District Court granted a temporary restraining
22 order and has set a briefing schedule and hearing for November 25, 2008. (See order at Exhibit
23 F). The City believes the federal Plaintiffs are likely to prevail. If this Court clarifies that the
24 injunction requires immediate removal of the seals, the City may have to obtain a federal permit
25 to remove the seals. Whether such a permit is required will depend on the outcome of the
26 pending federal litigation.

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1 **B. PROOF THAT THE CITY HAS INITIATED THE PERMITTING PROCESS**

2 The City asks that the Court take judicial notice of the City's notice of compliance filed
3 on January 18, 2008 and the voluminous supporting documents on this issue. The declaration of
4 Kristen Schelch, found at Exhibit D, concisely summarizes the City's ongoing efforts to
5 complete the permitting process and is incorporated by reference.

6 **C. PROPOSED PLAN FOR FURTHER COMPLIANCE**

7 Based on the regulatory expertise of Ms. Schelch, the City proposes that the Court set the
8 following benchmarks based on the CEQA's requirements:

- 9 12/31/08: Completion of the technical studies for the EIR
10 2/28/09: Completion of the City's internal review of the EIR first and second
 drafts
11 4/30/09: Expiration of the public comment period for the released draft of the
12 EIR
13 6/30/09: Finalization of City's responses to all public comments in the EIR
14 9/30/09: Deadline for San Diego City Council's EIR Certification Decision²

15 The City has no means to compel the Coastal Commission, the Water Quality Control Board,
16 and the Corps to issue the permits by a certain deadline after the EIR is certified. For that
17 reason, the City requests that no further deadlines be set at this time.

18 Although the proposed compliance schedule may appear to be long, it deserves mention
19 that this timeline is entirely consistent with other major City projects. At Exhibit G there is a
20 graph depicting the lengthy timelines for project completion for 5 other major City projects. The
21 City has also lodged a copy of an EIR that was prepared for the Sea World Master Plan Update
22 because the project also took place in the Coastal Zone, required permits from multiple agencies,
23 and generated a large number of public comments. From a process standpoint only, it is quite
24 similar to the excavation plan for Children's Pool. According to the City's staff, there were two
25 years of outreach (community meetings) that took place while the EIR was prepared and it took 9
26 months from the first released EIR draft to the time the EIR went to the Council for approval.

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28 _____ ² The Council will be in recess in August 2009.

1 The City's proposed EIR completion times for Children's Pool are shorter in comparison.

2 **D. PROPOSED SANCTIONS FOR FUTURE NON-COMPLIANCE**

3 The City respectfully objects on due process grounds to this Court's order requiring that
4 it propose how it should be sanctioned in the future for not complying with the Judgment. First,
5 the Court has under advisement what it has characterized as an order which will clarify whether
6 the seals have to be immediately removed from Children's Pool, so the City is not even certain
7 the full scope of what the Court's injunction requires. Under these circumstances, it is a
8 violation of due process for a party to be ordered to propose how it should be sanctioned for
9 violating an order whose scope is the subject of litigation and possibly an appeal.

10 It is just as fundamentally unfair to require a party to propose how it should be sanctioned
11 without being told specifically what conduct the sanction would apply. Ordinarily sanctions
12 cannot be imposed until *after* a party has been given notice of an alleged violation of a court
13 order and has been given an opportunity to respond. A predetermination of a penalty for non-
14 compliance runs afoul of the City's right to be noticed and heard *before* the Court has determined
15 if there is a violation of the Court's order and considered any mitigating circumstances.

16 The City is also concerned that the result of a predetermined schedule of sanctions, the
17 CEQA process will be tainted. The City is obligated to comply with the CEQA and failure to do
18 so will potentially subject the City to costly litigation. CEQA's requirements are rigid and the
19 City is concerned that predetermined sanctions for a compliance schedule that is divorced from
20 the CEQA framework could actually penalize the City for good faith efforts to comply with the
21 CEQA and other environmental laws. Moreover, the San Diego City Council is vested with
22 legislative power to certify the EIR and the City is concerned that predetermined sanctions are an
23 improper encroachment into these legislative powers. The City Council has a duty under the law
24 to fairly consider public comments before certifying an EIR.

25 If the Court overrules these objections, the City requests that this Court defer requiring
26 the City to propose sanctions against itself and afford the City an opportunity to file a writ
27 petition with the Court of Appeal over this issue. The City has no objection to the Court
28 soliciting from the parties recommendations for an appropriate sanction *after* the City has been

1 given notice and an opportunity to be heard about an alleged violation of the Court's injunction
2 and the Court has actually found that a violation has occurred. The appropriateness or severity
3 of any sanction would depend on whether a party's violation is intentional.

4 Dated: October 24, 2008

MICHAEL J. AGUIRRE, City Attorney

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6 By: 

George F. Schaefer
Deputy City Attorneys

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8 Attorneys for Defendant
9 CITY OF SAN DIEGO

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