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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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BY: _____ DEPUTY

1 BRIGGS LAW CORPORATION [FILE: 1434.00]
Cory J. Briggs (State Bar no. 176284)
2 Karen L. Skaret (State Bar no. 239779)
99 East "C" Street, Suite 111
3 Upland, CA 91786
Telephone: 909-949-7115
4 Facsimile: 909-949-7121

5 COAST LAW GROUP LLP
Marco A. Gonzales (State Bar no. 190832)
6 169 Saxony Road, Suite 204
Encinitas, CA 92024
7 Telephone: 760-942-8505
Facsimile: 760-942-8515

8 Attorneys for Plaintiff San Diego Navy
9 Broadway Complex Coalition

11 UNITED STATES DISTRICT COURT
12 SOUTHERN DISTRICT OF CALIFORNIA

'07 CV 0038 JM WMc

14 SAN DIEGO NAVY BROADWAY COMPLEX
15 COALITION,

16 Plaintiff,

17 vs.

18 U.S. DEPARTMENT OF DEFENSE; ROBERT M.
GATES, in his official capacity as Secretary of the
19 U.S. Department of Defense; U.S. DEPARTMENT
OF THE NAVY; DONALD C. WINTER, in his
20 official capacity as Secretary of the U.S. Department
of the Navy; NAVAL FACILITIES
ENGINEERING COMMAND; W. GREG SHEAR,
21 JR., in his official capacity as Commander of the
Naval Facilities Engineering Command; NAVAL
22 FACILITIES ENGINEERING COMMAND
SOUTHWEST; MICHAEL A. GIORGIONE, in his
23 official capacity as Commander of the Naval
Facilities Engineering Command Southwest; and
24 MANCHESTER PACIFIC GATEWAY LLC,

25 Defendants.

CASE NO. _____

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF FOR
VIOLATIONS OF THE NATIONAL
ENVIRONMENTAL POLICY ACT AND
ADMINISTRATIVE PROCEDURE ACT**

28 Plaintiff SAN DIEGO NAVY BROADWAY COMPLEX COALITION alleges as follows:

1 **Parties**

2 1. Plaintiff SAN DIEGO NAVY BROADWAY COMPLEX COALITION is a non-profit,
3 social-advocacy organization formed and operating under the laws of the State of California. Plaintiff's
4 members reside in or near the City of San Diego, California, and have an interest in protecting the
5 region's air quality, minimizing and ameliorating traffic, ensuring informed and responsible growth,
6 increasing the number of and protecting public parks and open spaces, and promoting other
7 environment-related quality-of-life issues.

8 2. Defendant U.S. DEPARTMENT OF DEFENSE is an agency or instrumentality of the
9 United States, and its Secretary is believed to be Defendant ROBERT M. GATES. Defendant U.S.
10 DEPARTMENT OF THE NAVY is an agency or instrumentality of the United States, and its Secretary
11 is believed to be Defendant DONALD C. WINTER. Defendant NAVAL ENGINEERING FACILITIES
12 COMMAND is an agency or instrumentality of the United States, and its Commander is believed to be
13 Defendant W. GREG SHEAR, JR. Defendant NAVAL ENGINEERING FACILITIES COMMAND
14 SOUTHWEST is an agency or instrumentality of the United States, and its Commander is believed to
15 be Defendant MICHAEL A. GIORGIONE. Defendant MANCHESTER PACIFIC GATEWAY LLC
16 ("MPG") is the applicant for the proposed federal action that is the subject of this proceeding or has
17 some other cognizable interest in the action.

18 3. Plaintiff is informed and believes and on that basis alleges that, at all times stated in this
19 pleading, each Defendant was the agent, servant, or employee of each other Defendant and was, in doing
20 the things alleged herein, acting within the scope of said agency, servitude, or employment and with the
21 full knowledge or subsequent ratification of his or its principals, masters, and employers. Alternatively,
22 in doing the things alleged herein, each Defendant was acting alone and solely to further his or its own
23 interests.

24 **Background Information**

25 4. The project (including all associated entitlements and leases) that is the subject of this
26 proceeding is a certain development agreement between the City of San Diego and Defendants (other
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1 than Defendant MPG) for the Navy Broadway Complex located on roughly four city blocks along the
2 waterfront in downtown San Diego ("Project").

3 5. On or about November 22, 2006, Defendants adopted (or caused or allowed to be
4 adopted) a finding that the Project will not have a significant impact on the environment ("FONSI"),
5 based solely on an environmental impact statement prepared in 1990, a record of decision prepared in
6 1992, and an environmental assessment prepared in 2006. On or about November 29, 2006, Defendants
7 recorded (or caused or allowed to be recorded) their written agreement to lease the Navy Broadway
8 Complex to a developer on a long-term basis; prior to its recording, the lease agreement had been kept
9 secret by Defendants and the developer and not disclosed to the public despite repeated requests for
10 disclosure. The Project's ultimate scope, design, and intensity could not have been ascertained until
11 November 29, 2006.

12 6. Plaintiff opposes the Project and challenges certain related actions taken by Defendants.
13 In particular, Plaintiff seeks to invalidate Defendants' adoption of the FONSI, lease of the Navy
14 Broadway Complex to a developer, and related actions and approvals with respect to the Project on the
15 grounds that Defendants have violated the National Environmental Policy Act ("NEPA"), the
16 Administrative Procedure Act ("APA"), and perhaps other laws.

17 18 **Jurisdiction, Venue, and Exhaustion of Remedies**

19 7. This Court has jurisdiction over this proceeding pursuant to Sections 1331 and 1361 of
20 Title 28 of the U.S. Code, because this pleading alleges violations of NEPA and the APA and seeks to
21 compel Defendants to perform duties owed to Plaintiff, its members, and other members of the public.
22 The Court also has jurisdiction over this proceeding pursuant to Section 701 *et seq.* of Title 5 of the
23 U.S. Code, because the pleading seeks judicial review of action taken by one or more agencies of the
24 United States.

25 8. Venue is proper in this Court under Section 1391(e) of Title 28 of the U.S. Code,
26 because (i) Defendants are either officers, employees, or agencies of the United States and (ii) both a
27 substantial part of the events or omissions giving rise to this proceeding were committed in this judicial
28 district and a substantial part of the property at issue in this proceeding is located in this judicial district.

1 9. Plaintiff has satisfied each and every exhaustion-of-remedies requirement that must be
2 satisfied in order to maintain this proceeding. Alternatively, no exhaustion-of-remedies requirement
3 may be applied to Plaintiff.

4 10. Plaintiff has no plain, speedy, adequate remedy in the ordinary course of law, since
5 Plaintiff, its members, and other members of the public will suffer irreparable harm as a result of
6 Defendants' violations of NEPA, the APA, and other laws. Defendants' approval of the Project also
7 rests on the failure to satisfy a clear, present, ministerial duty to act in accordance with those laws. Even
8 when Defendants are permitted or required by law to exercise their discretion in approving projects
9 under those laws, they remain under a clear, present, ministerial duty to exercise their discretion within
10 the limits of and in a manner consistent with those laws. Defendants have had and continue to have the
11 capacity and ability to approve the Project within the limits of and in a manner consistent with those
12 laws, but Defendants have failed and refuse to do so and have exercised their discretion beyond the
13 limits of and in a manner that is not consistent with those laws.

14 11. Plaintiff has a beneficial right and interest in Defendants' fulfillment of all their legal
15 duties, as alleged in this pleading.

16
17 **FIRST CLAIM:**

18 **Failure to Prepare Environmental Impact Report**

19 **(Against All Defendants)**

20 12. Paragraphs 1 through 11 are fully incorporated into this paragraph.

21 13. NEPA requires every federal agency to prepare an environmental impact statement
22 ("EIS") for every major action significantly affecting the quality of the human environment that the
23 agency proposes to approve or carry out. In general, the EIS must address (i) the proposed action's
24 environmental impact, (ii) any adverse environmental effects that cannot be avoided if the proposed
25 action is implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-
26 term uses of the environment and the maintenance and enhancement of long-term productivity, (v) any
27 irreversible and irretrievable commitments of resources that would be involved in the proposed action
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1 if implemented, (vi) mitigation measures for the proposed action, and (vii) cumulative impacts for the
2 proposed action.

3 14. Defendants have not prepared an EIS for the Project. Plaintiff believes, however, that
4 the Project is a major action proposed to be approved and carried out by at least one federal agency and
5 has the potential to affect the quality of the human environment, including but not limited to the
6 environment in downtown San Diego and along the waterfront. Such impacts may include, among other
7 things, increased traffic and congestion, increased air pollution, increased water pollution, increased
8 demand for public-safety services (e.g., police and fire), increased risk from seismic hazards, increased
9 risk from terrorist events, incompatible land uses, and further decreases in the size and number of public
10 parks and other urban open spaces.

11 15. Defendants' refusal to prepare an EIS for the Project was contrary to NEPA, arbitrary
12 and capricious under the APA, a prejudicial abuse of discretion, and not supported by sufficient
13 evidence.

14 16. Plaintiff, its members, and other members of the public have been harmed as a result of
15 Defendants' violations of NEPA and the APA because they have been denied the benefits and
16 protections provided by compliance with those laws. By way of example and without limitation,
17 Plaintiff, its members, the public, and the decision-makers who approved and are carrying out the
18 Project were not fully informed about the impacts of, mitigation measures for, and alternatives to the
19 Project prior to the decision to approve and carry out the Project.

20
21 **SECOND CLAIM:**

22 **Failure to Prepare Supplemental Environmental Impact Statement**

23 **(Against All Respondents and Real Parties in Interest)**

24 17. Paragraphs 1 through 16 are fully incorporated into this paragraph.

25 18. Under certain circumstances, NEPA requires every federal agency to prepare a
26 supplemental environmental impact statement ("SEIS")--that is, a statement that supplements a
27 previously prepared EIS--for every major action significantly affecting the quality of the human
28 environment that the agency proposes to approve or carry out. In particular, an SEIS must be prepared

1 when (i) the agency makes substantial changes in the proposed action that are relevant to environmental
2 concerns or (ii) there are significant new circumstances or information relevant to environmental
3 concerns and bearing on the proposed action or its impacts. Additionally, every federal agency must
4 (i) adopt procedures for introducing an SEIS into its formal administrative record (if there is one) for
5 the proposed action and (ii) prepare, circulate, and file an SEIS in the same manner as a draft or final
6 EIS unless alternative procedures have been approved by the Council on Environmental Quality.

7 19. Defendants have not prepared an SEIS for the Project and opted instead to rely on the
8 FONSI, which was based solely on the environmental impact statement prepared in 1990, the record
9 of decision prepared in 1992, and the environmental assessment prepared in 2006. Plaintiff believes,
10 however, that Defendants have made significant changes to the Project relevant to environmental
11 concerns over downtown San Diego and the waterfront. Alternatively and additionally, Plaintiff
12 believes that there are significant new circumstances or information (if not both) relevant to
13 environmental concerns over and bearing on the Project or its impacts in downtown San Diego and
14 along its waterfront. Such changes, circumstances, and information may include, among other things,
15 (i) revisions to the scope, design, and intensity of the Project; (ii) previously unforeseeable increases
16 in traffic and congestion, air pollution, water pollution, demand for public-safety services (e.g., police
17 and fire), risk from seismic hazards, risk from terrorist events, and incompatible land uses, as well as
18 previously unforeseen and unforeseeable decreases in the size and number of public parks and other
19 urban open spaces; and (iii) previously unknowable terms and conditions of the Navy Broadway
20 Complex lease between Defendants and the developer.

21 20. Defendants' refusal to prepare an SEIS for the Project was contrary to NEPA, arbitrary
22 and capricious under the APA, a prejudicial abuse of discretion, and not supported by sufficient
23 evidence.

24 21. Plaintiff, its members, and other members of the public have been harmed as a result of
25 Defendants' violations of NEPA and the APA because they have been denied the benefits and
26 protections provided by compliance with those laws. By way of example and without limitation,
27 Plaintiff, its members, the public, and the decision-makers who approved and are carrying out the
28

1 Project were not fully informed about the impacts of, mitigation measures for, and alternatives to the
2 Project prior to the decision to approve and carry out the Project.

3
4 **THIRD CLAIM:**

5 **Failure to Allow Public Participation before Making Finding of No Significant Impact**
6 **(Against All Respondents and Real Parties in Interest)**

7 22. Paragraphs 1 through 21 are fully incorporated into this paragraph.

8 23. NEPA requires every federal agency to provide the public with an opportunity to review
9 and comment on environmental assessments and proposed findings of no significant impact for every
10 major action significantly affecting the quality of the human environment that the agency proposes to
11 approve or carry out, so that the public has a meaningful opportunity to participate in the decision not
12 to prepare an EIS. In particular, every agency must (i) provide the public with notice of and solicit
13 comments on the agency's intent to adopt a finding of no significant impact before making the decision
14 not to prepare an EIS; (ii) adopt procedures to ensure that environmental information is made available
15 to the public before decisions are made and before actions are taken; (iii) implement procedures to make
16 the NEPA process more useful to decision-makers and the public; (iv) encourage and facilitate public
17 involvement in decisions that affect the quality of the human environment; and (v) make diligent efforts
18 to involve the public in preparing and implementing NEPA procedures. Defendants' own regulations
19 for implementing NEPA "clearly recognize" the "importance of public participation . . . in preparing
20 environmental assessments" and recommend the development of "a plan to ensure appropriate
21 communication with affected and interested parties." Additionally, the *Navy Commanding Officer's*
22 *Guide to Environmental Compliance* includes "provid[ing] the opportunity for public comment" as part
23 of the Navy's NEPA program.

24 24. Plaintiff, its members, and other members of the public were provided with no notice
25 of and no opportunity to comment on the environmental assessment or the FONSI for the Project. The
26 environmental assessment and the FONSI were the product of secret, back-room dealings, with the
27 specific goal of preventing the public from meaningfully participating in Defendants' decision not to
28

1 prepare an SEIS for the Project and otherwise influencing the ultimate scope, design, and intensity of
2 the Project.

3 25. Defendants' failure to provide the public with an opportunity to review and comment
4 on the Project's environmental assessment and the FONSI was contrary to NEPA, arbitrary and
5 capricious under the APA, a prejudicial abuse of discretion, and not supported by sufficient evidence.

6 26. Plaintiff, its members, and other members of the public have been harmed as a result of
7 Defendants' violations of NEPA and the APA because they have been denied the benefits and
8 protections provided by compliance with those laws. By way of example and without limitation, the
9 public was unable to provide the decision-makers who approved and are carrying out the Project with
10 information about the Project's potentially significant environmental impacts not identified in the
11 environmental assessment or requiring a level of analysis that can only be provided in an EIS, about
12 mitigation measures for the Project, about alternatives to the Project, and about ways to correct or
13 otherwise improve the limited analysis of the Project's impacts--all with the goal of fostering better
14 decision-making with respect to the Project.

15
16 **Prayer**

17 FOR ALL THESE REASONS, Plaintiff respectfully prays for the following relief against
18 Defendants (and any and all other parties who may oppose Plaintiff in this proceeding):

19 A. A judgment determining or declaring that Defendants failed to comply fully with NEPA
20 and the APA as they relate to the Project and that the FONSI was illegal in at least some respect,
21 rendering the FONSI null and void;

22 B. A judgment determining or declaring that Defendants failed to comply fully with NEPA
23 and the APA as they relate to the Project and that its approval (including all associated entitlements and
24 leases) was illegal in at least some respect, rendering the approval null and void;

25 C. A judgment determining or declaring that Defendants must prepare an EIS or an SEIS
26 fully in accordance with NEPA and the APA before final approval of the Project may be granted;

27 D. Injunctive relief prohibiting Defendants (and any and all persons acting at the request
28 of, in concert with, for the benefit of, in privity with, or under one or more of them) from taking any

1 action on any aspect of, in furtherance of, or otherwise based on the Project unless and until Defendants
2 fully comply with all applicable provisions of NEPA and the APA, as determined by the Court;

3 E. Any and all other relief that may be authorized by NEPA or the APA but not explicitly
4 or specifically requested elsewhere in this Prayer;

5 F. All legal fees and other expenses incurred in connection with this proceeding, including
6 but not limited to reasonable attorney fees as authorized by law; and

7 G. Any and all further relief that this Court may deem appropriate.

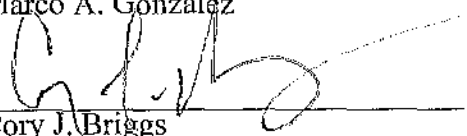
8 Date: January 4, 2007.

Respectfully submitted,

9 BRIGGS LAW CORPORATION
10 Cory J. Briggs
Karen L. Skaret

11 COAST LAW GROUP LLP
12 Marco A. González

13 By:


Cory J. Briggs

14 Attorneys for Plaintiff San Diego Navy Broadway
15 Complex Coalition
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