

1 Port has a vested interest in protecting the long-term  
2 health and sustainability of the tidelands. Consequently,  
3 we intend to continue to cooperate with the cleanup team's  
4 actions to remediate this site.

5 This image shows the locations of six previous or  
6 ongoing San Diego Bay cleanup sites. All of which have  
7 relied, or continued to rely upon, the Port's involvement.  
8 Going clockwise, these sites are the Shelter Island Yacht  
9 Basin TMDL site, Tow Basin site, Teledyne Ryan or  
10 Convair Lagoon site, Campbell Shipyard site, BF Goodrich  
11 former south campus site, and the South Bay Power Plant  
12 site. By way of examples, all of these cleanups, some of  
13 which remain ongoing, have involved the Port's leadership  
14 and cooperative efforts with the San Diego Regional Water  
15 Quality Control Board and other State agencies.

16 To demonstrate the Port's leadership and  
17 cooperation, I will describe briefly, at a high level, the  
18 Port's involvement at each of these six sites. The first  
19 site I'll discuss today is the Shelter Island Yacht Basin  
20 TMDL site. In response to elevated levels of copper in the  
21 water at this site, the Regional Board developed a TMDL  
22 program for Shelter Island Yacht Basin that requires a  
23 76 percent reduction in copper loading into the basin within  
24 17 years.

25 The primary sources of dissolved copper have been

1 identified as passive leaching of copper from copper-based  
2 anti-fouling hull coatings and copper released during  
3 underwater hull cleaning of boats. The TMDL requires the  
4 Shelter Island Yacht Basin stakeholders, including the Port,  
5 to take steps to achieve this overall reduction. As the  
6 cleanup team has stated, "The Port is working very  
7 cooperatively with the Regional Board on this matter." In  
8 particular, the Port is -- the Port is working at phasing  
9 out copper-based hull paint and is taking a lead role in  
10 investigating the use of alternative vessel hull paints to  
11 curtail copper discharges into the San Diego Bay.

12 The Port has secured grant funds to assist in the  
13 switching of hull paints and has been facilitating a  
14 discussion on this point between the Board the yacht owners  
15 and the marinas. We have also made financial contributions  
16 to this effort. Also, the Port is a cosponsor of  
17 Senator Kehoe's bill, SB 623, which we expect will lead to a  
18 ban on copper hull paints and copper in brake pads.

19 The next site is the Tow Basin site. This is an  
20 area adjacent to the San Diego Bay involving PCB  
21 contamination associated with a former aeronautics facility.  
22 On-site tenant operations in the '50s and '60s included the  
23 testing of hull designs and aerospace prototypes in a large  
24 concrete pool known as the Tow Basin. Regulatory oversight  
25 agencies believe that over the decades of the Tow Basin's

1 existence, on-site PCBs washed into on-site storm drains,  
2 drained into the Bay, and caused potential sediment  
3 contamination.

4 The Port has been working cooperatively with the  
5 Regional Board to conduct the necessary investigation,  
6 assessment, and remedial work for this site. To accomplish  
7 the site remediation goals, the Port recently completed the  
8 testing of site sediments in accordance with the sediment  
9 quality objectives promulgated by the State Resources  
10 Control Board -- Water Resources Control Board. I apologize.

11 The next site I'll discuss is the Teledyne Ryan  
12 Convair Lagoon site. Between the early 1940s and mid-1990s,  
13 this -- the TDY site was used for aerospace component  
14 manufacturing. In 2004, the Regional Board issued a cleanup  
15 and Abatement Order for the remediation of site PCBs, trace  
16 metals, and volatile organic compounds.

17 To further site remediation efforts, the Port  
18 assisted in making historic specialized insurance assets  
19 available to help pay for demolition and remediation costs  
20 at this site. Further, the Port facilitated the tenants'  
21 compliance, under the Regional Board's oversight, to  
22 remediate the sediments in Convair Lagoon.

23 Next is the Campbell Shipyard site. The Port  
24 provided significant assistance and leadership at another  
25 large San Diego Bay dredging project at this site. Campbell

1 began its shipyard operations at this site in 1926. And  
2 their shipyard industrial processes were conducted over  
3 San Diego Bay or in close proximity to the Bay.

4 In 1995, the Regional Board issued Cleanup and  
5 Abatement Order number 95-21 to address contaminated bay  
6 sediments, soils, and groundwater at Campbell's former  
7 facility. The Port worked cooperatively with, and  
8 supported, the Regional Board's cleanup approach at this  
9 site. The Port assisted in pushing the site toward  
10 mediation and also in securing insurance proceeds from a  
11 number of dischargers, in addition to the Port's own  
12 insurance.

13 Together, these insurance funds were used to  
14 finance the dredging and capping of the sites' impacted  
15 sediments. Ultimately, the Port, itself, performed the  
16 sediment dredging and capping work at the Campbell site.

17 Next is the former Goodrich south campus site. The  
18 Goodrich south campus site is a closed aerospace facility  
19 located adjacent to the Bay shoreline in Chula Vista. Since  
20 1941, this site had been used for industrial activities  
21 associated with the operations of Rohr, Inc., which later  
22 became a division of the Goodrich Company.

23 In 1999, the Port acquired the property known as  
24 the former Goodrich south campus as part of the Chula Vista  
25 Bayfront Master Plan. But in 1998, the Regional Water Board

1 issued Cleanup and Abatement Order number 98-08 to Goodrich,  
2 which mandated that Goodrich perform certain remediation  
3 actions on the south campus. The Port is currently working  
4 with the Regional Board to investigate potential areas of  
5 historic contamination, including sediment contamination, at  
6 this site.

7 The final site I will discuss is the South Bay  
8 Power Plant site. The South Bay Power Plant is a complex  
9 decommissioning and demolition project related to a power  
10 plant facility located adjacent to the Bay in Chula Vista.  
11 The plant began generating power at this site in 1960, and  
12 the Port acquired the plant in 1999 for the purpose of  
13 facilitating its removal from the San Diego Bayfront. The  
14 power plant's removal raises environmental issues --  
15 numerous environmental issues, including those relating to  
16 bay sediments.

17 The Port recognizes that the site's present and  
18 future remediation requires our continued cooperation and  
19 leadership. And this is apparent because the plant's  
20 demolition and remediation will be a multiagency process.  
21 Along with the Port and the City of Chula Vista, the  
22 permitting process additionally involves, among others: The  
23 California Coastal Commission, the San Diego Air Pollution  
24 Control District, Cal OCSEA (phonetic), the San Diego County  
25 Department of Environmental Health, the Regional Board, and

1 the California Department of Fish and Game. As the  
2 Regional Board, itself, has recognized, the Port has been  
3 cooperative while working with the Board to further the  
4 remediation of this site.

5 I want to conclude simply by stating that these are  
6 examples -- numerous examples of the Port's commitment to  
7 cleanup and remediation efforts in San Diego Bay. We  
8 continue to work with our tenants and other dischargers in  
9 conjunction with the Regional Board to realize our mutual  
10 cleanup objectives. To a very great extent, the Port is in  
11 alignment with the Regional Board and the cleanup team's  
12 remedial footprint as set forth in these proceedings with  
13 the minor exception that Bill mentioned and will be  
14 discussed by other presenters for the Port. The Port has  
15 historically been aligned with the Board and will continue  
16 to partner with the Board on this, and future, cleanup  
17 endeavors.

18 That concludes my presentation.

19 MR. DESTACHE: Thank you very much. Questions? I don't  
20 think there would be any cross.

21 MR. BROWN: Thank you, Randa. And I did want to mention  
22 what the point of this presentation is. The cleanup team is  
23 arguing to you that you have the discretion to name the Port  
24 as primarily, rather than secondarily, liable.

25 But the flipside of that is also true. You have

1 leased. And I believe it's all leased to NASSCO or BAE.

2 Next slide. Okay. The current MS 4 permit was  
3 issued by the San Diego Regional Board in 2007, and the  
4 compliance requirements in the MS 4 permit are very  
5 prescriptive. It's a very long, detailed permit.

6 They document this MS 4 permit in order to  
7 determine that compliance with these requirements would be  
8 protective of receiving water quality. The best management  
9 practices that the District implements in compliance with  
10 the MS 4 permit and the tidelands adjacent to the shipyard  
11 sediment site include inspection of the storm drain inlets  
12 on Belt Street annually or biannually, a monthly sweeping of  
13 Belt Street, inspection of tenant facilities to verify that  
14 they are implementing BMPs and operating in a manner  
15 protective of water quality, and establishment of procedures  
16 and training of staff to identify and eliminate illegal  
17 discharges and illegal connections to the MS 4.

18 And additionally, the Port District Environmental  
19 Services Department has prepared a jurisdictional urban  
20 runoff management program, or a JURM, document in accordance  
21 with the requirements of the MS 4 permit. In my opinion,  
22 the Port District maintains the areas tributary to the  
23 shipyard sediment site in accordance with its JURM.

24 In the BAE presentation yesterday by the attorney,  
25 he mentioned that there are a number of potential pollutants

1 that may be associated with various land uses, and one of  
2 them being streets and so forth. I'd like to point out that  
3 those are potential pollutants that need to be addressed by  
4 BMPs, such as those described both in your MS 4 permit and  
5 the JURM. And those BMPs are implemented by the Port  
6 District to control the discharge of those pollutants to  
7 receiving waters like San Diego Bay.

8 U.S. EPA has audited the Port District's stormwater  
9 program, and they found that the Port District's  
10 Environmental Services Department has a well-trained and  
11 knowledgeable staff dedicated to the stormwater program. In  
12 my opinion, based on my evaluation and experience with other  
13 MS 4 compliance programs in California, the Port District's  
14 compliance program is being implemented to the maximum  
15 practicable standard prescribed by the MS 4 permit. It is  
16 also my opinion that the Port District reviews the  
17 requirements of the MS 4 permit as a minimum compliance  
18 requirement and has proactively implemented compliance  
19 activities.

20 Next slide. Item 11 of the draft technical report  
21 alleges that the Port District operates the MS 4 facilities  
22 discharging to San Diego Bay via outfalls SW 4 and SW 9.  
23 In fact, the City of San Diego owns and operates the MS 4  
24 facilities discharging via these outfalls SW 4 and SW 9.  
25 And based on the documentation reviewed and interview of



1 Port District by way of staff, the City of San Diego owns  
2 and operates MS 4 facilities discharging to the SW 4 and  
3 SW 9 outfall.

4 The City of San Diego maintains easements and owns  
5 and operates the MS 4 facilities in the associated outfalls,  
6 SW 4 and SW 9, and has since the responsibility for  
7 administration of the State's tidelands property was  
8 conveyed in trust into the Port in 1963. The nonleased  
9 portion of the tidelands jurisdiction that discharges to  
10 outfall SW 4 is limited to portions of Belt Street, and  
11 that's approximately one acre. And the MS 4 on  
12 Belt Street -- in other words, the storm drain under  
13 Belt Street is actually owned and operated by the City of  
14 San Diego.

15 So again, the -- the area in blue is the nonleased  
16 area that's within the tidelands area administered by the  
17 Port District. Again, you see that the yellow lines are the  
18 City's storm drains. The red line, again, is the -- the  
19 tidelands boundary.

20 And the blue is the nonleased portions of the  
21 tidelands administered by the Port District. This is a more  
22 magnified view of the nonleased tidelands upgrading of SW 4.  
23 Outfall SW 4 is located on land that has been leased to BAE.  
24 And its predecessor, Southwest Marine, since 1979.

25 BAE does own and operate storm drain inlets that

1 discharge to the City of San Diego's MS 4 that discharges to  
2 outfall SW 4. And I'd like to note that the BAE facilities  
3 only receive stormwater from within their leasehold. They  
4 don't receive storm -- or stormwater from the blue areas.

5 And the BAE facilities connect to the City of  
6 San Diego's MS 4, and the BAE storm drain inlets are valved.  
7 And they only discharge to the City's MS 4, if necessary, to  
8 prevent catastrophic flooding of the BAE shipyard. And the  
9 operation of those facilities is described in their  
10 stormwater pollution prevention plan.

11 Let's see. One item I would like to point out  
12 is -- let's see. This is Catch Basin 1. This is the SDG&E  
13 facility. And this is Sampson Street right here (indicating).

14 This is the catch basin that has received a lot of  
15 discussion today. You'll see that it connects directly to  
16 the City storm drain which then goes out to SW 4. The BAE  
17 storm drain inlets -- I think this is one here. Another one  
18 here (indicating).

19 And I think they have got a couple of manholes  
20 along this reach here. And I think they've got a couple of  
21 storm drain inlets on this part of their property. But they  
22 go into the -- into the City's storm drain that goes to SW 4  
23 (indicating).

24 Okay. Again, this is another up-close showing the  
25 areas of the nonleased tidelands upgrading to SW 4. Again,

1 this is a -- this nonleased area is a street.

2 It's a two-lane street. Actually, a rather a  
3 narrow two-lane street. Probably narrower than the one out  
4 in front of our building here. And it encompasses a total  
5 of a little bit over one acre.

6 Next slide. This is a magnified view of the  
7 tidelands -- tidelands upgrade of SW 9. Outfall SW 9 is  
8 located on property that has been leased to NASSCO since at  
9 least 1960. And NASSCO also contains and discharges all  
10 storm -- storm runoff to the sanitary sewer.

11 I'd like to point out that BAE also contains their  
12 stormwater runoff, and they discharge their stormwater  
13 runoff to -- at this time to the sanitary sewer. However,  
14 the Regional Board has had both NASSCO and BAE permitted for  
15 their stormwater discharges to San Diego Bay for almost  
16 40 years under NPDES permits.

17 Neither NASSCO nor BAE discharge to the -- out to  
18 the storm drain or out to Belt Street or any MS 4 facilities  
19 owned by the Port District. Again, you can see the little  
20 sliver of blue at the top of the slide, and that is a very  
21 narrow sliver of the parking lot that is used by NASSCO  
22 employees that somehow escaped being leased -- being  
23 included as part of the lease to NASSCO.

24 Go to the next one. Okay. The nontenant area of  
25 the Port District constitutes approximately one

1 one-hundredth of one percent of the area tributary to  
2 San Diego Bay in the area of the shipyard sediment site.

3 This map here shows the area that's drained by both  
4 SW 4, SW 9, and Chollas Creek. And all this area drains  
5 down to the shipyard sediment site. In that area, there are  
6 other, more significant, stormwater dischargers tributary to  
7 the shipyard sediment site that may be sources of chemicals  
8 of concern.

9 For example, the City of Lemon Grove and -- Cities  
10 of Lemon Grove and La Mesa are in that area to the -- on  
11 kind of the right-hand side of that area. And the City of  
12 Lemon Grove and the City of La Mesa own and operate MS 4  
13 facilities that convey urban runoff from areas upgrading of  
14 the shipyard sediment site. Lemon Grove's and La Mesa's  
15 MS 4 facilities discharge indirectly to San Diego Bay in  
16 the vicinity of the shipyard sediment site through  
17 Chollas Creek.

18 It's approximating that the Tentative Cleanup and  
19 Abatement Order means neither of these entities is a liable  
20 party due to their MS 4 activities, although their  
21 contributing watershed constitutes a relatively larger  
22 contributing watershed. And both of these cities operate  
23 their MS4s under the same San Diego County MS 4 permit. And  
24 there are other entities as well in that area that discharge  
25 stormwater, including Caltrans and perhaps others.

1 MR. CARRIGAN: Thank you. Thank you very much,  
2 Dr. Johns.

3 MR. DESTACHE: Do we have any additional cross for  
4 Dr. Johns? We will move -- redirect?

5 MR. BROWN: No, I have no redirect.

6 MR. DESTACHE: Okay. So we're going to go to rebuttal  
7 witness for --

8 MR. CARRIGAN: Yeah. I wanted to call Mr. Becker from  
9 the San Diego Water Board staff and a member of the cleanup  
10 team to briefly discuss what the Port's stormwater expert  
11 stated about its permit and how that might differ with the  
12 Water Board's interpretation of its permit.

13 If I might ask Mr. Brown to indulge me. Could you  
14 put up the exhibit that has the little tiny blue areas on  
15 it?

16 MR. BROWN: I hope I have somebody who can.

17 MR. CARRIGAN: I just have a couple quick questions once  
18 we get it up.

19 MR. DESTACHE: Mr. Becker, have you taken the oath?

20 MR. BECKER: Yes, I have. My name is Eric Becker,  
21 B-e-c-k-e-r. I'm a senior engineer with the Southern  
22 Watershed Unit.

23 MR. CARRIGAN: While we're looking for the exhibit,  
24 Mr. Becker, what's your involvement with the Regional  
25 Board's enforcement or interpretation of the MS 4 permit?

1 Do you work at the stormwater branch?

2 MR. BECKER: Yes. I worked with the stormwater program  
3 and for the last ten years for the Board.

4 MR. CARRIGAN: Understood. Now, did you see this  
5 exhibit earlier when the stormwater presentation was being  
6 made by the Port District?

7 MR. BECKER: Yes, I did, briefly.

8 MR. CARRIGAN: And I don't want to mischaracterize the  
9 testimony. But my understanding was the expert testified  
10 that the only area that the Port is responsible for is the  
11 blue area depicted.

12 Is that the testimony you heard?

13 MR. BECKER: That's the -- that is correct.

14 MR. CARRIGAN: And just for context, the Bay is down  
15 below here. And the expert testified that this is the  
16 boundary of the Port tidelands -- this red dot (indicating).

17 What is the Water Board's interpretation of the  
18 Port's extent of responsibility for the MS 4 system?

19 MR. BECKER: That would be incorrect. The lateral  
20 stormwater -- lateral stormwater system in the facilities  
21 is also included in the MS 4 system.

22 MR. CARRIGAN: So all of the area in the tidelands is  
23 the responsibility of the Port District under the MS 4  
24 permit?

25 MR. BECKER: That is correct.

1 MR. CARRIGAN: Thank you. No further questions.

2 MR. BROWN: I'll have redirect, but does somebody else

3 have questions?

4 MR. DESTACHE: I think we'll go with the redirect on

5 this witness, and then we'll go to the City of San Diego.

6 MR. BROWN: Mr. Becker, are you aware that the City owns

7 the storm drains?

8 MR. BECKER: What do you refer by "storm drains"?

9 Because there's several parts to the storm drain. It could

10 be the main storm drain line --

11 MR. BROWN: I'm talking about the main storm drain line.

12 MR. BECKER: I'm -- can you clarify what your question

13 is?

14 MR. BROWN: This area here, the main storm drain line,

15 does the City own those -- those drains (indicating)?

16 MR. BECKER: I can't testify to that.

17 MR. BROWN: Are you aware that it's in the record that

18 the City, at the time that the tidelands were transferred to

19 the Port District, reserved an easement and an ownership of

20 these -- this storm drain system?

21 MR. BECKER: I can't -- I can't speak to that.

22 MR. BROWN: Do you know that that was included in

23 Mr. Collacott's declarations and is in the record?

24 MR. BECKER: No, I cannot.

25 MR. BROWN: I have no further questions on that.

1 MR. CARRIGAN: And now, I think this is what we call  
2 "redirect."

3 Mr. Becker, under the Port's permit, are they  
4 responsible for discharges to the MS 4 for stormwater  
5 collected in the tideland area?

6 MR. BECKER: Yes, they are.

7 MR. CARRIGAN: Thank you.

8 MR. BROWN: Can I ask again?

9 Are they -- are they responsible for drains whether  
10 they own those drains or not? If they are private drains,  
11 would they own them? Would they be responsible?

12 MR. CARRIGAN: These questions call for legal  
13 conclusions, so I would object. I mean -- if the City has  
14 private arrangements with the -- with the Port District,  
15 that's between them. My question goes to the extent of the  
16 permit and the responsibility under the permit. That's all  
17 I was asking the witness to testify to.

18 MR. BROWN: Under the --

19 MR. CARRIGAN: If there's some other basis by which the  
20 Court can make a claim against another party, that's not our  
21 business here today.

22 MR. DESTACHE: I would agree with that. But Mr. Brown,  
23 you can ask the question again or a question that would  
24 elicit an answer that -- whether Mr. Becker or not can  
25 answer it.



1 MR. BROWN: Under an MS 4 permit -- and this is briefed  
2 extensively. Under an MS 4 permit, is a party responsible  
3 for all drains in the jurisdiction of that party or only for  
4 those drains in that jurisdiction that are owned by that  
5 party?

6 MR. BECKER: Owned and operated by that part of the  
7 MS 4 system.

8 MR. BROWN: And do you know whether the Port owns those  
9 drains?

10 MR. BECKER: I don't have anything to say that they  
11 do -- do or do not.

12 MR. BROWN: Well, the records are replete with  
13 information that the Port does not own those drains.

14 MR. BECKER: I was just asking who does own the drains  
15 then.

16 MR. BROWN: The City of San Diego.

17 MR. CARRIGAN: I think that those issues are set forth  
18 in detail in the record, and you can review our response to  
19 comments --

20 MR. LEDGER: I'll object to any testimony of Mr. Brown.

21 (Interruption in the proceedings)

22 MR. BROWN: Every other lawyer in this room has  
23 testified extensively today, so I thought I'd take my turn  
24 as well.

25 MR. DESTACHE: I have a question for Mr. Becker.

1 MR. BROWN: Could you put the map back on?

2 Now, for the main storm drain line, the one that  
3 was actually tested, is it your understanding that this  
4 storm drain is owned by the City of San Diego?

5 MS. KOLB: The inventory map shows the street -- the  
6 main drain coming down Sampson Street. Sampson Street.  
7 That's not Sampson Street.

8 MR. BROWN: Is this -- have you reviewed the documents  
9 that show that the City owned -- maintained an easement and  
10 ownership of this part of the storm drain?

11 MS. KOLB: I -- today when we reviewed the records, I  
12 saw as-billeds from 1988 that the outfall was relocated by  
13 the Port District and their tenant at that time to redirect  
14 the outfall to its current location. I did not see that it  
15 was on our inventory.

16 MR. BROWN: Did you review the easement and ownership  
17 documents that were also filed at the time of the  
18 realignment?

19 MS. KOLB: The easement documents were not included with  
20 the as-billeds.

21 MR. BROWN: Okay. Thank you.

22 MR. LEDGER: If there are no other questions --  
23 actually, on this point for Ms. Kolb, I actually did want to  
24 make her available to answer Board member Strawn's question  
25 earlier today regarding ownership of CB1.

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I, ERIN WINN, CSR NO. 13579, A CERTIFIED SHORTHAND REPORTER FOR THE STATE OF CALIFORNIA, DO HEREBY CERTIFY:

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I FURTHER CERTIFY THAT I AM NEITHER COUNSEL FOR NOR RELATED TO ANY PARTY TO SAID ACTION, NOR IN ANYWISE INTERESTED IN THE OUTCOME THEREOF.

IN WITNESS THEREOF, I HAVE HEREUNTO SUBSCRIBED MY NAME THIS *11<sup>th</sup>* DAY OF *February, 2012*

*Erin Winn*

ERIN WINN, CSR NO. 13579  
CERTIFIED SHORTHAND REPORTER  
FOR THE STATE OF CALIFORNIA

**Attachment I**

**Excerpts from the Transcripts of the California Regional  
Water Quality Control Board Public Meeting/Hearing, dated  
November 16, 2011**

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

SAN DIEGO REGION

GRANT DESTACHE, CHAIR

In the Matter of the )  
Regional Board )  
Public Meeting/Hearing )  
ITEM NUMBER 5 )  
\_\_\_\_\_ )

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TRANSCRIPT OF PROCEEDINGS

San Diego, California

Wednesday, November 16, 2011

Reported by:

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Orange County  
920 W. 17th St., Second Floor  
Santa Ana, CA 92706

Los Angeles  
523 W. Sixth St., Suite 1228  
Los Angeles, CA 90014

Central Coast  
1610 Oak St., Suite 106  
Solvang, CA 93463

1           So that's the framework that I'm working with. And  
2 I'm hoping that we can get enough time to do some  
3 significant deliberations this afternoon and come back with  
4 a recommendation. However, I don't think that we'll be  
5 specifically reported out today.

6           I know that Ms. Hagan and Ms. Okun -- I will be  
7 counseling with them probably over lunch to actually firm up  
8 that process; okay?

9           MR. RICHARDSON: Great. Thank you for that  
10 clarification. We appreciate that.

11           Before I get started, I also want to commend the  
12 cleanup team for all its efforts. As I said at the outset  
13 of this proceeding, this has been a mammoth task in  
14 developing this extraordinarily large administrative record  
15 that supports thousands of pages of the Draft Technical  
16 Report which supports this Cleanup and Abatement Order  
17 that's before you today. So I sincerely mean that, staff.  
18 Thank you for your efforts.

19           As I also said in my opening statements, it has  
20 been a very long road to get here today. Mediation spanned,  
21 as you know, numerous years involving numerous experts with  
22 PhDs and practically every subject matter of the order and  
23 every major field and resulted in the tentative order that's  
24 before you today.

25           In light of these significant efforts -- and let me

1 be clear -- NASSCO can accept, and will implement, this  
2 order as it's drafted if not changed. And so let me be very  
3 clear -- repeat that. NASSCO can accept, and will  
4 implement, this order as drafted if it's not changed and  
5 assuming some other pieces fall together as well, including  
6 the federal court litigation among all these dischargers to  
7 fund it, and the development of a reasonable remedial action  
8 plan somewhere. But NASSCO can, and will implement, this  
9 order, if it's ordered.

10 But NASSCO also firmly believes that it was, and  
11 is, necessary to present all the evidence before this Board  
12 and the alternatives for its consideration and discuss what  
13 an objective review of the evidence presented to you this  
14 past week shows for this specific site. So let's start with  
15 a few of the fundamental truths about this process.

16 Well, one is this the most expensively studied site  
17 in San Diego Bay -- period -- as Barker testified in his  
18 deposition. Second, this order would adopt the most  
19 stringent cleanup levels ever considered in California, much  
20 less San Diego. No party has contended that these cleanup  
21 levels are not low enough, are not protective, or that the  
22 cleanup levels lower than this have been adopted somewhere  
23 else. This order is very, very conservative.

24 Given this, the Board needs to recognize that this  
25 order does not treat these dischargers in a manner similar

1 decades ago. It's prepared to do so. It's prepared to try  
2 and be the steward for the bay that its employees testified  
3 to.

4 I'm not sure that I ever thought I'd be saying this  
5 in front of the Board, but I actually agree with Ms. Hunter  
6 on something. Today is the day. Today is the day when this  
7 matter should be put to rest. It should be put to rest with  
8 a balanced approach, with a complete approach, and one that  
9 takes into account all aspects of the waterfront jobs  
10 included.

11 But as I mentioned earlier, if the TCAO and DTR  
12 remain as drafted without amendment, BAE is prepared to  
13 accept, and to implement, this order and looks forward to  
14 doing so. Thank you.

15 MR. DESTACHE: Thank you, Mr. Tracy. Okay. We'll move  
16 to Campbell Industries.

17 MR. HANDMACHER: Good morning. Again, my name is  
18 Jim Handmacher, and I'm here representing  
19 Campbell Industries.

20 Campbell Industries is in general agreement on the  
21 technical issues with NASSCO and BAE, and I don't intend to  
22 sit here and rehash what they have already very well  
23 presented to the Board on those issues. Rather, I want to  
24 sort of add some of my own personal observations of this  
25 process and the evidence that you've heard.



1 certain inertia at work here that say, "We must do  
2 something, We can't have spent the last 20 years and not do  
3 something at the end." And I know that's a difficult thing  
4 for you to put aside, but I think that is your role.

5 Despite all of this, if you are going to require  
6 mass removal of chemicals through a dredge, then Campbell  
7 supports the approach that is presented in the CAO and DTR.  
8 I think it is extremely conservative, as NASSCO and BAE have  
9 already stated. And no further areas of dredge are  
10 justified by any of the science. It goes well beyond what  
11 is necessary to protect human health and the environment.

12 And so if the Board, despite all the science,  
13 believes that a dredge is necessary, then the Board should  
14 not go beyond what has been proposed. Thank you.

15 MR. DESTACHE: Thank you very much for your time. We  
16 will move to the U S. Department of Navy, the gentleman  
17 that's saving me lots of time in these hearings.

18 MR. SILVERSTEIN: Well, actually, the two hours that  
19 saved -- I had hoped to use an hour-and-a-half of it now.

20 MR. DESTACHE: Don't feel predisposed to do that.

21 MR. SILVERSTEIN: Okay. I won't. I won't. Needless to  
22 say, I'm here for the Navy. I'm David Silverstein still.

23 I said at the beginning that the Navy does not  
24 oppose the CAO as it is now drafted. What I mean is: If  
25 you adopt that -- or more, I guess, appropriately -- if you

1 recommend its adoption as it's written, the Navy, like the  
2 other parties, will cooperate in the implementation process.  
3 This whole thing will be over. I don't see anybody here who  
4 will really miss it, either.

5 There has been a lot of evidence presented. And  
6 you know, a lot of it has been compelling one way or the  
7 other. But I'd ask you not to be swayed by the siren song  
8 of the NGOs who are inviting you to adopt a more aggressive  
9 policy out there.

10 There's enough evidence in the record right now  
11 that you could easily adopt a much less aggressive policy --  
12 something on the order of studying the process of natural  
13 attenuation, a burial of -- natural burial of sediments and  
14 dilution and that sort of thing -- and sand movement. And  
15 that would be protective of human health and the environment.  
16 you could adopt something like that. And the record that  
17 you have here -- the very rich record that you have here  
18 would support that. And I don't think any court could budge  
19 that, really.

20 That said, again, we don't oppose the order as it's  
21 written right now. I'd remind you that that order is  
22 something arrived at by all the parties -- all the parties  
23 either had input into it or had the opportunity to have  
24 input into it. And in some ways it represents -- it  
25 represents -- it represents a bargain. It represents a --

1 honorable Board members, members of the advisory team.

2 The Board should know, and may be drawing this  
3 inference by now, that this TCAO is the result of the  
4 cleanup team's work with all of the designated parties. We  
5 worked with all of the experts you heard testify in this  
6 proceeding, and some that you didn't. We worked with  
7 Mr. MacDonald, the NGOs' expert. We worked with Dr. Ginn  
8 and his staff, Mr. Nielsen and Dr. Becker, Dr. Johns of the  
9 Port District.

10 And we worked with Dr. Condor from SDG&E. And  
11 probably, some of that 700,000 was helping us out, I'm  
12 assuming. We worked with the City's Richard Hammond  
13 (phonetic). We worked with the Navy's Lem Sinfield and  
14 Bart Chadman (phonetic). We worked with all the experts in  
15 this case to develop this Tentative Cleanup and Abatement  
16 Order, and it is a very robust piece of scientific work.

17 I think every assumption that we made that a party  
18 disagreed with has been exposed for your scrutiny in this  
19 proceeding. And you'll have your chance to give it that  
20 scrutiny.

21 We developed a TCAO based on the cleanup team's  
22 assessment of the scientific principals analyzed by all of  
23 these experts. You heard, as I heard today, every single  
24 discharger that's on the hook to pay for this cleanup  
25 complain about it, but ultimately say that if it's adopted,

1 they'll accept and implement it. Every single discharger.  
2 And I think I have got them all listed over there under the  
3 cleanup team right now.

4 They support dredging 23 polygons. That's a lot  
5 of jobs. Like any good compromise, we suppose just about  
6 everyone has some complaints about the TCAO, and you've  
7 heard them.

8 All of these dischargers put their differences with  
9 the cleanup team aside and agreed to implement this order,  
10 if it's adopted, as proposed. Some reluctantly, but they  
11 all did it. Some dischargers want to be removed from the  
12 order, but they all support the dredge footprint.

13 I first -- I'm going to just cover a few brief  
14 points. My first point, keep the named dischargers in the  
15 order. I won't go into great detail on this point.

16 There is nothing new been argued (sic) that was not  
17 argued in the papers. If you want to see the cleanup team's  
18 summary of the arguments and responses in a complete and  
19 comprehensive manner with respect to Star and Crescent, you  
20 should look at our response to comments beginning at page 5-1.

21 If you want to see our arguments with respect to  
22 SDG&E, look at our response to comments at page 9-1. If you  
23 want to see our arguments with respect to the Port District,  
24 look at page 11-29 and forward. And make your own  
25 determination on the evidence that's in the record. This

1 certify the EIR.

2 Mr. Gibson?

3 MR. GIBSON: One of the unfortunate things about going  
4 last is that all of the good points and lines have been  
5 used, so I hope you'll bear with me if I sound a bit  
6 repetitive. I want to start off by offering some things  
7 in acknowledgement.

8 I don't think there's nearly enough of that  
9 considering the sheer amount of work that's gone into this.  
10 And with the cleanup team, in particular, I'd like to thank  
11 and acknowledge Chad Laughlin (phonetic), who I forgot to  
12 mention last Wednesday; David Barker, whose personal  
13 involvement goes back in this many decades, more than just  
14 20 years; Julie Chan; Tom Alo; Vicente Rodriguez, whose  
15 technical expertise -- we would not have been able to get  
16 most of the documents out on time without him; Cynthia  
17 Gorham and Lisa Honda (phonetic), who are working on the  
18 TMDL for Chollas Creek -- and I will be talking about that a  
19 little bit later; Benjamin Tobler, whose name you've heard  
20 several times; Alan Monji; Eric Becker; and, of course,  
21 Mr. Carrigan.

22 But I would also like to thank -- and although  
23 he's not here today to enjoy this -- Mr. Tim Gallagher, who  
24 mediated about two-and-a-half years of sessions, many of  
25 them very interesting sessions. I'm looking forward to

1 someday seeing a book about this.

2 And the designated parties themselves and the  
3 interested parties; especially, all of those people --  
4 I counted about 40 -- who came out: Employees of BAE,  
5 employees of NASSCO -- their contractors, residents of  
6 Sherman Heights and Barrio Logan, National City who came  
7 out and spoke so articulately to our Board on their  
8 concerns for San Diego Bay.

9 I'm sure many of you have heard other Regional  
10 Boards do not enjoy this level of communication from the  
11 public. Chairs do get thrown. Names get called. But,  
12 happily, our hearing on this very contentious issue went  
13 extremely well. And the Board received some outstanding  
14 input from those parties.

15 I would also like to take note and commend the  
16 presiding officer and members of this Board, and the  
17 previous presiding officers, Mr. Mindman (phonetic) and  
18 Mr. King, whose leadership in this matter brought us to  
19 where we are today, as well as the members of the advisory  
20 time for their hard work in this matter.

21 My thanks to all of you. It has, indeed, been  
22 a long road to getting to this moment. And I have been  
23 looking forward to it, as have you, for a long time.

24 It is, in fact, a great story. It has everything.  
25 It has all the elements: Tragedy, drama, intriguing

1 science, fisherman, Surf Scoters, and, yes, hair loss.

2 A few weeks ago, I had the opportunity, when  
3 Carl Nettleton came by the office and said, "Dave, I want  
4 to show you something," to see a production that was made  
5 in 1990 by the San Diego Oceans Foundations and narrated by  
6 Walter Cronkite, complete with sailor's cap and commodore's  
7 coat. And here it is. This VHS tape has it on there.

8 It was titled "Marine Pollution in San Diego Bay"  
9 and subtitled "It's all of us." It was about the ongoing  
10 and historic discharges to San Diego Bay and their effects  
11 on the biology of the Bay and the risks to human health  
12 resulting from these discharges. When I confess to him --  
13 Carl said, "I really want to show you this," I really did  
14 not have time. But I am glad that I spent 30 minutes  
15 watching that tape because it was so illustrative as to what  
16 we have all been talking about these last four days and what  
17 we have been working on for many, many years.

18 In this program, the pollutants were the same:  
19 PCBs, Tributyn, copper, mercury, PAHs. Many of the  
20 locations are very familiar to us now after three days. And  
21 many of the players were the same: The Port of San Diego,  
22 NASSCO, BAE, SDG&E. Many of the same sorts of people who  
23 came and testified here last Wednesday also were interviewed  
24 during this production.

25 It even featured a young David Barker being

1 interviewed and a thoughtful Art Coe, as the executive  
2 officer of the Water Board, being interviewed on these  
3 matters. What was different, however, was the timing.  
4 The Greeks have two words for time. "Chronos," meaning  
5 "chronological time" -- the daytime, also referred to as  
6 "man's time." And "kairos," the time of ripeness when fruit  
7 can be picked by hand, also called "God's time."

8 In 1990, it was the right time to clean up the  
9 pollutants in San Diego Bay, but there was not a readiness  
10 to do it. It was not a moment of ripeness. This  
11 however -- as has been pointed out to you by many  
12 speakers -- is the moment of ripeness. This is the moment  
13 of readiness.

14 In 1990, we could little imagine devices like this.  
15 This is the hard drive that contains the administrative  
16 record for these proceedings. 140 linear feet -- although,  
17 I have heard 154 feet, too -- for an order that will propose  
18 to clean up 144,000 cubic yards of contaminated sediments.  
19 That's about one linear foot per thousand cubic yards, and  
20 it's all here on this device.

21 We did not have that technology in 1990. And,  
22 socially and technologically, we were simply not prepared,  
23 in my view, for the magnitude and the cost of the work that  
24 it would take -- will take to remediate the contaminated  
25 sediments in San Diego Bay at this site as well as others.



1 Now, we have these tools and the science and technology to  
2 fully consider, in advance, the right clean up and the right  
3 remediation of these sediments.

4 And we heard, during the last few days with some  
5 noteworthy exceptions, a social preparedness and a desire  
6 for significant remediation of these contaminated sediments  
7 in San Diego Bay. Even given the risks that we have heard  
8 that pertain to dredging the sediments, the community wants  
9 this done. We heard one speaker during that time say he did  
10 not think that this was the right order. I think he wants  
11 it done, but he wants it done a different way.

12 I also noted, however, in this production -- in  
13 this video tape a quote. There was actually a couple of  
14 good quotes, but I don't have the VCR anymore. So I'm going  
15 to have to figure out a way to get this down on another  
16 form.

17 But the one that I did note was that speaking about  
18 sewage in San Diego Bay and the relocation of sewage in San  
19 Diego Bay to Point Loma. The quote was, "Something had to  
20 be done, and San Diego rallied to do it." That time has  
21 come again, as I think should be fully evident.

22 It is, in fact -- I would asset -- time for  
23 San Diego to rally behind this proposed Cleanup and Abatement  
24 Order for these two shipyards, as proposed by the responsible  
25 parties, themselves, and the cleanup team, as described and

1 documented in great detail in the framework of the draft --  
2 or the Tentative Cleanup and Abatement Order, the Draft  
3 Technical Report, and the programmatic Environmental Impact  
4 Report and all of the many supporting documents in that  
5 140 linear feet of administrative record.

6 In preparing for this moment, I was thinking about  
7 Mark Twain and his quote in a chapter from My Autobiography  
8 published in the North American Review in 1906 and thinking  
9 that that shipyard was opened in 1915, not many years later.  
10 "Figures often beguile me," he wrote. "Particularly, when  
11 I have the arranging of them myself. In which case, the  
12 remark attributed to Disraeli would often apply with justice  
13 in force."

14 Continue to quote. "There are three kinds of lies,  
15 Lies, damned lies, and statistics." It should not surprise  
16 us, therefore, that in this matter, there are strong  
17 differences of opinion and interpretation around the record  
18 and the data that the proposed actions that could be seen as  
19 rising to Twain's observation.

20 I would like to make a couple of points that  
21 Cris Carrigan has already made, but I do want to reiterate  
22 them. I think that they are important here. SDG&E, in  
23 particular, has made accusations regarding the deflection of  
24 responsibility and has asked you, the Board, to consider the  
25 source. But think about the source. In fact, that's

1 absolutely right.

2 SDG&E has made repeated statements regarding the  
3 deflection of responsibility and testimony regarding the  
4 role of the shipyards as sources of the primary pollutants  
5 of concern, yet the shipyards have not disputed their role  
6 or their dischargers. Indeed, they have owned them here at  
7 this podium. It is SDG&E, in my view and the cleanup team's  
8 view, that has not owned its responsibility in this matter.  
9 It is not a choice for you, as Board members, between SDG&E.  
10 The cleanup team asserts it is, in fact -- they are both  
11 responsible.

12 With regard to the naming of the Port as a primary  
13 responsible party, I will personally own that I had personal  
14 misgivings about naming the Port as a primary responsible  
15 party, and that Mr. Carrigan has properly and accurately  
16 described his position and his recommendations from -- on  
17 that question from the very day he arrived and started  
18 working on the cleanup team.

19 But for all of the reasons provided in the Draft  
20 Technical Report, the Cleanup and Abatement Order, the CUT  
21 stands by its recommendation.

22 I do note, however -- and I warmly share  
23 Mr. Brown's assertion that -- in his opening remarks, that  
24 the Port is the Water Board's best friend, maybe its only  
25 friend -- to quote him -- in this and future cleanups in

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San Diego Bay.

I, too, look forward to working very closely with the Port in the years and months to come to achieve our share of goals of a clean and healthy San Diego Bay that also supports the economic industries, the shipyards that are important to our local economy that provide jobs that pay almost as good as attorneys. Found that hard to believe, but I'll accept the testimony on that from the Port Association.

It is an important fact that we can have both, and we need to have both in San Diego Bay. It is the premier water body of our region.

I used Mark Twain's quote thoughtfully. And if you thought it was to cast blame, you thought incorrectly. It is more about the necessity to define the parameters of success and avoiding the blame game later that I gave thought to Mark Twain's dilemma in his arranging of figures.

We have heard many instances during the last several days in which good experts can review the same data and information and draw radically divergent conclusions. Maybe surf the same wave in different directions, perhaps. Nonetheless, what this hearing is really about is deciding how clean is clean enough.

The goals of the Clean Water Act, as I reiterated this morning, are to restore and maintain the chemical,

1 But it's clear in this hearing -- you did hear  
2 people say, including NASSCO, that this is an overly  
3 conservative order. That we disagree with the underlying  
4 fundamental bases of the finding, including that there's no  
5 impairment to beneficial uses, and the dredging is not  
6 justified and will do more harm than good.

7 NASSCO's agreement to implement the order and accept  
8 it was conditioned upon a number of assumptions. And a lot  
9 of those assumptions are out of our control.

10 For example, there's federal court litigation  
11 ongoing today -- how to fund this thing. We have to know  
12 that this thing can be funded and implemented. We also have  
13 to know that there's a reasonable remedial action plan. And  
14 I agree, it sounds like there will be a separate opportunity  
15 to come before the Board and speak to you about the remedial  
16 action plan, and I look forward to that.

17 But the parties can't be in a position today -- or  
18 at least NASSCO cannot be in a position today to accept the  
19 order and agree not to appeal it not knowing what the  
20 conditions of that remedial action plan are. Moreover, we  
21 don't know what this final order will look like. Until that  
22 happens, we're uncomfortable and can't comment on that.

23 So we'll accept, and we'll implement the order.  
24 We support the process. This was a long mediation process.  
25 We actively participated. Our experts actively participated

1 unusual, from my experience, that we would be asked to  
2 render decisions about -- that could affect, or will affect,  
3 future decisions of which we don't control -- that is, BAE  
4 does not control all aspects of those decisions.

5 So we are prepared to accept the terms of the order  
6 as it is presently drafted. We are prepared to implement  
7 that order. But we are not prepared to waive any rights to  
8 appeal under circumstances -- as Mr. Richardson indicated,  
9 we don't have answers to many, many questions that we need  
10 to have for us to make any kind of a commitment in regard to  
11 that.

12 MR. DESTACHE: Thank you, Mr. Tracy.

13 MR. HANDMACHER: This is Jim Handmacher again for  
14 Campbell Industries.

15 As I expressed before, it's our position that a  
16 dredge program is not appropriate at this time at this site.  
17 As I stated before, if a dredge program is going to be  
18 implemented, then the remedial footprint that is set forth  
19 in the TCAO is an appropriate footprint. Unlike NASSCO and  
20 BAE, Campbell Industries is not in a position to implement  
21 the CAO. Campbell Industries is no longer an operating  
22 entity.

23 Campbell Industries does not have control of the  
24 site. We would be shot if we went on the site to try to  
25 implement this CAO. Lead poisoning, I think, was the word

1 through the entire process.

2 I think the cleanup team will tell you with every  
3 stage of this proceeding, we were as supportive as we  
4 possibly could be. So we do support the process, but we  
5 just can't be in a position to waive our rights at a time  
6 when we just don't have the full picture. There are just  
7 too many pieces of that puzzle left unanswered. That's all.

8 MS. OKUN: Thank you. And the panel isn't asking anyone  
9 to stipulate to anything they're not willing to stipulate  
10 to. It just was not clear to us what the parties were  
11 trying to tell us, basically. And we're just trying to get  
12 clarification, not to create some unusual procedure or push  
13 anyone into agreeing to something that they don't want to.

14 MR. TRACY: Mike Tracy on behalf of BAE.

15 In my opening statement, I indicated that BAE was  
16 willing to accept the order as currently drafted. In that  
17 opening statement, I had said with caveats to that. I  
18 didn't specifically mention what those caveats were.

19 We hold those same caveats now. One of those  
20 caveats is, as Mr. Richardson mentioned, there's federal  
21 litigation. How does this get paid for? That is a primary  
22 assumption by BAE as to the accepting and implementing of  
23 this.

24 But there are others, including the wrap. And  
25 there are others, including future actions. It is highly

REPORTER'S CERTIFICATE

I, ERIN WINN, CSR NO. 13579, A CERTIFIED SHORTHAND  
REPORTER FOR THE STATE OF CALIFORNIA, DO HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT OF PROCEEDINGS WAS  
TAKEN BEFORE ME ON November 16, 2011  
AT THE TIME AND PLACE THEREIN SET FORTH, WAS TAKEN DOWN  
BY ME IN SHORTHAND, AND THEREAFTER TRANSCRIBED INTO  
TYPEWRITING UNDER MY DIRECTION AND SUPERVISION;

AND I HEREBY CERTIFY THAT THE FOREGOING TRANSCRIPT  
OF PROCEEDINGS IS A FULL, TRUE AND CORRECT TRANSCRIPT OF  
MY SHORTHAND NOTES SO TAKEN.

I FURTHER CERTIFY THAT I AM NEITHER COUNSEL FOR NOR  
RELATED TO ANY PARTY TO SAID ACTION, NOR IN ANYWISE  
INTERESTED IN THE OUTCOME THEREOF.

IN WITNESS THEREOF, I HAVE HEREUNTO SUBSCRIBED MY  
NAME THIS 21<sup>st</sup> DAY OF February, 2012



ERIN WINN, CSR NO. 13579  
CERTIFIED SHORTHAND REPORTER  
FOR THE STATE OF CALIFORNIA



**Attachment J**

**Correspondence from the Port to the California Regional Water  
Quality Control Board dated July 15, 2004, exhibits excluded**



July 15, 2004

VIA MESSENGER

File Number:

**03-0284.05**

*visited*

Mr. John H. Robertus  
Executive Officer  
San Diego Regional Water  
Quality Control Board  
9174 Sky Park Court, Suite 100  
San Diego, California 92123

RECEIVED  
SAN DIEGO  
JUL 15 PM 3:52

Re: Investigation Order Nos. ~~R9-2004-0026~~ and ~~R9-2004-0027~~ -- San Diego Unified Port District Response; PLRP:03-0066.05:otbre

Dear Mr. Robertus:

The San Diego Unified Port District ("Port") submits this response, with attachments and the enclosed technical report (hereinafter, the "Technical Report") (together "the Port's Response"), as its response to, and in compliance with, Investigation Order Nos. R9-2004-0026 and R9-2004-0027 (collectively, "Orders" or "Investigation Orders"). Order No. R9-2004-0026 was issued to the Port, Marine Construction Design Company, Chevron, Atlantic Richfield Co. ("ARCO"), San Diego Gas & Electric ("SDG&E"), and the City of San Diego ("City"), regarding the Southwest Marine Shipyard located at 2205 E. Belt, and the foot of Sampson Street, San Diego, California. Order No. R9-2004-0027 was issued to the Port, the City, the United States Navy ("Navy"), and Chevron, regarding the National Steel and Shipbuilding Company ("NASSCO") shipyard located at Harbor Drive and 28<sup>th</sup> Street, San Diego, California.<sup>1</sup> Neither Southwest Marine, nor NASSCO, is named in the Orders.

In its Findings, the Regional Water Quality Control Board ("Regional Board" or "RWQCB") sets forth its basis for naming the Port District in the Investigation Orders. The Regional Board finds that the Port is the owner of the lands occupied by facilities, including NASSCO and Southwest Marine, which discharged or are suspected of discharging waste to San

<sup>1</sup> By two letters dated April 9, 2004 from your office, the April 16, 2004 deadline to respond to both Orders was extended to July 15, 2004. Further note that the Regional Board has never served the Port with a copy of the NASSCO Order, Order No. R9-2004-0027.

Mr. John H. Robertus  
July 15, 2004  
Page 2

Diego Bay. The Regional Board further concludes that "the Port controls decisions regarding the siting and types of facilities, which occupy lands adjacent to San Diego Bay through leases for the use of these lands." Finally, the Board concludes that the Port has "the ability under its lease agreements with facility operators to impose controls, which could prevent or reduce waste discharges to San Diego Bay." See Orders ¶ 6. For these reasons, the Regional Board now is requiring the Port to show cause why it should not be named in an order requiring the cleanup of contaminated sediments that have likely occurred as a result of nearly 100 years of operations at and near the NASSCO and Southwest Marine leaseholds.

The Port's Response is believed to be fully responsive to the Investigation Orders, based on information reasonably available to the Port, including the Regional Water Quality Control Board's ("Regional Board" or "RWQCB") files concerning NASSCO and Southwest Marine, and other publicly available information. Please feel free to contact the undersigned, however, should you need any additional information or if you have any questions with respect to this response.

## I. INTRODUCTION

The Orders require each named party to submit a technical report showing cause why it should not be named as a discharger in a Cleanup and Abatement Order ("CAO") for the cleanup of contaminated sediments that have resulted from NASSCO's and Southwest Marine's long term operations at their sites. For the reasons set forth below, the Port District maintains that it is both premature and inappropriate to consider naming the Port in a CAO to clean up contamination caused by nearly a century of operations by others.

The Port first takes this opportunity to restate its objections to the issuance of the Investigation Orders to the Port. Section 13267 of the Porter-Cologne Water Quality Control Act ("Water Code") allows the Regional Board to issue such an order to a party who has "discharged," is "discharging," or "proposes to discharge" wastes, or who is suspected of "discharging" the wastes; the Port is none of these. To the contrary, the Port is only the trustee of the properties occupied by long-term tenants that discharged wastes. In addition, the cost/benefit analysis conducted by the Regional Board prior to issuance of the Orders, as required by Water Code § 13267(b), was inadequate.<sup>2</sup> Finally, the Board failed to respond,

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<sup>2</sup> The Regional Board estimates the cost of responding to each Order to be in the range of \$3,000 to \$5,000, basing its estimate "on a typical cost range for preparing a Phase I Environment Site Investigation Report." A typical Phase I report, however, does not anticipate the type of detail required here. The Orders require the Port to review copious records and provide extensive detailed information from nearly 100 years of numerous operations, as set forth in the Regional Board's list of required elements for an adequate technical report. The Port's costs to respond have significantly exceeded the RWQCB's estimate. Clearly, the burden and cost of preparing these reports does not bear a reasonable relationship to the benefits to be obtained from them, as required by § 13267(b)(1).

Mr. John H. Robertus  
July 15, 2004  
Page 3

within 14 days, to the Port's March 4<sup>th</sup> written objections, as provided in the Regional Board's February 19, 2004 cover letter to Investigation Order No. R9-2004-0026.

As the Regional Board is aware, the Port is not discharging and has not discharged wastes into the waters of the State from these leaseholds. Nor has the Port caused or permitted such waste to be discharged. The Port therefore asserts that it is inappropriate to name it in a § 13304 CAO for the cleanup of such wastes. Most importantly, however, naming the Port in a CAO in this case would be contrary to the Regional Board's previous agreement to first direct compliance issues regarding the NASSCO and Southwest Marine facilities to the tenants, as will be discussed further below. The RWQCB has expressly agreed that it would look to the Port for assistance in obtaining tenant compliance only *after* the tenant failed to comply *and after* the Regional Board had taken enforcement action against the tenant. As these conditions have not yet been met, it would be premature to issue a CAO against the Port.

Even if the Regional Board finds it necessary to name the Port, it should be held only secondarily liable. Here, as the Port understands it, both NASSCO and Southwest Marine have been cooperating with the Regional Board for over 10 years to address the sediment contamination on their leaseholds. As the State Water Resources Control Board ("State Board") found in *In the Matter of the Petition of Prudential Insurance Co.*, SWCRB Order No. WQ 87-6 (6/18/87), where there is no evidence that a landowner ever contributed directly to a discharge, the landowner should bear only secondary responsibility for the cleanup where (a) the owner would not have the legal right to conduct the cleanup unless the tenant failed to do so; (b) the lease is for a long term; and, (c) the tenant is cooperating with the Regional Board. Each of these factors is present in this case, and thus if it is determined that the Port must be named in a CAO for either of these sites, it should only be held secondarily liable based upon the reasoning in *Prudential Insurance*.

For reasons unknown to the Port, NASSCO and Southwest Marine recently requested that the Regional Board take enforcement action against the Port solely because the Port "owns" their leaseholds. Southwest Marine argued, for example, that, since the Port and others "will be required to participate eventually in any event, even if only by way of contribution litigation," it is in their and the public's best interest to bring them into the process now. See letter dated November 12, 2003 to Regional Board from Christian Volz of McKenna Long & Aldridge, LLP. While both tenants have encouraged the Regional Board to name the Port in a CAO, they failed to make clear that each has expressly agreed in their leases to accept the condition of the premises when they signed their leases, and to defend, indemnify and hold the Port harmless from any claims arising out of their performance under the leases, their use and operation of the premises, or the condition of the premises. As such, the suggestion that the Port will be required to participate in the cleanup in any event (i.e., without the Regional Board's intervention) appears to be disingenuous at best.

## II. EARLY DEVELOPMENT OF SAN DIEGO BAY

### A. Early Uses of Tidelands and Submerged Lands on and near the NASSCO and Southwest Marine Sites

Both the NASSCO and Southwest Marine sites have been operated for heavy industrial and shipyard uses for nearly a century. The Port's enclosed Technical Report provides a detailed account of the historical use of these and adjacent sites dating back to the early 1900s. The Technical Report details probable sources of sediment contamination which likely occurred during the first half of the 20<sup>th</sup> Century from petroleum, shipbuilding and repair, and similar industrial operations which were conducted on properties throughout the area. The Technical Report is summarized briefly below.

Records show that Southwest Marine's predecessor, San Diego Marine Construction ("SDMC"), commenced its shipbuilding and repair operations at or in close proximity to the Southwest Marine site in as early as 1915, at the foot of Sampson Street. SDMC's lease with the City of San Diego authorized the site to be used for the "erection and maintenance of a building . . . for the purpose of carrying on and maintaining marine ways, repairing boats and construction and launching of all kinds of watercraft." SDMC constructed and procured wharves and docks to carry out its operations, and dredged tens of thousands of cubic yards of material to expand its operations, throughout the better part of the 20<sup>th</sup> Century.

Records also show that industrial operations at the NASSCO site commenced even earlier, in 1909, when Standard Oil began its operations at its bulk facility and wharf. The presence of Standard Oil was made known to all in San Diego in 1913, when a catastrophic explosion and fire occurred at the present NASSCO site, destroying Standard Oil's facility and causing an estimated two million gallons of gasoline and unrefined oil to burn and/or discharge into San Diego Bay. The facility was rebuilt after the fire, and was one of several facilities that operated at the NASSCO site over the past 96 years. Shipbuilding and repair facilities were introduced to the NASSCO site in 1939 and were taken over by NASSCO's predecessor, National Iron Works, in approximately 1944-45. NASSCO's robust shipyard operations have been continuous since that time.

In addition to the industrial and shipyard operations at the sites, records show that adjacent properties have also been used for heavy industrial purposes since the early 1900s. The United States Naval Repair Station, located adjacent to and just south of the NASSCO facility, for example, began its ship repair operations as early as 1922. The Naval Repair Station, originally known as the "US Destroyer Base," was used extensively for the repair and maintenance of U.S. Navy destroyers. Numerous destroyers were decommissioned and commissioned at this facility in the mid-1920s, which work required the removal of paint and rust from the ships, as well as the treatment of all machinery and equipment with grease and oil.

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Sediments impacted by these operations were likely redistributed to the NASSCO and Southwest Marine sites when the Repair Station was dredged in 1935, to supply the fill needed for the expansion of the area between Sampson and 28<sup>th</sup> Street, where the NASSCO and Southwest Marine facilities are currently located.

Two properties located to the north of the shipyards include a kelp manufacturing business, known as Kelco, and SDG&E's Silvergate Power Plant. Kelco has operated a plant on the San Diego Bay waterfront between Sampson and Sicard Streets from as early as 1941. Records show that, over the years, Kelco maintained a number of above ground storage tanks containing butane, alcohol, muriatic acid, ammonia, and calcium chloride, as well as a 550-gallon underground storage tank for gasoline. In 1975, Kelco submitted plans for the demolition of a 500-foot pier and for the dredging of 6,000 cubic yards of sediments. The dredged sediment was tested and found to contain elevated levels of grease and oils, cadmium, lead, mercury and zinc.

SDG&E's Silvergate Power Plant is located at the southwest corner of Sampson Street and Harbor Drive and went online in 1941. SDG&E utilized an easement to the San Diego Bay for intake and discharge lines used in its cooling system. SDG&E reportedly used the surface of the easement to create holding ponds for waste disposal from the Silvergate Power Plant.

Various other operations on properties in close proximity to the NASSCO and Southwest Marine sites are discussed in further detail in the enclosed Technical Report.

## **B. The Port's Formation in 1962**

As described in the Technical Report, this area was devoted to heavy industrial and shipyard operations for over 50 years prior to the formation of the Port District in 1962. The Port clearly had no control over the siting of these operations, nor could the Port have controlled the activities that resulted in sediment contamination during the nearly 50-year period before it was in existence. Even after the Port was established in 1962, the Port did not become the "owner" of tidelands and submerged lands in the traditional or legal sense of the word. The Port was created, rather, as an extension of the State of California, to manage the properties, in the role of a "trustee," to promote specific statewide interests on behalf of the citizens of California. *See generally* San Diego Unified Port District Act ("the Act" or "Port Act"), Stats. 1962, 1<sup>st</sup> Ex.Sess., c. 67, pp. 362 et seq. (set forth at Cal. Harb. & Nav. Code, App. 1, pp. 317 et seq. (38 Pt. 2, West 1999)).

The Port Act authorized establishment of the Port to develop and manage San Diego Bay and to promote "commerce, navigation, fisheries and recreation thereon." *Id.* at § 4. In doing so, the Port Act conveyed to the Port, *in trust*, the State's property on and near San Diego Bay, and required local cities (including the City of San Diego) to convey to the Port, in trust, those

tidelands and submerged lands that they owned. *Id.* at §§ 5, 5.5, 14. The Port Act requires the Port to hold and use these tidelands and submerged lands for specified purposes, *id.* at § 87, and requires improvement of any unimproved trust properties to avoid reversion back to the State. *Id.* at § 87(j).

In the United States Supreme Court case that is still regarded as seminal on the scope of the public trust doctrine, *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892), the Supreme Court held that, although a state, as trustee, may delegate administration of public trust lands to a local public agency, it cannot abdicate its trust over the property. *Id.* at 453-54. The Court held that “[t]here always remains with the state the right to revoke those powers.” *Id.* As such, the Port is plainly not an “owner” of the NASSCO and Southwest Marine sites as that term is commonly or legally understood.<sup>3</sup> The State of California has simply delegated its powers to manage and control public use of these lands to the Port District. *See Graf v. San Diego Unified Port District*, 7 Cal.App.4<sup>th</sup> 1224, 1229 (4<sup>th</sup> Dist. 1992). In fact, as the United States District Court for the Southern District of California recently held in a cost recovery action, the Port is simply “a body operating as an instrumentality of the state government” and, for purposes of CERCLA litigation, the Port is, in fact, “the State.” *San Diego Unified Port Dist. v. TDY Industries, Inc.* (May 14, 2004), Civil Case No. 03CV1146-B (POR), Order Denying Defendants’ Motion to Strike Attorney’s Fees.<sup>4</sup> (A copy of this decision is enclosed as Exhibit “1”.)

The California Coastal Act further guides and provides for oversight of the Port District’s planning and management of properties in and on San Diego Bay. Section 30260 of the Coastal Act provides, for example, that “[c]oastal-dependent industrial facilities shall be encouraged to locate or expand within existing sites and shall be permitted reasonable long-term growth.” This provision further requires that “where new or expanded coastal-dependent industrial facilities cannot feasibly be accommodated consistent with other policies in this division, they may nonetheless be permitted in accordance with this section . . . if (1) alternative locations are infeasible or more environmentally damaging; (2) to do otherwise would adversely affect the public welfare; and (3) adverse environmental effects are mitigated to the maximum extent feasible.” Given the constraints placed upon the Port District in managing the lands it holds in trust, combined with the historical development of these shipyards, clearly the Port should not be

<sup>3</sup> “Ownership” is defined as “the collection of rights to use and enjoy property, including the right to transmit it to others . . .” and as the “entirety of the powers of use and disposal allowed by law.” (Blacks Law Dictionary (4th ed. 1968) pp. 1260-61.)

<sup>4</sup> If ownership alone is sufficient to justify naming the property owner in a CAO under Water Code § 13304, arguably liability under § 13304 for the NASSCO and Southwest Marine sites should extend to the State, which has the ultimate authority over how the properties may be used, how title to the properties is to be held, and to whom title to the properties may revert or be transferred. The State, in effect, is the equitable and beneficial “owner” of the NASSCO and Southwest Marine sites.

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held responsible for the siting of the NASSCO and Southwest Marine operations. Most importantly, the Port District is not an "owner" for purposes of attaching liability under Water Code Sections 13267 or 13304.

### III. NAMING THE PORT IN A CAO WOULD BE PREMATURE BASED UPON THE BOARDS' ESTABLISHED POLICY FOR ADDRESSING PORT RESPONSIBILITY FOR TENANT OPERATIONS

In as early as 1990, the State and Regional Boards acknowledged the Port's limited responsibility for the operations of its tenants, when both Boards agreed not to take any enforcement action against the Port for a tenant's failure to comply with permit requirements until after efforts to obtain tenant compliance had first failed, and then only after the Port had been given an effective opportunity to obtain the tenant's compliance. The Regional Board's current policy arose as a result of the Port District's challenge to being designated as a "discharger" in addendums to waste discharge requirements ("WDR") issued to six boatyards and shipyards (including the NASSCO facility) in 1989.<sup>5</sup> See *In the Matter of the Petition of San Diego Unified Port Dist.*, SWRCB Order No. WQ 90-3 (6/6/90). The Port petitioned the State Board to either: (1) remove its name as a "responsible party" on the permits; or (2) in the alternative, name it only as being "secondarily responsible" for permit compliance. *Id.*

The State Board denied the Port's request to remove the designation entirely, but concluded that it had been the Regional Board's intent to hold the Port only secondarily responsible for the tenant's monitoring program and day-to-day operations.<sup>6</sup> *Id.* at 16. The State Board remanded the matter to the Regional Board to clarify the Port's limited responsibility. At the same time, the State Board opined that, as a public agency, the Port should be given the opportunity to obtain compliance from the tenant prior to enforcement action being taken against the Port. *Id.*

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<sup>5</sup> The WDR/NPDES permits that were the subject of the Port's challenge included Regional Board Order Nos. 85-01 (NPDES Permit No. CA 0107646—Campbell Industries), 85-02 (NPDES Permit No. CA 0107654—Kettenburg Marine Corp.), 85-03 (NPDES Permit No. CA 0107719—Nielsen Beaumont Marine), 85-05 (NPDES Permit No. CA 0107671—NASSCO), 87-49 (NPDES Permit No. CA 0108006—Bay City Marine), and 87-65 (NPDES Permit No. CA 0108332—Continental Maritime of San Diego). See State Board Order No. WQ 90-3, at 1.

<sup>6</sup> The State Board quoted a November 27, 1989, letter from the Regional Board's Executive Director to the Port in which the Executive Director confirmed that the "tenants in their capacity as operators of the facilities *retain the primary responsibility to maintain compliance and to take remedial action to correct any violations.*" Order No. WQ 90-3, pg. 10. The Regional Board further stated, in response to the Port's petition, that the Regional Board would take enforcement action against the Port "*only as a last resort*" and only *after* the Port had "*ample opportunity*" to compel the Port's tenants to comply with the Regional Board's orders. *Id.*



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Since the State Board's direction to the Regional Board did not sufficiently clarify the Port's obligations as a "secondarily responsible" party, the Port initiated steps to challenge the order in Superior Court. Prior to filing its lawsuit, however, the Port District reached an agreement with the State and Regional Boards as to the specific language to be placed in its tenants' permits. This language was set forth in a letter from the Port District, approved by officers of both the State and Regional Boards, *see* July 2, 1990 letter from David B. Hopkins to Sheila K. Vassey and David T. Barker, a copy of which is attached hereto as Exhibit "2", and is as follows:

"The Regional Board will notify the Port District of any violation by [the tenant] of any permit conditions, for the purpose of obtaining the assistance of the Port District in attempting to obtain compliance by [the tenant]. The Port District is not primarily responsible for compliance with the permit requirements. The Regional Board will not take enforcement action against the Port District for violations by [the tenant] unless there is a continued failure to comply by [the tenant] after the Port District has been given notice of the violations, and until after the Regional Board has issued against [the tenant] either a cleanup and abatement order, cease and desist order, or complaint for administrative civil liabilities." *Id.*

Thus, over fourteen (14) years ago,<sup>7</sup> and as is still set forth in both the Southwest Marine and NASSCO permits issued by the Regional Board, the Regional Board committed to take no enforcement action against the Port District for its lessees' violations "unless there is a continued failure to comply by lessee after the [Port] has been given notice of the violations and an opportunity to obtain compliance of the lessee."<sup>8</sup> *See* WDR for NASSCO, Order No. R9-2003-0005 at ¶ 14(c), and WDR for Southwest Marine, Order No. R9-2002-0161 at ¶ 13 (c), attached hereto as Exhibits "5" and "6," respectively.

In light of the Boards' policy regarding the Port District's responsibility for its tenants' permit compliance, the Port maintains that it would be premature to name the Port in a CAO for the cleanup of its tenants' leaseholds at this time.<sup>9</sup> Here, we do not believe that the Regional

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<sup>7</sup> See Addendum No. 2 to Order No. 85-05, dated March 11, 1991, and attached hereto as Exhibit "3."

<sup>8</sup> The Regional Board subsequently adopted the same policy to apply regarding all shipyard tenants in the region. See Order No. 97-36 NPDES Permit, No. CAG039001, attached hereto as Exhibit "4."

<sup>9</sup> Although this policy was designed in response to permit issues, the State Board determined that the same analysis applied whether dealing with a CAO or WDRs. *Id.* at p. 10. As such, the policy applies equally to the situation before us today.

Board has notified the Port of any specific tenant violations issued in connection with the sediment contamination that is the subject of the Investigation Orders, and we are unaware of the failure by the tenants to comply with any Regional Board directive to address the issue. Instead, it appears as though both NASSCO and Southwest Marine are cooperating fully with the Regional Board's investigation of the sediment contamination, and have not indicated an unwillingness to comply with any Regional Board orders. Based upon the State and Regional Boards established approach with respect to the Port District's responsibility for its tenants' activities, naming the Port in a CAO for the cleanup of the NASSCO and Southwest Marine leaseholds at this time is inappropriate.

#### **IV. THE PORT DISTRICT SHOULD, AT MOST, BE NAMED SECONDARILY LIABLE IN ANY CAO**

##### **A. Water Code Section 13304**

Section 13304 of the California Water Code allows the Regional Board to issue a CAO to a person who has discharged, or who has caused or permitted a discharge of, waste into the waters of the state where such discharge "creates, or threatens to create, a condition of pollution or nuisance." As described in the Investigation Orders, based on sediment analytical results for the NASSCO and Southwest Marine shipyards, the Regional Board identified the following contaminants of concern ("COCs"): arsenic, cadmium, chromium, copper, lead, total polycyclic aromatic hydrocarbons (PAHs), polychlorinated biphenyls (PCBs), mercury, nickel, silver and zinc. As set forth in the Port's Technical Report, there is little question that the shipyard operations at and near the present NASSCO and Southwest Marine sites have, for the better part of the last century, substantially contributed to the sediment contamination. According to the Regional Board, potential shipyard sources of the COC's include, without limitation, ship painting activities, sand-blast grit from stripping paint, ship construction and repair activities, iron working, engine repairs or overhauls, bilge water, and fuel spills or leaks. In addition to potential sources of COCs from the shipyards and nearby naval facilities, Chollas Creek discharges urban runoff from industrial and residential communities into San Diego Bay through a concrete-lined channel that separates the NASSCO leasehold from the US Navy Repair Base. Chollas Creek has been designated a toxic hot spot by the Regional Board based on water quality and sediment data analytical test results.

In contrast to these long-term industrial operations, the Port District has never operated on these properties. To the contrary, it merely inherited leases allowing the existing operations to continue when the Port was created in 1962.

## B. Potential Landowner Liability

The Port acknowledges that the State Board has consistently taken the position that a passive landowner can be held accountable for discharges that occur on the property so long as the landowner has knowledge of the activity and the ability to regulate it. *See, e.g., In the Matter of the Petition of United States Department of Agriculture, Forest Service*, SWRCB Order No. WQ 87-5, (4/16/87). The State Board has also held, however, that a landowner should bear only "secondary" responsibility for a cleanup under certain circumstances, including when the following facts are present: "(a) the [owner] did not in any way initiate or contribute to the actual discharge of waste, (b) the [owner] does not have the legal right to carry out the cleanup unless its tenant fails to do so, (c) the lease is for a long term, and (d) the site investigation and cleanup are proceeding well." *In the Matter of Petition of Prudential Insurance Company*, SWRCB Order No. WQ 87-6 (6/18/87). Here, while we do not believe that the Port should be named in a CAO issued for the cleanup of contaminated sediments at the Southwest Marine and NASSCO leaseholds, in the event that the Port is ultimately named in a CAO, we strongly urge that it be held only secondarily liable for the reasons set forth below.

### 1. *The Port Should Not Be Held Accountable for the Shipyards' Discharges*

Although the State Board has upheld the imposition of primary responsibility on non-operating landowners, generally such cases have involved some active involvement by the landowner, combined with the tenant's failure to comply. In *In re Petition of Logsdon*, SWRCB Order No. WQ 84-6 (1984), for example, landowners Harold and Joyce Logsdon had leased their property to Valley Wood Preserving ("VWP") for use as a wood treatment facility. While the Logsdons were not the "operators" of the facility, Mr. Logsdon was the president of VWP and made routine visits to the site. *Id.* at p. 17. The State Board found that he was keenly aware of the operations and the potential for discharges of contaminants resulting from wood treatment operations. In addition, the Regional Board had exhausted all efforts to obtain compliance from VWP before it initiated enforcement action against the Logsdons.

Unlike in *Logsdon*, here the Port has not been involved in the operations of its shipyard tenants other than to act as a lessor in its capacity as trustee of the property. Moreover, the shipyards, to our knowledge, are continuing to cooperate with the Regional Board. As such, the facts in this case would not support a finding of primary liability under the *Logsdon* analysis.

The State Board also confirmed a finding of primary responsibility in *In re Petition of San Diego Unified Port District*, SWRCB Order No. WQ 89-12 (1989)(hereinafter "*Paco Terminals*"). There, the Board found that the tenant, Paco Terminals, was several months behind in implementing the CAO that the RWQCB had issued to it, that the Port had substantial control over the areas on the leasehold where the discharges of copper ore had occurred, that the Port now had exclusive control over the site since the tenant's short term lease had ended, and that the

Port had been involved in assisting the tenant in getting its operations started. The State Board further noted that the Port clearly had knowledge, given that its environmental assessment document prepared prior to the initiation of Paco's operations had identified the potential for the discharge of copper ore into San Diego Bay. Moreover, the Board noted that the Port itself had proposed the mitigation measures, as part of the environmental review, to be implemented to avoid such discharges. The *Paco Terminal* facts are clearly distinguishable from those in the instant matter.

As discussed above, unlike the situation in *Paco Terminals*, the Port here inherited the existing shipyard sites in 1962, and so had nothing to do with the siting or approval of these operations on tidelands.<sup>10</sup> Moreover, unlike in *Paco Terminals*, there is no question here that the Port has never conducted operations that resulted in discharges at the NASSCO or Southwest Marine sites; nor have there been allegations that the Port assisted in operations that resulted in such discharges. The Port has had no control over the pre-existing operations of the shipyards and provided no instructions to its tenants as to where and how their discharges were to be managed – this authority has long rested with the Regional Board. As such, the Port should not be held responsible for their discharges. See, e.g., *City of Modesto Redevelopment Agency v. Superior Court*, 119 Cal. App. 4<sup>th</sup> 28 (1<sup>st</sup> Dist. 2004).

In *Paco Terminals*, a short-term lease ended leaving the Port with exclusive possession and control of the property that was the subject of the CAO. In contrast, here the Port has no authority to enter the NASSCO and Southwest Marine leaseholds and take possession of the properties in order to remedy the contamination. At best, the Port could, if justified by a clear tenant default, attempt to terminate one of these long-term leases. Such an attempt, however, would be fraught with difficulty and most likely prove fruitless given the political realities of the situation, including oversight by the cities and the Coastal Commission.

Rather than the Port, it is the Regional Board that has the authority to regulate discharges from its tenants' industrial operations. Since January 1, 1970, section 13263 of the Water Code has required regional boards to regulate proposed and existing discharges from facilities such as these. Consistent with this obligation, the Regional Board here issued WDRs and other permits to both NASSCO and Southwest Marine, beginning in as early as 1974. Clearly, the Port could not develop and enforce its own, separate discharge requirements, or otherwise regulate the discharges of these facilities once that authority was legislatively delegated to the Regional Board. Moreover, had the Port made any attempt to regulate its tenants' discharges, it clearly

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<sup>10</sup> As the Regional Board is aware, these shipyards were in place long before the Port was created and the Port has never had a legitimate opportunity to relocate these established facilities from their original locations. The concept that the Port somehow controls (or controlled) decisions over the siting of facilities of the size, infrastructure, and intensity of NASSCO and Southwest Marine is simply a fiction. A monumental decision such as re-siting such facilities would not be the Port's alone, but would require at a minimum the consent and approval of the California Coastal Commission, among others. See, e.g., Pub. Res. Code §§ 30700-30721; 14 C.C.R. §§ 13600-13648.

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would be preempted from doing so under the Water Code. *See, e.g., Water Quality Association v. County of Santa Barbara*, 44 Cal.App.4<sup>th</sup> 732 (2d Dist. 1996)(an otherwise valid local regulation is preempted by state statute if it duplicates or contradicts the statute, or if it enters into a field of regulation expressly or impliedly reserved to the state).

The permit requirements imposed by the Regional Board on these facilities under the WDRs/NPDES permit program are extensive and complex. The Port must rely on the expertise of, and the extensive enforcement and oversight powers and responsibilities exercised by, the Regional Board. The Port's only recourse for a violation of the law by a tenant is to hold the tenant in default under its lease. Although the Port's leases with both NASSCO and Southwest Marine require compliance with all laws, the Port is not aware of any violation except where such violations were already being corrected by the facilities with oversight by the Regional Board. Since these facilities have not been alleged to have been operating outside the terms of their validly issued permits, there has been no event triggering a potential default upon which the Port could even contemplate holding them in default of their leases. To suggest that the Port has any greater authority is a fallacy.<sup>11</sup>

## *2. If Named at All, the Port Should be Held Only Secondarily Liable*

Time and again, the State Board has refused to hold passive landowners primarily responsible where the landowner has not in any way contributed to the actual discharge and the tenant is complying with an outstanding CAO or WDRs. *See, e.g., In re Petition of Spitzer*, SWRCB Order No. 89-8 (5/16/89); *In re Petition of Prudential Insurance*, SWRCB Order No. WQ 87-6 (6/18/87); *In re Petition of U.S. Department of Agriculture*, SWRCB Order No. WQ 87-5 (4/16/87); and *In re Petition of Wenwest, Inc.*, SWRCB Order No. 92-13 (10/22/92). The common thread through these cases is that, in each case, those actually responsible for waste discharges were available and were complying with efforts to address the contamination or violation. In such cases, the Board has consistently held that it is appropriate to hold the landowner only secondarily liable.

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<sup>11</sup> With regard to the siting or types of facilities which may have contributed to waste discharges into San Diego Bay, the Regional Board was keenly aware of the location and types of facilities located on these properties at the time it issued its WDRs for the facilities. To the extent a particular structure or facility was of an inappropriate "type" or was inappropriately "sited" on the NASSCO or Southwest Marine premises, the Regional Board could have and should have exercised its own control through its regulatory oversight and enforcement responsibilities. To argue that liability should be imposed against the Port now simply because it allowed existing tenants to continue operating in accordance with a Regional Board-permitted or preexisting uses, in a permitted location, strains one's concept of fairness and is inconsistent with public policy supporting such uses in San Diego Bay. Such a position would tend to allow the actual discharger to escape full responsibility for the conditions that it, on its own and without support of the Port, created and has maintained.

Consistent with State Board precedent, the RWQCB should here too only name the Port, if it names it at all, as secondarily liable in any CAO for cleanup at the NASSCO and Southwest Marine sites.<sup>12</sup> Both NASSCO and Southwest Marine are viable, ongoing concerns, and both, to the best of the Port's knowledge, are complying with Regional Board directives. Moreover, the facts here make for an even more compelling case that the Port should not be named as primarily responsible. Here, as in *Prudential Insurance*, the Port has demonstrated that it did not in any way initiate or contribute to the actual discharge of waste from the NASSCO and Southwest Marine leaseholds, and no allegations have been made to the contrary. The Port is not able to go on to the tenants' leaseholds at this time and carry out a cleanup, and so holding the Port primarily responsible would be unworkable. The tenants' leases here are for a long time -- in Southwest's case through 2034, and in NASSCO's case, through 2040. And, most importantly, Southwest Marine and NASSCO, the responsible parties, are complying with the Regional Board's requirements. For all of these reasons, the Port should be named, if at all, as only secondarily liable in any CAO issued to its tenants.

#### **IV. THE NASSCO AND SOUTHWEST MARINE LEASES REQUIRE THE TENANTS TO INDEMNIFY THE PORT DISTRICT**

It is our understanding that the Regional Board's decision to name the Port District in the Investigation Orders was influenced, at least in part, by letters from NASSCO and Southwest Marine urging the Regional Board to do so. The tenants argued that the Port should be named in a CAO because the tenants will ultimately seek contribution from the Port for cleanup costs associated with the sediment contamination in any case. Southwest Marine also claims, erroneously, that "the Port has recognized that it is responsible for the condition of the property prior to the lease with SWM." See November 12, 2003 letter from Christian Volz of McKenna, Long and Aldridge, to the Regional Board, at p. 2.

While it may be true that our tenants will surely embroil the Port District in a lawsuit in an attempt to share in the ultimate cost of any cleanup, this fact alone should not persuade the Regional Board to name the Port District in the CAOs. Liability as between the Port and its tenants is clearly spelled out in their lease agreements. In particular, both tenants have expressly agreed to accept full responsibility for the condition of their leased premises at the time they entered into their existing leases, and to indemnify the Port for any claims arising from their activities on the leaseholds or the condition of the property. As such, the Port District maintains that it has no liability for site conditions.

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<sup>12</sup> If the Port must be named in any CAO for cleanup of its tenants' leaseholds, naming it as secondarily liable is also more consistent with the Regional Board's long term policy regarding involving the Port in tenant violations only as a last resort, as discussed above in Part III of this letter.

## A. The NASSCO Leases

As indicated above, NASSCO has operated a shipyard on its leasehold since the 1940's (originally under the name, "National Iron Works"). Initially, NASSCO operated its facility under a series of leases entered into with the City of San Diego, at a time when the City owned the premises in fee. The Port became NASSCO's landlord in 1962. NASSCO entered into a series of leases with the Port beginning in April 1974. The Port's current leases with NASSCO were entered into in 1991 and 1995, and are hereinafter referred to as the NASSCO Leases.<sup>13</sup>

As it had done in past leases, NASSCO accepted the condition of the premises in its present condition, when it signed the NASSCO Leases, and affirmatively represented that it had independently inspected the premises and "*made all tests, investigations and observations necessary to satisfy itself of the condition of the premises.*" See NASSCO Leases ¶ 38. NASSCO further represented that the premises were in a condition "as called for by the Lease" and that *the Port had performed "all work with respect to the premises."* *Id.* NASSCO, moreover, accepted complete responsibility "*for any risk of harm to any person and property from any latent defects in the premises.*" *Id.* Since NASSCO had been operating its facility on at least a portion of the same property for the prior 35-year period, the tenant was uniquely qualified to assess the condition of its premises at the time it entered into the NASSCO Leases and did so, accepting the condition of the premises. As a result, NASSCO has effectively released the Port from any and all claims and liability resulting from the condition of the premises at the time it entered into the NASSCO Leases.

NASSCO also expressly agreed, in its Leases, to defend, indemnify, and hold the Port harmless from any damages or injuries "resulting directly or indirectly from granting and performance" of the Leases "or arising from the use and operation of the leased premises." NASSCO Leases ¶ 21. Specifically, the NASSCO Leases state:

"Lessee shall be liable and responsible for any Contaminants located on the leased premises and arising out of the occupancy or use of the leased premises by Lessee. Such liability and

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<sup>13</sup> In October 1991, the Port renewed NASSCO's lease for a portion of its facility, affecting approximately 5,498,071 square feet of tidelands, located at Harbor Drive and 28<sup>th</sup> Street in the City of San Diego, for a term ending December 31, 2040. A copy of this lease is attached hereto as Exhibit "7." The lease was amended on December 6, 1994. A copy of this Amendment is attached hereto as Exhibit "8." NASSCO renewed a separate lease with the Port on January 10, 1995, for a different portion of the NASSCO facility affecting approximately 73,366 square feet of tidelands located generally to the northwest of the October 1991 leasehold. The January 1995 lease was entered into for a term of forty-six years, ending December 31, 2040. A copy of this lease is attached hereto as Exhibit "9." With some exceptions not material to this discussion, the October 1991 Lease, as amended, and the January 1995 Lease are identical in all respects.

responsibility shall include, but not be limited to, (i) removal from the leased premises any such Contaminants; (ii) removal from any area outside the premises, including but not limited to surface and ground water, any such Contaminants generated as part of the operations on the leased premises; (iii) damages to persons, property and the leased premises; (iv) all claims resulting from those damages; (v) fines imposed by any governmental agency, and (vi) any other liability as provided by law."

NASSCO Leases ¶ 43.

Thus, not only do the NASSCO Leases prohibit NASSCO from discharging wastes in violation of any rule, regulation, ordinance, order or law, but to the extent such a violation may have occurred, NASSCO must hold the Port harmless from any damages it may suffer as a result. Similarly, NASSCO must indemnify the Port for any costs arising from any allegation that the Port is responsible for any damage to the premises, including damages arising from NASSCO's operations.

## **B. The Southwest Marine Leases**

As with NASSCO, Southwest Marine has operated its facility at the Southwest Marine site for several decades. In 1979, Southwest Marine took over the prior lease between the Port, and Southwest Marine's predecessor-in-interest, San Diego Marine Construction Corporation ("SDMC"). SDMC was operating on the leasehold when the Port was formed in 1962, and the Port renewed SDMC's in 1972. SDMC operated until its successor, Southwest Marine took over in 1979, at which time the Port and Southwest Marine entered into a lease, dated September 17, 1979 ( hereinafter the "Southwest Marine Lease")<sup>14</sup>

As with the NASSCO Leases, the Southwest Marine Lease contains an "ACCEPTANCE OF PREMISES" provision, wherein Southwest Marine accepted the condition of the premises and assumed all risk and liability associated with any defects in the premises. It reads as follows:

"38. ACCEPTANCE OF PREMISES: By signing this Lease, Lessee represents and warrants that it has independently inspected the premises and made all tests, investigations and observations

<sup>14</sup> The September 1979 Lease contained a lease term of 39 years and three months, commencing September 1, 1979, and ending November 30, 2018. The lease was amended April 23, 1985, by way of an "Amendment No. 1," which, among other things, contained a new lease term of 50 years, beginning September 1, 1984, and ending August 31, 2034. A copy of this lease is attached hereto as Exhibit "10." The April 23, 1985 Amendment superceded the September 1, 1979 Lease, except as to any rentals due the Port under the prior lease and any "remedies granted to Lessor" under the prior lease.



Mr. John H. Robertus  
July 15, 2004  
Page 16

necessary to satisfy itself of the condition of the premises. Lessee agrees that it is relying solely on such independent inspection, tests, investigations and observations in making this Lease. Lessee further acknowledges that the premises are in the condition called for by this Lease, that Lessor has performed all work with respect to premises and that Lessee does not hold Lessor responsible for any defects in premises."

Southwest Marine Lease ¶ 38.

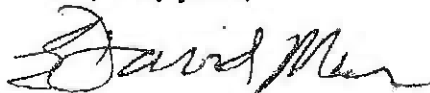
Southwest Marine also expressly agreed to indemnify and hold the Port harmless for any liability "resulting directly or indirectly from granting and performance of [the] lease or arising from *the use and operation* of the leased premises *or any defect in any part thereof.*" *Id.* at ¶ 21. Thus, Southwest Marine expressly represented and agreed, at the time it entered into its Lease, that it was satisfied with the condition of the premises, that the Port had no responsibility for the then-existing conditions on the premises, and that Southwest Marine would indemnify the Port for any liability arising from Southwest Marine's operations and for any defects in the premises.

Because the Port has never operated the shipyards, and is contractually indemnified for any investigation or cleanup costs it may incur, these facts combined with each tenant's express acceptance of the condition of its leased premises, should compel the Regional Board to resist the temptation to give in to the tenants' ill-intentioned attempts to avoid their own liability. Instead, the Regional Board should impose responsibility for the cleanup and abatement of the sediment contamination where such responsibility squarely belongs, on those who have discharged wastes.

## V. CONCLUSION

For the foregoing reasons, the San Diego Unified Port District respectfully requests that it not be named in any CAO with respect to the Southwest Marine and NASSCO sites. As demonstrated herein, good cause exists for *not* naming the Port as a discharger to a Cleanup and Abatement Order to be issued by the Regional Board for the subject sediment contamination.

Very truly yours,



E. David Merk  
Director, Recreation & Environmental Services

Enclosures

cc: Duane E. Bennett, Port Attorney  
Susan J. Flieder, Deputy Port Attorney

**Attachment K**

**Port District's Submission of Comments, Evidence and Legal  
Argument, dated May 26, 2011 (resubmitted on August 15, 2011  
redacting certain sections) exhibits excluded**

Brown & Winters  
Attorneys at Law

SAN DIEGO REGIONAL  
WATER QUALITY  
CONTROL BOARD

120 Birmingham Drive, Suite 110  
Cardiff-by-the-Sea, CA 92007-1737  
Telephone: (760) 633-4485  
Fax: (760) 633-4427

2011 AUG 16 P 1:14

Scott E. Patterson, Esq.  
Extension 104  
[spatterson@brownandwinters.com](mailto:spatterson@brownandwinters.com)

August 15, 2011

Via Electronic Mail & Overnight Mail

Mr. Frank Melbourn  
California Regional Water Quality Control Board – San Diego Region  
9174 Sky Park Court, Suite 100  
San Diego, CA 92123

Re: In re Tentative Cleanup and Abatement Order No. R9-2011-0001

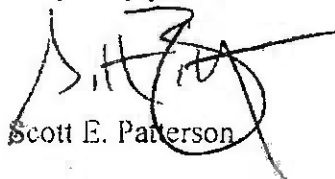
Dear Mr. Melbourn,

Pursuant to my earlier letter of August 12, 2011, attached is the San Diego Unified Port District's ("Port") resubmission of its Submission of Comments, Evidence and Legal Argument. This submittal is identical to the original May 26, 2011 submission but redacts certain portions from the Port's Comments and fully redacts Exhibits 10, 12 and 13 to the Declaration of Scott Patterson in Support of the Port's May 26, 2011 Comments.

The Port respectfully requests that the enclosed Submission of Comments, Evidence and Legal Argument be included in the administrative record. The Port also requests that the RWQCB remove any prior iterations of the Port's May 26, 2011 Comments from the administrative record.

Please do not hesitate to contact us if you have any questions regarding the foregoing.

Very truly yours,

  
Scott E. Patterson

SEP/jd  
Attachments

**SAN DIEGO UNIFIED PORT DISTRICT'S SUBMISSION OF COMMENTS,  
EVIDENCE AND LEGAL ARGUMENT**

**TENTATIVE CLEANUP AND ABATEMENT ORDER R9-2011-0001  
AND RELATED DRAFT TECHNICAL REPORT**

Designated Party Name: San Diego Unified Port District  
Represented by: William D. Brown  
Representative Company/Agency: Brown & Winters  
Representative Street Address: 120 Birmingham Drive, Suite 110  
City, State, Zip Code: Cardiff, CA 92007  
Phone Number: 760-633-4485  
Email Address: [bbrown@brownandwinters.com](mailto:bbrown@brownandwinters.com)

The San Diego Unified Port District (Port) submits the following comments, evidence and legal argument to the Tentative Cleanup and Abatement Order R9-2011-0001 (TCAO) and related Draft Technical Report (DTR). These comments are intended to be supplemental to, and incorporate, the Port's prior submissions, including the letter of April 22, 2008 from Sandi Nichols to Michael McCann and attachments (Shipyard Administrative Record [SAR] 378166-378205), as well as the letter of July 15, 2004 from David Merk to John Robertus and the attachments (SAR 158809-158824; SAR 158826-159338).

## *I. Introduction*

The Port supports the Cleanup Team's (CUT) remedial footprint proposed in the TCAO and DTR. As with a number of other sites, the Port intends to continue to cooperate with the CUT's efforts at the Shipyard Sediment Site. However, neither the facts nor the authority cited in the TCAO and DTR support naming the Port as a primarily liable discharger. Specifically, the Port has cooperated, and will continue to cooperate, with the California Regional Water Quality Control Board - San Diego Region (Regional Board). Early in the process, the California State Lands Commission encouraged and directed the Port to use its unique position as landlord to urge its tenants to work with the Regional Board toward a resolution. The Port has taken this responsibility seriously and will continue to do so. Further, the Port's tenants have adequate financial resources and are cooperating with the Regional Board.

Finally, the DTR acknowledges that there is no evidence that the Port "initiated or contributed to the actual discharge of waste to the Shipyard Sediment Site." (DTR §11.2, at p. 11-4.) Likewise, there is no evidence that the Port has discharged any contaminants from its municipal separate storm sewer system (MS4) facilities. As such, the Port should not be named a primary discharger in the TCAO. For the same reasons, the Port should be deleted from the MS4 Investigation and Mitigation directives in the TCAO. (TCAO Directives 3-5, pp. 21-23.)

The Port looks forward to the adoption of the TCAO, with the removal of the Port, and the cleanup of the Shipyard Sediment Site.

## II. *Port Support of the Proposed Remedial Footprint*

### TCAO Finding 33 and Attachment 2

DTR §§1.2; 1.4.2.1, and 1.5.2

The Port is supportive of the proposed cleanup approach reflected in the TCAO and DTR, while reserving the right to consider any comments that may come in during the public comment period. According to Regional Board Executive Officer and CUT team head, David Gibson, this is exactly the type of support which the CUT is seeking and would expect from the Port. (Exhibit "1" [Gibson Deposition], 43:4-22.)

To illustrate this support, the Port's designated expert, Dr. Michael Johns, provides support for the proposed remedial footprint. (Exhibit "2" [Port Expert Designation]; Exhibit "3" [Dr. Johns Declaration], ¶¶8-9.) In particular, Dr. Johns agrees with the process used to identify the polygons for the remedial footprint and has concluded that the factors used to select "worst first" polygons are consistent with the findings.

Dr. Johns also agrees that the Shipyard sediment contamination has contributed to the impairment of beneficial uses in San Diego Bay and likely continues to harm human health and environmental resources. (Exhibit "3" [Dr. Johns Declaration], ¶5(a)-(d).) In this regard, Dr. Johns has concluded that the contaminants are bioaccumulating in biota relevant to human health and that exposed fish and shellfish can migrate offsite, spreading the reach of the contamination throughout the San Diego Bay and potentially to those who consume the exposed fish and shellfish. (Exhibit "3" [Dr. Johns Declaration], ¶6(a)-(d).) Likewise, the shipyard activities are

likely exposing and/or redistributing legacy contaminants that create an ongoing source of San Diego Bay contamination. (Exhibit "3" [Dr. Johns Declaration], ¶7(a)-(d).)

Additionally, the Port's experts agree that the remedial footprint can go forward without delay. While some parties may claim that the remediation cannot go forward unless the Chollas Creek outfall area is included within the remedial footprint or otherwise addressed because of recontamination concerns, the Port's designated fate and transport expert has concluded that any interim resedimentation from Chollas Creek discharges will not adversely impact the remediation efforts at the Shipyards. (Exhibit "2" [Port Expert Designation]; Exhibit "4" [Dr. Poon Declaration], ¶¶13-15.) As such, the Port supports the exclusion of the mouth of Chollas Creek from the remedial footprint as well as the decision to move forward expeditiously with the remediation.

#### **A. Port Support During the TCAO/DTR Process**

The Port also reiterates its willingness to provide appropriate support to the Regional Board in its efforts to implement the TCAO and DTR. The Port was instrumental in coordinating initial efforts to get the dischargers and interested parties into discussions and mediation to try to reach a consensus on remedial approach and scope. The Port has worked to locate and leverage dischargers' potentially applicable insurance policies that could assist in funding the remediation. The Port also made its experts available to the CUT to assist in the site assessment.

The Port remains committed to supporting the Regional Board in any appropriate manner afforded by law. The Port will continue to be engaged in any appropriate mediation process, to reach a resolution of any remediation and monitoring issues. Likewise, the Port is working with the CUT and supporting its efforts through the California Environmental Quality Act (CEQA)

process. The Port is further working with the CUT to explore options for potential disposal or dewatering sites for the dredged sediment.

**B. Past and Present Port Support and Cooperation with the Regional Board**

The Port is dedicated to protecting and improving the environmental conditions of San Diego Bay and the Port tidelands. The Board of Port Commissioners is committed to conducting Port operations and managing resources in an environmentally sensitive and responsible manner and ensuring that tenant operations do the same.

The Port was created by the State Legislature in 1962 to manage San Diego Bay and surrounding tidelands by balancing economic benefits, community services, environmental stewardship, and public safety. (California Harbors and Navigation Code, App. 1 [the Port Act].) The Port takes seriously its authority and responsibility to protect, preserve, and enhance San Diego Bay's physical access; natural resources, including plant and animal life; and water quality. (Port Act, §4(b).)

The Port has adopted as its mission statement the commitment to protecting the tideland resources through balancing economic benefits, community services, environmental stewardship, and public safety on behalf of the citizens of California. To this end, the Port has developed strategic goals to protect and improve the environmental conditions of San Diego Bay and surrounding tidelands. The Port currently has several programs in place to protect stormwater, reduce pollutant sources, improve air quality, and reduce air emissions. For example, the Port has established an environmental committee with the goal of promoting environmental improvement projects throughout the San Diego Bay beyond ordinary compliance obligations. (Exhibit "1" [Gibson Deposition], 56:12-57:14.) Such Port programs have positively impacted water quality in bays and harbors throughout the state.



To the extent the CUT would designate the Port as a primary discharger because of perceived non-cooperation grounded in the Port's withdrawal from a voluntary mediation process that it suggested, such a position would be an inappropriate basis for Port primary liability as a matter of law. On the contrary, the Port's commitment to the above principles is reflected in its long history of cooperating with the Regional Board in efforts to remediate sites at which the Port is a landlord, some of which are listed below.

1. *Campbell Shipyard*

The Port provided significant assistance and leadership at another large San Diego Bay dredging project, the Campbell Shipyard site. At that site, the Port worked cooperatively with and supported the Regional Board's cleanup approach. (See, Exhibit "1" [Gibson Deposition], 28:12-24; 48:18-49:9; Exhibit "5" [Barker Deposition], Vol. III, 539:11-25.) The Port assisted in pushing the site toward mediation and assisted in securing insurance proceeds from a number of dischargers as well as its own insurance. These funds were used to finance the dredging and capping of the impacted sediments. Ultimately, the Port performed the sediment dredging and capping work. (Exhibit "6" [Carlisle Deposition], Vol. I, 119:2-6.)

2. *Shelter Island Yacht Basin TMDLs*

The Regional Board has been implementing copper TMDLs at the Shelter Island Yacht Basin. As David Barker acknowledged in his deposition, the Port "is working very cooperatively with the [Regional Board]" on this matter. (Exhibit "5" [Barker Deposition], Vol. III, 543:2-8.) In particular, the Port has been working at phasing out copper-based hull paint and "taking a lead role in investigating the use of alternative vessel hull paints to curtail copper discharges into the [San Diego Bay]." (Exhibit "5" [Barker Deposition], Vol. III, 544:25-545:6.) The Port has sought grant funds to assist in the switching of hull paints and has been facilitating a discussion on this point between the Regional Board, the yacht owners and the marinas. (Exhibit "5" [Gibson Deposition], 31:20-32:15; Exhibit "5" [Barker Deposition], Vol. III, 545:7-10.) The

Port has also made financial contributions to this effort. ((Exhibit "1" [Gibson Deposition], 32:16-23.)

3. *Teledyne Ryan/Convair Lagoon*

The Port has worked cooperatively with the Regional Board at the Teledyne Ryan (TDY) and Convair Lagoon sites. These sites involve a former aeronautical facility that had landside contamination impacts (the TDY site) and San Diego Bay sediment contamination impacts (the Convair Lagoon site). Again, the Port is working cooperatively with the Regional Board at this site. (Exhibit "5" [Barker Deposition], Vol. III, 540:11-20.) In fact, the Port assisted in bringing historic specialized insurance assets to help pay for demolition and remediation costs on the TDY site. Further, the Port worked aggressively with Regional Board oversight to remediate the sediment in the Convair Lagoon.

4. *South Bay Power Plant*

The South Bay Power Plant is a complex decommissioning and demolition project related to a power plant facility. There are related environmental issues associated with this work, including issues relating to San Diego Bay sediment. The Port has been cooperative while working with the Regional Board at the South Bay Power Plant site. (Exhibit "1" [Gibson Deposition], 30:18-31:8.) The Port is also working with other responsible agencies and parties through a very complex process to implement the demolition and related processes.

5. *Former BFGoodrich South Campus*

BFGoodrich is a site involving investigation and remediation in an area adjacent to the San Diego Bay. The Port is working with the Regional Board in investigating potential areas of historic contamination, including sediment contamination.

6. *Tow Basin*

The Tow Basin is an area adjacent to the San Diego Bay involving PCB contamination associated with a former aeronautics facility. The Port has been working cooperatively with the Regional Board to conduct the necessary investigation and remedial work pursuant to the Sediment Quality Objectives.

III. *The Port Should Not be Primarily Responsible for its Tenants' Discharges*

TCAO Finding 11

DTR §11.2

The DTR states that the Port may be named as a discharger due to its capacity as landlord of certain tenants identified as dischargers but also recognizes that “[i]n certain situations, the State Water Board has found it appropriate to consider a lessee primarily responsible and the lessor secondarily responsible for compliance with a cleanup and abatement order.” (DTR, §11.2, at p. 11-4.) As the DTR further notes, while this determination requires an analysis of various factors, the general rule is “that a landowner or lessor party may be placed in a position of secondary liability where it did not cause or permit the activity that lead to the initial discharge into the environment and there is a primarily responsible party who is performing the cleanup.” (*Id.*) The Port agrees with the DTR’s statements of the law in this regard.

While the DTR goes on to correctly note that “there is no evidence in the record that the Port District initiated or contributed to the actual discharge of waste to the Shipyard Sediment Site” it incorrectly concludes that “it is ... appropriate to name the Port District as a discharger in the CAO to the extent the Port’s tenants, past and present, have insufficient financial resources to cleanup [sic] the Shipyard Sediment Site and/or fail to comply with the order.” (DTR §11.2, at p. 11-4 [citing *In the Matter of Petitions of Wenwest, Inc. et al.*, WQ 92-13, p. 9; *In the Matter of Petitions of Arthur Spitzer, et al.*, WQ 89-8, p. 21.]

The DTR acknowledges that “[i]n the event the Port District’s tenants, past and present, have sufficient financial resources to clean up the Shipyard Sediment Site and comply with the Order, then the San Diego Water Board may modify its status to secondarily responsible party in the future.” (DTR §11.2, at pp. 11-4 to 11-5.) This anticipated modification is appropriate and should be implemented because there is substantial evidence of the Port District’s tenants’ abilities to fund the Order. In the same fashion, the evidence illustrates that the Port District’s tenants are complying with the Order.

**A. The Port’s Tenants Have Sufficient Assets to Conduct the Cleanup**

**TCAO Finding 11**

**DTR §11.2**



The Port’s tenants have more than sufficient assets to conduct the cleanup. In fact, prior iterations of the TCAO did not name the Port as a primary discharger because of its determination that the Port’s tenants had adequate assets to conduct the cleanup and were cooperating. (SAR 375780, at 375818-375819.) Inexplicably, the latest draft of the TCAO reaches a contrary conclusion without presenting any new facts that would justify this change in position. Having acknowledged the correct legal analysis for determining whether the Port should be primarily or secondarily liable, the CUT bears an initial burden of establishing through evidence the facts necessary to conclude that the Port’s tenants do not have adequate assets to fund the cleanup efforts. Yet, no such evidence has ever been presented.

In fact, the evidence establishes beyond question that the Port’s tenants have adequate assets to fund the cleanup efforts. The DTR estimates the remedial cleanup and monitoring costs will total \$58.1 million. (DTR §32.7.1, at p. 32-40.) During the discovery period, the Port sought and received responses from its tenants confirming that the tenants have adequate assets, whether in the form of traditional financial assets or insurance assets, to perform the cleanup. As


detailed below, the Port's current and historic tenants have more than adequate financial and insurance assets – at least \$800 million. This is exclusive of the available financial and insurance assets of other dischargers such as the Navy and the City of San Diego.

Additionally, the Port's tenants have lease and permit terms obligating the tenants to defend and indemnify the Port against this type of liability. (See, e.g., SAR 159273, 159289 at ¶21 [NASSCO Lease]; Exhibit "7" [SDG&E Tidelands Use and Occupancy Permit Excerpt], p. 5, ¶10; SAR 159307, 159324 at ¶20 [Southwest Marine Lease]; Exhibit "8" [Southwest Marine Lease Amendment No. 4 Changing Name to BAE Systems San Diego Ship Repair, Inc.]<sup>1</sup>) Consequently, the tenants' significant assets would be applicable to the Port's responsibility for any alleged "orphan shares" under these indemnity agreements. There is, therefore, no basis to conclude that the Port's tenants will be unable to cover the costs of remediation.

1. *BAE*

During the administrative discovery process, BAE stipulated that "it has the financial assets to cover any amounts of the cleanup and remedial monitoring under [the TCAO] which are premised upon BAE's established liability for the time period 1979 to the present with respect to the BAE leasehold only and that are ultimately allocated to BAE." (Exhibit "9" [BAE Stipulation].)  Redacted pursuant to letter from Scott Patterson to San Diego Regional Water Quality Control Board, dated August 12, 2011 

2. *NASSCO*

During the administrative discovery process, NASSCO stipulated that "it has the financial assets to cover the amount of the [TCAO] that are ultimately allocated to NASSCO." (Exhibit "11" [NASSCO Stipulation].) 

Diego Regional Water Quality Control Board, dated August 12, 2011.

3. *SDG&E*

Redacted pursuant to letter from Scott Patterson to San Diego Regional Water Quality Control Board, dated August 12, 2011.

4. *Campbell*

During the administrative discovery process, Campbell produced documents regarding its insurance profile. Based on its review of these and other relevant documents, the Port believes that Campbell has tens of millions of dollars of liability coverage that would be potentially applicable to the remediation and monitoring efforts. (Exhibit "14" [Summary of Campbell Historic Liability Insurance].)

5. *Star & Crescent Boat Company*

Based on its review of relevant documents, the Port believes that Star & Crescent has millions of dollars of liability coverage that would be potentially applicable to the remediation and monitoring efforts. (Exhibit "15" [Summary of Star & Crescent Boat Company Historic Liability Insurance].) Additionally, Star & Crescent has stipulated that it has assets totaling between \$750,000 and \$1 million. (Exhibit "16" [Star & Crescent Stipulation].) Given Star & Crescent's likely limited share of liability for the Shipyard Sediment Site in comparison to the

other dischargers, the combination of insurance and financial assets eliminate any likelihood that there will be any "orphan share" assigned to the Port.

The Port is aware that the Star & Crescent entity that is currently named in the TCAO and DTR disputes its successor liability for the other predecessor entities that operated at the Shipyard Sediment Site. However, this dispute does not present the risk of significant "orphan share" liability that could potentially be assigned to the Port. Regardless of whether the current Star & Crescent entity is liable for the earlier operations at the Shipyard Sediment Site, the identified insurance assets would still apply, so long as the insured entity is named as a discharger under the TCAO and DTR. Thus, if the TCAO and DTR were amended to name all of the potentially liable entities – San Diego Marine Construction Company, Star and Crescent Boat Company and Star & Crescent Investment Co. – the insurance assets should be available to address directly any established liability, whether or not these entities are still in existence. (See, California Insurance Code §11580(b)(2).)

**B. The Port's Tenants Are Cooperative**

**TCAO Finding 11**

**DTR §11.2**

In addition to possessing more than adequate financial assets to conduct the remediation, the Port's tenants are currently cooperating with the Regional Board. Although the tenants have been proposing a remedial approach that differs in some respects from the remedial approach proposed by the CUT, the process is "proceeding cooperatively." (Exhibit "5" [Barker Deposition], Vol. III, 489:20-490:14.)

#### **IV. *There is no Evidence of Port Non-Cooperation***

In contrast to the extensive evidence provided above regarding the Port's history of prior cooperation with the Regional Board in achieving remediation of numerous environmental challenges throughout the San Diego Bay area and cooperation with the Regional Board in the specific context of this matter, the CUT has contended in its administrative discovery responses that the Port was named as a discharger because it has not cooperated with the CUT during this process.

The Port notes that the allegation of non-cooperation is not contained in the TCAO or DTR. This absence confirms that, at least as of the date of the most recent TCAO and DTR, no issue regarding the Port's cooperation existed. In fact, the concern regarding Port cooperation is not grounded in fact. When asked to identify the basis for the allegations of non-cooperation, the witnesses testified to concerns that the Port was not supporting the remedial footprint and was not going to produce witnesses to confirm this support. (Exhibit "5" [Barker Deposition], Vol. III, 520:7-21, 521:23-522:24; Exhibit "1" [Gibson Deposition], 33:9-22.) As detailed above, the Port has produced expert witnesses to support the remedial footprint. Likewise, the witnesses testified that the Port had not been supportive of efforts to locate a site for dewatering or disposal of the dredged sediments. (Exhibit "5" [Barker Deposition], Vol. III, 523:4-21.) Again, as noted above, the Port is working with the CUT to explore solutions to this issue and is working to provide appropriate support in the CEQA process. (See, Exhibit "5" [Barker Deposition], Vol. III, 527:23-529:6.)

The only other basis for the allegation of non-cooperation was the Port's decision to withdraw from the mediation process. (Exhibit "1" [Gibson Deposition], 33:9-34:10, 44:5-13; Exhibit "6" [Carlisle Deposition], 110:20-23.) However, as noted, the Port's withdrawal from a voluntary mediation process that it initially proposed is an inappropriate basis for naming the Port as a primary discharger, as a matter of law. Further, any implication that the mediation withdrawal constitutes Port non-cooperation or opposition to the TCAO process is directly



rebutted by the Port's cooperation cited above. In sum, the Port has provided and continues to provide appropriate cooperation during the TCAO process.

*V. The Port Has not Discharged Contamination from its MS4 Facilities*

**TCAO Finding 11**

**DTR §11.3**

As a secondary basis for Port designation, the TCAO and DTR allege that the Port should be named as a discharger based upon its ownership and operation of MS4 facilities that have purportedly discharged contamination. Specifically, the TCAO and DTR allege that MS4 facilities owned or operated by the Port have discharged through the SW4 and SW9 outfalls and minor storm drains. However, the evidence in the record does not support this basis for Port discharger liability.

**A. The Port Does not Own or Operate SW4 or SW9**

**TCAO Finding 11**

**DTR §§11.3.1, 11.4**

The DTR states that the Port "operates the following MS4 storm drains which convey urban runoff from source areas up-gradient of the Shipyard Sediment Site's property and discharge directly or indirectly into San Diego Bay within the NASSCO and BAE Systems leasehold: ... Storm Drain SW4; Storm Drain SW9." (DTR §11.3.1, at pp. 11-5 to 11-7.) Elsewhere, the DTR alleges that the Port has discharged pollutants "through its SW4 ... and SW9 MS4 conduit pipes, as well as other minor drains on its tidelands property and watershed." (DTR §11.4, at p. 11-8.)

These statements are incorrect. The Port does not own or operate the SW4 or SW9 outfall or the MS4 facilities leading to these outfalls. Rather, as the CUT has acknowledged in its administrative discovery responses, both outfalls (SW4 and SW9) and related MS4 facilities are operated by the City under an easement. (Exhibit "17" [CUT Discovery Responses Excerpts], Responses to Special Interrogatories 28, 30.) The City has similarly acknowledged that its "storm drain system enters the NASSCO leasehold at the foot to 28<sup>th</sup> Street and terminates at the southeasterly corner" where it "discharges into Chollas Creek" at the SW9 outfall. (See, SAR 158787, 158971, 158806 [2004 City Storm Water Pollution Prevention Program Report].) The City has an easement for the MS4 facilities that terminate at the SW4 outfall. (Exhibit "18" [City Easement].) Moreover, the City retained easements for "all water, sewer and drainage facilities, known or unknown" located within the tidelands when the City first conveyed the tidelands in trust to the Port. (Exhibit "19" [Conveyance].) Because there is no evidence the Port has ever owned or operated SW4 and SW9 or the MS4 facilities that lead directly to these outfalls, the Port cannot be held liable for discharges from this portion of the MS4. (Exhibit "20" ¶7 [Collacott Declaration].)

The CUT's administrative discovery responses clarify that the TCAO and DTR "do not allege that the Port District manages or operates the portion of the City of San Diego's MS4 that drains to" SW4 and SW9. (Exhibit "17" [CUT Discovery Responses Excerpts], Responses to Special Interrogatories Nos. 28, 30.) Rather, the contention is that the Port "is responsible for controlling pollutants into and from *its own MS4 system*" and that "the Port District cannot passively allow pollutants to be discharged through *its MS4* and into another Copermittees' MS4s, like the City of San Diego." (*Id.* [emphasis added].) Yet, neither the DTR nor the administrative discovery responses identify what part of the MS4 owned or operated by the Port would ultimately lead to SW4 or SW9, much less how such MS4 facilities have discharged pollutants to SW4 or SW9.

**B. There is no Evidence that the Port's MS4 Facilities are Discharging Pollutants to the San Diego Bay**

**TCAO Finding 11**

**DTR §11.5**

The DTR contains no evidence that Port discharges from its MS4 are contributing to the Shipyard Sediment Site contamination.

*1. There is no Evidence that SW4 and SW9 are Discharging Contaminants to the Shipyard Sediment Site*

**TCAO Finding 11**

**DTR §§11.6.4, 11.6.5**

The TCAO and DTR fail to provide evidentiary support for the conclusion that SW4 and SW9 have discharged contaminants to San Diego Bay and the Shipyard Sediment Site. In fact, the DTR acknowledges that “no monitoring data is available” for either SW4 or SW9. (DTR §§11.6.4, at p. 11-13 [SW4]; 11.6.5, at p. 11-15 [SW9].) In lieu of actual monitoring results, the DTR simply concludes that “it is highly probable that historical and current discharges from th[ese] outfalls have discharged” various contaminants. (*Id.*) Reliance upon assumption rather than evidence as a basis for liability is legally unsound.

In *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2010) 2011 U.S.App.LEXIS 4647, 41 Env.L.Rptr. 20109, the claimant alleged the co-permittees on an NPDES permit had discharged various pollutants in violation of the permit. (Exhibit “21” [NRDC Case].) The claimant argued initially that the “measured exceedances in the Watershed Rivers *ipso facto* establish Permit violations by Defendants.” (NRDC, *supra*, at \*44.) However, the Ninth Circuit noted that because “the Clean Water Act does not prohibit ‘undisputed’ exceedances; it prohibits ‘discharges’ that are *not* in compliance with the Act (which means in

compliance with the NPDES) ... responsibility for those exceedances requires proof that some entity discharged a pollutant." (*Id.*, at \*44-45.)

Against this backdrop, the Ninth Circuit found that "the primary factual dispute between the parties is whether the evidence shows any *addition* of pollutants by Defendants" to the waterways. (*NRDC, supra*, at \*45.) The claimant asserted that because "the monitoring stations are downstream from hundreds of miles of storm drains which have generated the pollutants being detected" it was "irrelevant which of the thousands of storm drains were the source of polluted stormwater – as holders of the Permit, Defendants bear responsibility for the detected exceedances." (*Id.*, at \*46.) The Ninth Circuit found this view unsatisfactorily simplistic as it "did not enlighten the district court with sufficient evidence for certain claims and assumed it was obvious to anyone how stormwater makes its way from a parking lot in Pasadena into the MS4, through a mass-emissions station, and then to a Watershed River." (*Id.*, at \*47.)

Ultimately, the Ninth Circuit found adequate evidence of discharges for two of the rivers, where mass emissions stations detecting the exceedances were located in a portion of the MS4 "owned and operated" by the defendant in question. (*NRDC, supra*, at \*51-52.) In contrast with that conclusion, the Ninth Circuit found that "it is not possible to mete out responsibility for exceedances detected" in these waterways. (*Id.*, at 52.) The Ninth Circuit was "unable to identify the relationship between the MS4 and these mass-emissions stations" and noted that "it appears that both monitoring stations are located within the rivers themselves." (*Id.*) The Ninth Circuit concluded that "[i]t is highly likely, but on this record nothing more than assumption, that polluted stormwater exits the MS4 controlled by the [defendants], and flows downstream in these rivers past the mass-emissions stations." (*Id.*) However, this assumption was inadequate because the claimant was "obligated to spell out this process for the district court's consideration and to spotlight how the flow of water from an ms4 'contributed' to a water-quality exceedance detected at the Monitoring Stations." (*Id.*, at 52-53.)

Based on the foregoing, liability requires evidence the co-permittee "discharged" pollutants from an MS4 facility that the co-permittee owns or operates. Testing or monitoring taken from the affected waterway, rather than from the MS4 system, is not adequate. This is so regardless of how "probable" or "likely" the assumption that the defendant may have discharged pollutants. In the present case, there is no evidence that SW4 or SW9 discharged any pollutants. Rather, the TCAO and DTR merely assume such discharges as "highly probable" based upon monitoring results from Chollas Creek. This is indistinguishable from the inadequate approach in *National Resources Defense Council* and cannot form the basis for liability arising out of the ownership or operation of an MS4 system.

2. *There is no Evidence that the Port's MS4 Facilities are Discharging Contaminants to the Shipyard Sediment Site*

**TCAO Finding 11**

**DTR §§11.6.4, 11.6.5**

Even if there was adequate evidence that SW4 and SW9 are discharging pollutants, there are no monitoring or test results establishing that there have been discharges from the Port's MS4 facilities into the City MS4 facilities that lead to the outfalls at SW4 and SW9. *National Resources Defense Council* makes clear that there must be evidence that the specific Port MS4 facilities, not the MS4 system generally, are discharging pollutants. This is true regardless of how "probable" it is that such discharges might be taking place. Contrary to the correct legal standard, the DTR broadly and incorrectly identifies the offending Port MS4 facilities as SW4 and SW9. The DTR contains no factual analysis of any actual Port MS4 facilities, much less the content of the discharges from the Port MS4 facilities. In fact, the Port has only very limited MS4 facilities that lead to SW4 and no MS4 facilities leading to SW9.

Furthermore, the Port's status as co-permittee under the NPDES permit since 1990 does not make it liable for any and all discharges from SW4 and SW9, regardless of whether the

Port's MS4 facilities discharged pollutants. Likewise, the Port is not broadly liable under the NPDES permit for its tenants' discharges into a portion of the MS4 system that the Port does not own or operate. There is no language in the NPDES permit that purports to impose such broad joint liability upon the Port. Such an interpretation of the NPDES permit would be contrary to the terms of the Clean Water Act, which is the basis for the NPDES permit. Under the Clean Water Act, a "co-permittee" is defined as "a permittee to an NPDES permit that is only responsible for permit conditions relating to the discharge for which it is operator." (40 Code of Federal Regulations §122.26(b)(1).) This is further reflected in the analysis in *National Resources Defense Council*, in which the Ninth Circuit focused on and required evidence of discharges from specific MS4 facilities owned and operated by the defendants, not from the MS4 system generally.

In sum, the Port is responsible only for discharges from MS4 facilities that it owns or operates. The Port's status as co-permittee under the NPDES permit does not support the conclusion that the Port owns or operates the entire MS4 system. Likewise, the Port's status as trustee of tidelands property does not support the conclusion that the Port owns or operates all MS4 facilities located on that property. In the absence of evidence linking discharges of pollutants from a specific portion of the MS4 system that the Port owns or operates, the Port is not responsible under the NPDES permit for those discharges.

3. *There is no Evidence that SW9 Discharges are Contaminating the Shipyard Sediment Site*

**TCAO Finding 11**

**DTR §§11.6.5**

Finally, even if SW9 was discharging some contaminants, this would not be a proper basis of liability. The SW9 outfall discharges at the southeasterly corner of the NASSCO leasehold into Chollas Creek, which is outside the proposed remedial footprint. The Port's

designated expert, Dr. Ying Poon, has done an extensive fate and transport modeling analysis and confirmed that any discharges from Chollas Creek would not result in any significant deposit, accumulation or resedimentation of the Shipyard Sediment Site. (Exhibit "2" [Port Expert Designation]; Exhibit "4" [Dr. Poon Declaration], ¶¶13-15) This extensive modeling contradicts the assumption in the TCAO that, based upon the erroneous Exponent Report approach, Chollas Creek flows result in the settling of contaminated sediment at the Shipyard Sediment Site. In the absence of any substantial evidence that SW9 discharges are transporting contaminants to the Shipyard Sediment Site, the Port cannot be liable based upon these alleged discharges.

#### VI. *Conclusion*

The Port is supportive of the CUT's presently proposed remedial approach, as reflected in the TCAO and DTR. The proposed remedial footprint is both necessary to achieve water quality objectives and is designed to accomplish these objectives. The Port intends to continue working cooperatively with the CUT and the Regional Board toward the remediation of the San Diego Bay, as it has done and continues to do at many other sites.

However, the Port should not face primary responsibility as a discharger. The TCAO acknowledges that the Port has not initiated or contributed the actual discharge of waste to the Shipyard Sediment Site. The Port's discharger tenants are financially able to perform the proposed remediation and monitoring. Likewise, the discharger tenants are cooperating with the CUT and the Regional Board. Therefore, under well-established State Water Board legal authority and the evidence presented in the TCAO and DTR, the Port should only be secondarily liable, at most.

**Attachment L**

**Declaration of Expert Robert Collacott in Support of the San  
Diego Unified Port District's Submission of Comments**



1 William D. Brown, Esq., (SBN 125468)  
2 Wentzelee Botha, Esq., (SBN 207029)  
3 BROWN & WINTERS, LLP  
4 120 Birmingham Drive, Suite 110  
5 Cardiff-by-the-Sea, CA 92007  
6 Telephone: (760) 633-4485  
7 Facsimile: (760) 633-4427  
8 E-mail: bbrown@brownandwinters.com  
9 wbotha@brownandwinters.com

10 Duane E. Bennett, Esq., Port Attorney (SBN 110202)  
11 Leslie A. Fitzgerald, Esq., Deputy Port Attorney (SBN 149373)  
12 SAN DIEGO UNIFIED PORT DISTRICT  
13 3165 Pacific Highway  
14 P. O. Box 120488  
15 San Diego CA 92112  
16 Telephone: (619) 686-6219  
17 Facsimile: (619) 686-6444  
18 E-mail: dbennett@portofsandiego.org  
19 lfitzgerald@portofsandiego.org

20 Attorneys for Designated Party  
21 SAN DIEGO UNIFIED PORT DISTRICT

22 CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
23 SAN DIEGO REGION

24 In re Tentative Cleanup and Abatement Order )  
25 No. R9-2011-0001 (formerly No. R9-2010- )  
26 0002) (Shipyard Sediment Site) )  
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I, Robert Collacott, declare:

1. I am a Principal Scientist at URS Corporation in Santa Ana, California. I have over 31 years of experience covering a broad range of environmental programs related to permitting storm water and wastewater discharges. I hold a M.S. in Biology from the University of California – Irvine and a Masters in Business Administration from the California State University – Fullerton. Attached as Exhibit I is a copy of my CV.

2. As an expert in municipal separate storm sewer system (“MS4”) regulation and compliance, I have analyzed and/or assisted in the development of many National Pollutant Discharge Elimination System (“NPDES”) MS4 permit compliance programs and associated MS4 facilities such as the MS4 system in the area of the San Diego Unified Port District (the “Port District”) jurisdiction tributary to the Shipyard Sediment Site.

3. I have extensive knowledge regarding NPDES regulatory schemes that govern the implementation and operation of MS4s.

4. To date I have reviewed California Regional Water Quality Control Board – San Diego Region Order No. R9-2007-0001 (the “MS4 Permit”); Tentative Cleanup and Abatement Order No. R9-2011-0001 and Draft Technical Report; permit files for the Port District, tenants and the City of San Diego, City of Lemon Grove and City of La Mesa; the Port District’s current compliance documentation, model MS4 Permit compliance programs, internet sites, policies and procedures, training programs and notices of violation.

5. I have interviewed appropriate Port District staff responsible for implementation of elements of the MS4 Permit compliance program; maintenance of historical maps, photos and engineering drawings; and management of tenant lease records. I have reviewed various Port files relating to the MS4 and the Port District’s compliance

1 program, including but not limited to the Port District's Jurisdictional Urban Runoff  
2 Management Plan ("JURMP"), historical maps and aerial photos of the Port District area in  
3 the vicinity of the Shipyard Sediment Site and tenant leases. I have also physically  
4 inspected the Port's MS4 facilities in the vicinity of the Shipyard Sediment Site.

5  
6 6. I reviewed the California Regional Water Quality Control Board - San Diego  
7 Region discharger databases, files, notices of violation and other published reports.

8 7. In my opinion, based on my analysis and pertinent to the Port District's  
9 Submission of Comments, Evidence and Legal Argument, there is no evidence that storm  
10 water flowing into portions of the MS4 that are owned and/or operated by the Port District  
11 has contributed to sediment contamination in the Shipyard Sediment Site.

12  
13 8. My opinion is based on the following facts:

14 a. The City of San Diego maintains easements and owns and operates  
15 the MS4 facilities and the associated outfalls SW4 and SW9, and has since the  
16 Tidelands property was conveyed in trust to the Port on February 15, 1963.

17  
18 b. Outfall SW9 is located on property that has been leased by National  
19 Steel and Shipbuilding Company ("NASSCO") since at least 1960. NASSCO does  
20 not discharge, nor has it ever discharged, storm water or non-storm water to the Port  
21 District's MS4 facilities.

22  
23 c. Outfall SW4 is located on property that has been leased by BAE  
24 Systems San Diego Ship Repair, Inc., and its predecessor company, Southwest  
25 Marine, Inc. (collectively, "BAE") since 1979. Although BAE owns and operates  
26 storm drain inlets associated with office facilities that discharge to the City of San  
27 Diego MS4 facility that discharges to outfall SW4, it does not discharge, nor has it  
28 ever discharged, storm water or non-storm water to the Port District's MS4 facilities.

1           d. From the date the Tidelands property was conveyed in trust to the  
2 Port on February 15, 1963, through the beginning of BAE's tenancy in 1979, the  
3 property that contains SW4 was leased by San Diego Marine Construction  
4 Corporation (a wholly owned subsidiary of Campbell Industries, Inc.) formerly  
5 known as MCCSD ("Campbell") and San Diego Marine Construction Company  
6 ("SDMC Co."). Campbell and SDMC Co. did not discharge storm water or non-  
7 storm water to the Port District's MS4 facilities.  
8

9           e. The portion of the Port District that is not leased to tenants and is  
10 tributary to outfall SW4 is limited to portions of Belt Street (approx. 1 acre),  
11 consisting of an estimated one-half mile (1/2 mile street) of curb and gutter, four  
12 storm drain inlets, and an estimated 770 feet of underground storm drains 24-inches  
13 in diameter and smaller. No area of the Port District drains to outfall SW9. The  
14 non-tenant area of the Port District constitutes approximately 0.01% of the area  
15 tributary to San Diego Bay in the area of the Shipyard Sediment Site.  
16

17           f. The Port District does not own or operate industrial facilities in the  
18 areas tributary to SW4 and SW9.  
19

20           g. The Port District inspects the storm drain inlets within its MS4 on  
21 Belt Street annually or biannually, and sweeps Belt Street monthly as required by the  
22 MS4 Permit.  
23

24           h. The Port District Environmental Services Department has prepared a  
25 JURMP document in accordance with the requirements of the MS4 Permit, and in  
26 my opinion, operates its MS4 facilities in accordance with its JURMP.  
27

28           9. In my opinion, based upon my evaluation and experience with other MS4  
compliance programs in California, the Port District's compliance program is being

1 implemented to the Maximum Extent Practicable standard prescribed by the MS4 permit. It  
2 is my opinion that the Port District views the requirements of the MS4 Permit as minimum  
3 compliance requirements, and has proactively implemented compliance activities at a higher  
4 level in several instances.

5  
6 I declare under penalty of perjury of the laws of the State of California that  
7 theforegoing is true and correct and that this declaration was executed on May 24,  
8 2011 at Villa Park, California.

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12 Robert Collacott

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**Attachment M**

**Declaration of Expert Michaels Johns, Ph.D. in Support of the San  
Diego Unified Port District's Submission of Comments**

1 William D. Brown, Esq., (SBN 125468)  
2 Wentzelee Botha, Esq., (SBN 207029)  
3 BROWN & WINTERS, LLP  
4 120 Birmingham Drive, Suite 110  
5 Cardiff-by-the-Sea, CA 92007  
6 Telephone: (760) 633-4485  
7 Facsimile: (760) 633-4427  
8 E-mail: bbrown@brownandwinters.com  
9 wbotha@brownandwinters.com

10 Duane E. Bennett, Esq., Port Attorney (SBN 110202)  
11 Leslie A. FitzGerald, Esq., Deputy Port Attorney (SBN 149373)  
12 SAN DIEGO UNIFIED PORT DISTRICT  
13 3165 Pacific Highway  
14 P. O. Box 120488  
15 San Diego CA 92112  
16 Telephone: (619) 686-6219  
17 Facsimile: (619) 686-6444  
18 E-mail: dbennett@portofsandiego.org  
19 lfitzgerald@portofsandiego.org

20 Attorneys for Designated Party  
21 SAN DIEGO UNIFIED PORT DISTRICT

22 CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
23 SAN DIEGO REGION

24 In re Tentative Cleanup and Abatement Order )  
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Presiding Officer: Grant Destache

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I, D. Michael Johns, declare:

1. I am a Partner at Windward Environmental LLC in Seattle, Washington, where I am responsible for the management of large multitask, multidisciplinary environmental investigations, including remedial investigations/feasibility studies and natural resource damage assessments. I hold a PhD from the Belle W. Baruch Institute, University of South Carolina in marine biology. I have 30 years of professional experience in aquatic ecological and human health risk assessments, particularly those associated with contaminated sediments. Attached as Exhibit 1 is a copy of my CV.

2. As an expert in remedial investigations/feasibility studies, with particular expertise in assessing the impacts of contaminated sediments on aquatic species and human health, I have conducted many aquatic and human health risk assessments associated with contaminated sediments in and around heavy industrial sites, including ports.

3. In conducting my analysis I have reviewed and relied upon the following documents:

- a. *Tentative Cleanup And Abatement Order No. R9-2011-0001. Shipyard Sediment Site, San Diego Bay, San Diego, CA. Dated September 15, 2010, this document ("TCAO") was issued by the California Regional Water Quality Control Board ("CRWQCB"), San Diego Region ("Water Board").*
- b. *Draft Technical Report for Tentative Cleanup and Abatement Order No. R9-2011-0001 for the Shipyard Sediment Site, San Diego Bay, San*



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Diego, CA – Volumes I, II, and III. Dated September 15, 2010, this document (“DTR”) was also issued by the San Diego Water Board.

- c. *NASSCO and Southwest Marine Detailed Sediment Investigation Report*, a technical report prepared in 2003 by the engineering and scientific consulting firm Exponent, of Bellevue, Washington.
- d. Sediment chemistry data from SDG&E sampling event in response to Order R9-2004-0026.
- e. California Water Code (“CWC”) section 13304.
- f. State Water Resources Control Board Resolution No. 92-94.
- g. *Water Quality Control Plan for the San Diego Basin (9)*. Dated September 8, 1994 (with amendments effective prior to April 25, 2007), this document (“Basin Plan”) was prepared by the California Regional Water Quality Control Board, San Diego Region.
- h. U.S. Environmental Protection Agency (EPA) risk assessment and exposure assessment guidance.
- i. Various other references of the type that are relied upon by experts in the field of remedial investigations/feasibility studies, sediment contamination and aquatic and human health risk assessments.

4. It is my opinion, based on my analysis and pertinent to the Port District’s Submission of Comments, Evidence and Legal Argument that: (i) the TCAO and DTR are correct that concentrations of chemicals of concern (“COCs”) in sediment in the Shipyard Sediment Site (“Site”) exceed what could be considered background concentrations for San Diego Bay; (ii) the COCs were sufficient both in terms of their concentrations and distribution to impair the beneficial uses of the site; and (iii) the remedial action footprint

1 and alternative cleanup proposed by the Water Board are consistent with CWC 13304 and  
2 Resolution No. 92-49.

3 **A. Aquatic and Human Health Risks**

4 5: It is my opinion that there is sufficient evidence that the Shipyard Site  
5 sediment contamination has contributed to the impairment of beneficial uses in San Diego  
6 Bay and likely continues to harm human health and environmental resources for the  
7 following reasons:  
8

- 9 a. Sediment contaminants in Site sediments are present, bioavailable, and,  
10 for a number of the contaminants, bioaccumulative.
- 11 b. Fish and shellfish collected at the Site have accumulated contaminants at  
12 concentrations predicted to harm seafood consumers (i.e., recreational  
13 and subsistence fishers).
- 14 c. Although fishing and shellfish harvesting do not occur on the Site  
15 because of security restrictions, there are nearby public access points and  
16 the fish and shellfish that have accumulated contaminants are mobile.
- 17 d. Shipyard activities at the Site periodically disturb contaminated  
18 sediments, creating an ongoing source of legacy contaminants and  
19 impacting beneficial uses in the Bay.

20 6. It is my opinion that COCs are bioaccumulating in biota for the following  
21 reasons:  
22

- 23 a. Laboratory exposures to site-collected sediments established that  
24 statistically significant accumulations of selected contaminants (arsenic,  
25 copper, lead, mercury, zinc, TBT, total PCBs, and high molecular weight  
26 PAHs) occur in clams that are in direct contact with and ingest  
27  
28

1 contaminated sediments, providing evidence that Site sediments  
2 contribute to the contaminant residues in the tissues of benthic organisms.

3 b. Benthic organisms are an important component of marine food webs and  
4 are a major component of the diet for both the sand bass<sup>1</sup> and spiny  
5 lobster<sup>2</sup> as well as many other fish, invertebrate and bird species.

6  
7 c. Many of the fish and shellfish that prey upon contaminated benthic  
8 organisms within the Site can be consumed by people, are highly mobile  
9 and can migrate off the Site throughout large portions of San Diego Bay.

10 These mechanisms contribute to the transfer of contaminants from the  
11 sediment to higher order receptors (including those relevant to human  
12 exposure) outside of the Site. The life histories of sand bass and spiny  
13 lobster, the two species targeted for human health evaluation at the Site,  
14 involve migration over large portions of San Diego Bay.<sup>3,4,5</sup>  
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19 <sup>1</sup> Mendoza-Carranza, M, and JA Rosales-Casian. 2000. *The feeding habits of spotted sand bass (Paralabrax*  
20 *maculatofasciatus) in Punta Banda Estuary, Ensenada, Baja California, Mexico.* In: CalCOFI Reports,  
21 Vol. 41. California Cooperative Oceanic Fisheries Investigations, pp. 194-200. Available from:  
22 <http://www.calcofi.org/publications/ccreports/96-vol41-2000.html>.

23 <sup>2</sup> Shaw, WN. 1986. *Species profiles: Life histories and environmental requirements of coastal fishes and*  
24 *invertebrates (Pacific Southwest): spiny lobster.* Biological Report 82 (11.47). Coastal Ecology Group, US  
25 Army Corps of Engineers, Vicksburg, MS and National Wetlands Research Center, US Fish and Wildlife  
26 Service, Slidell, LA.

27 <sup>3</sup> Hovel K, and C Lowe. 2007. *Shelter use, movement, and home range of spiny lobsters in San Diego County.*  
28 Paper MLPA07\_01. California Sea Grant College Program, Research Completion Reports, University of  
California, San Diego, San Diego, CA.

<sup>4</sup> Pondella DJ, Allen LG, Craig MT, Gintert B. 2006. *Evaluation of eelgrass mitigation and fishery*  
*enhancement structures in San Diego Bay, California.* Bull Mar Sci 78(1):115-131.

<sup>5</sup> Jarvis ET, Linardich C, Valle CF. 2010. *Spawning-related movements of barred sand bass, Paralabrax*  
*nebulifer, in southern California: interpretations from two decades of historical tag and recapture data.*  
Bull South Cal Acad Sci 109(3):123-143.

1 d. PCBs are bioaccumulative, and cleanup is necessary for incremental  
2 improvement in the beneficial use of San Diego Bay by recreational and  
3 subsistence fishers.

4 7: It is my opinion that Site activities likely expose and/or redistribute legacy  
5 contaminants and create an ongoing source to San Diego Bay based on the following:  
6

- 7 a. Site activities contribute to the release and potential transport of  
8 sediment-bound and dissolved contaminants in San Diego Harbor.
- 9 b. While legacy contaminants can be buried over time by natural  
10 sedimentation, subsurface contaminants can be exposed through vessel  
11 maneuvering, engine testing, and other Site activities.
- 12 c. Resuspension of bottom sediments can increase the bioavailability of  
13 contaminants (e.g., contaminants can temporarily partition to the water  
14 prior to settling back to the bottom) and serve to locally redistribute  
15 contaminants.  
16
- 17 d. This physical reworking of the sediments in areas impacted by Site  
18 contaminants creates an ongoing source to San Diego Bay and continues  
19 to impact beneficial uses through the mechanisms discussed above.  
20

21 **B. Consistency of the Remedial Action Footprint Proposed by the Water Board**  
22 **with Resolution No. 92-49**

23 8. In my opinion, the process used by the Water Board to identify areas  
24 requiring remedial actions (e.g., use of polygons to define the remedial footprint) was  
25 appropriate. In using the polygons, the Water Board recognized that species such as fish and  
26 spiny lobster are mobile and that exposure to Site contaminants can occur site-wide rather  
27 than only at a single location. In developing the proposed remedial footprint, the Water  
28

1 Board correctly addressed impairment to more sedentary species, such as the organisms that  
2 form the benthic community. The factors used by the Water Board to select "worst first"  
3 polygons are consistent with my findings.

4 9. It is my opinion that the remedial footprint contemplated by the DTR will  
5 adequately address risks posed by contaminated sediments within the Site in accordance  
6 with the Water Board's responsibility to protect the beneficial uses of waters of the state  
7 pursuant to California Water Code section 13304, with the following caveats:  
8

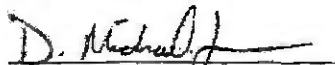
9 a. Polygon SW29 - Only a portion of this polygon was included in the  
10 proposed remedial action footprint; the remaining area will be the subject  
11 subsequent action by the Water Board. Having reviewed additional data  
12 collected from within the boundaries of the SW29 polygon (i.e., split  
13 sample data from the samples collected by SDG&E under Order No. R9-  
14 2004-0026), I found that total PCB concentrations measured in samples  
15 represent some of the highest found within the Site. In addition polygon  
16 SW29 is at the edge of the study area and represents an unbounded area  
17 of higher concentrations of total PCBs. Because of these factors (i.e.,  
18 high PCB concentrations not bounded by sediment data showing lower  
19 concentrations), the portion of polygon SW29 not currently included in  
20 the remedial footprint warrants subsequent action.  
21  
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23 a. Polygon NA23 - The DTR acknowledges the high ranking of this  
24 polygon using the "worst first" analysis but concludes that it is  
25 technically infeasible to dredge because doing so would adversely affect  
26 Pier 12, the tug boat pier, and the riprap shoreline, as well as undermine  
27 the sediment slope for the floating dry dock sump. However, other areas  
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in which dredging is not feasible are currently included in the remedial action footprint. Alternative remedial technologies proposed in these latter areas include capping and backfill. The constraints that precluded dredging in polygon NA23 (e.g., inaccessibility of sediment under piers) appear to have been overcome for these other areas. Therefore, the decision not to include polygon NA23 in the remedial action footprint on the basis of technical feasibility should be re-evaluated.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct and that this declaration was executed on May 25, 2011 at Seattle, Washington.

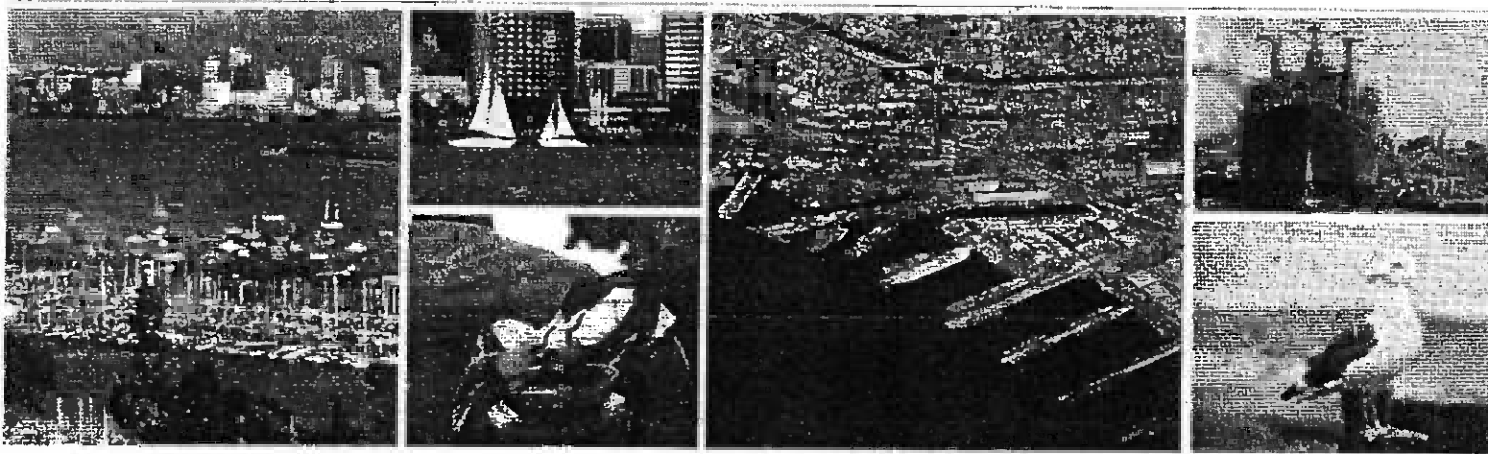
  
D. Michael Johns

**Attachment N**

**Excerpts from California Regional Water Quality Control Board's  
Response to Comments Report, dated August 23, 2011**

**California Regional Water Quality Control Board  
San Diego Region**

**Response to Comments Report**



**Tentative Cleanup and Abatement Order No. R9-2011-0001  
and Draft Technical Report for the  
Shipyard Sediment Site  
San Diego Bay**

**August 23, 2011**



## 11. TCAO Finding 11 and DTR Section 11: San Diego Unified Port District

Finding 11 of CAO No. R9-2011-0001 states:

The San Diego Water Board alleges, but the Port District denies, that the Port District caused or permitted wastes to be discharged or to be deposited where they were discharged into San Diego Bay and created, or threatened to create, a condition of pollution or nuisance. The Port District is a special government entity, created in 1962 by the San Diego Unified Port District Act, California Harbors and Navigation Code Appendix I, in order to manage San Diego Harbor, and administer certain public lands along San Diego Bay. The Port District holds and manages as trust property on behalf of the People of the State of California the land occupied by NASSCO, BAE Systems, and the cooling water tunnels for SDG&E's former Silver Gate Power Plant. The Port District is also the trustee of the land formerly occupied by the Star & Crescent Boat Company and its predecessor, and by Campbell Industries at all times since 1963 during which they conducted shipbuilding and repair activities.<sup>1</sup> The Port District's own ordinances, which date back to 1963, prohibit the deposit or discharge of any chemicals or waste to the tidelands or San Diego Bay and make it unlawful to discharge pollutants in non-storm water directly or indirectly into the storm water conveyance system. The San Diego Water Board has the discretion to name the Port District in its capacity as the State's trustee as a "discharger" in the Shipyard Sediment Site CAO and hereby does so, consistent with its responsibility for the actions, omissions and operations of its tenants and to the extent indicated by previous State Water Board and San Diego Water Board orders

The wastes the Port District caused or permitted to be discharged, or to be deposited where they were discharged into San Diego Bay through its ownership of the Shipyard Sediment Site contained metals (arsenic, cadmium, chromium, copper, lead, mercury, nickel, silver, and zinc), butyl tin species, PCBs, PCTs, PAHs, and TPH.

The Port District also owns and operates a municipal separate storm sewer system (MS4) through which it discharges waste commonly found in urban runoff to San Diego Bay subject to the terms and conditions of a National Pollutant Discharge Elimination System (NPDES) Storm Water Permit. The San Diego Water Board alleges, but the Port District denies, that the Port District has discharged urban storm water containing waste directly to San Diego Bay at the Shipyard Sediment Site. The waste includes metals (arsenic, cadmium, chromium, copper, lead, mercury, nickel, silver, and zinc), total suspended solids, sediment (due to anthropogenic activities), petroleum products, and synthetic organics (pesticides, herbicides, and PCBs).

The urban storm water containing waste that has discharged from the on-site and off-site MS4 has contributed to the accumulation of pollutants in the marine sediments at the Shipyard Sediment Site to levels, that cause, and threaten to cause, conditions of pollution, contamination, and nuisance by exceeding applicable water quality objectives

for toxic pollutants in San Diego Bay. Based on these considerations the San Diego Unified Port District is referred to as "Discharger(s)" in this CAO.

<sup>1</sup> Star & Crescent Boat Company and Campbell Industries owned and operated ship repair and construction facilities in past years prior to BAE Systems San Diego Ship Repair, Inc.'s occupation of the leasehold. See Sections 5 and 6 of the Technical Report.

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### RESPONSE 11.1

**Comments Submitted By:** Port District, City of San Diego

**DTR Section:** 11

**Comment IDs:** 13, 15, 20, 21, 22, 24, 26, 27, 28, 29, 286, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449

**Comment**

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ID 13

Port Support During the TCAO/DTR Process

The Port also reiterates its willingness to provide appropriate support to the Regional Board in its efforts to implement the TCAO and DTR. The Port was instrumental in coordinating initial efforts to get the dischargers and interested parties into discussions and mediation to try to reach a consensus on remedial approach and scope. The Port has worked to locate and leverage dischargers' potentially applicable insurance policies that could assist in funding the remediation. The Port also made its experts available to the CUT to assist in the site assessment.

The Port remains committed to supporting the Regional Board in any appropriate manner afforded by law. The Port will continue to be engaged in any appropriate mediation process, to reach a resolution of any remediation and monitoring issues. Likewise, the Port is working with the CUT and supporting its efforts through the California Environmental Quality Act (CEQA) process. The Port is further working with the CUT to explore options for potential disposal or dewatering sites for the dredged sediment.

ID 15

Past and Present Port Support and Cooperation with the Regional Board

The Port is dedicated to protecting and improving the environmental conditions of San Diego Bay and the Port tidelands. The Board of Port Commissioners is committed to conducting Port operations and managing resources in an environmentally sensitive and responsible manner and ensuring that tenant operations do the same.

The Port was created by the State Legislature in 1962 to manage San Diego Bay and surrounding tidelands by balancing economic benefits, community services, environmental stewardship, and public safety. (California Harbors and Navigation Code, App. 1 [the Port Act].) The Port takes seriously its authority and responsibility to protect, preserve, and enhance San Diego Bay's physical access; natural resources, including plant and animal life; and water quality. (Port Act, §4(b).)

The Port has adopted as its mission statement the commitment to protecting the tideland resources through balancing economic benefits, community services, environmental stewardship, and public safety on behalf of the citizens of California. To this end, the Port has developed strategic goals to protect and improve the environmental conditions of San Diego Bay and surrounding tidelands. The Port currently has several programs in place to protect storm water, reduce pollutant sources, improve air quality, and reduce air emissions. For example, the Port has established an environmental committee with the goal of promoting environmental improvement projects throughout the San Diego Bay beyond ordinary compliance obligations. (Exhibit " 1 " [Gibson Deposition], 56:12-57:14.) Such Port programs have positively impacted water quality in bays and harbors throughout the state.

To the extent the CUT would designate the Port as a primary discharger because of perceived non-cooperation grounded in the Port's withdrawal from a voluntary mediation process that it suggested, such a position would be an inappropriate basis for Port primary liability as a matter of law. On the contrary, the Port's commitment to the above principles is reflected its long history of cooperating with the Regional Board in efforts to remediate sites at which the Port is a landlord, some of which are listed below.

#### 1. Campbell Shipyard

The Port provided significant assistance and leadership at another large San Diego Bay dredging project, the Campbell Shipyard site. At that site, the Port worked cooperatively with and supported the Regional Board's cleanup approach. (See, Exhibit " 1 " [Gibson Deposition], 28:12-24; 48:18-49:9; Exhibit "5" [Barker Deposition], Vol. III, 539:11-25.) The Port assisted in pushing the site toward mediation and assisted in securing insurance proceeds from a number of dischargers as well as its own insurance. These funds were used to finance the dredging and capping of the impacted sediments. Ultimately, the Port performed the sediment dredging and capping work. (Exhibit "6" [Carlisle Deposition], Vol. I, 119:2-6.)

#### 2. Shelter Island Yacht Basin TMDLs

The Regional Board has been implementing copper TMDLs at the Shelter Island Yacht Basin. As David Barker acknowledged in his deposition, the Port "is working very cooperatively with the [Regional B]oard" on this matter. (Exhibit "5" [Barker Deposition], Vol. III, 543:2-8.)

In particular, the Port has been working at phasing out copper-based hull paint and "taking a lead role in investigating the use of alternative vessel hull paints to curtail copper discharges into the [San Diego B]ay." (Exhibit "5" [Barker Deposition], Vol. III, 544:25-545:6.) The Port has sought grant funds to assist in the switching of hull paints and has been facilitating a discussion on this point between the Regional Board, the yacht owners and the marinas. (Exhibit "5" [Gibson Deposition], 31:20-32:15; Exhibit "5" [Barker Deposition], Vol. III, 545:7-10.) The Port has also made financial contributions to this effort. ((Exhibit " 1 " [Gibson Deposition], 32:

16-23.)

### 3. Teledyne Ryan/Convair Lagoon

The Port has worked cooperatively with the Regional Board at the Teledyne Ryan (TDY) and Convair Lagoon sites. These sites involve a former aeronautical facility that had landside contamination impacts (the TDY site) and San Diego Bay sediment contamination impacts (the Convair Lagoon site). Again, the Port is working cooperatively with the Regional Board at this site. (Exhibit "5" [Barker Deposition], Vol. III, 540:11-20.) In fact, the Port assisted in bringing historic specialized insurance assets to help pay for demolition and remediation costs on the TDY site. Further, the Port worked aggressively with Regional Board oversight to remediate the sediment in the Convair Lagoon.

### 4. South Bay Power Plant

The South Bay Power Plant is a complex decommissioning and demolition project related to a power plant facility. There are related environmental issues associated with this work, including issues relating to San Diego Bay sediment. The Port has been cooperative while working with the Regional Board at the South Bay Power Plant site. (Exhibit "1" [Gibson Deposition], 30:18-31:8.) The Port is also working with other responsible agencies and parties through a very complex process to implement the demolition and related processes.

### 5. Former BFGoodrich South Campus

BFGoodrich is a site involving investigation and remediation in an area adjacent to the San Diego Bay. The Port is working with the Regional Board in investigating potential areas of historic contamination, including sediment contamination.

### 6. Tow Basin

The Tow Basin is an area adjacent to the San Diego Bay involving PCB contamination associated with a former aeronautics facility. The Port has been working cooperatively with the Regional Board to conduct the necessary investigation and remedial work pursuant to the Sediment Quality Objectives.

ID 20

The Port Should Not be Primarily Responsible for its Tenants' Discharges

The DTR states that the Port may be named as a discharger due to its capacity as landlord of certain tenants identified as dischargers but also recognizes that "[i]n certain situations, the State Water Board has found it appropriate to consider a lessee primarily responsible and the lessor secondarily responsible for compliance with a cleanup and abatement order." (DTR, § 11.2, at p. 11 -4.) As the DTR further notes, while this determination requires an analysis of various factors, the general rule is "that a landowner or lessor

party may be placed in a position of secondary liability where it did not cause or permit the activity that lead to the initial discharge into the environment and there is a primarily responsible party who is performing the cleanup." (Id) The Port agrees with the DTR's statements of the law in this regard.

While the DTR goes on to correctly note that "there is no evidence in the record that the Port District initiated or contributed to the actual discharge of waste to the Shipyard Sediment Site" it incorrectly concludes that "it is ... appropriate to name the Port District as a discharger in the CAO to the extent the Port's tenants, past and present, have insufficient financial resources to cleanup [sic] the Shipyard Sediment Site and/or fail to comply with the order." (DTR §11.2, at p. 11-4 [citing In the Matter of Petitions of Wenwest, Inc. et al., WQ 92-13, p. 9; In the Matter of Petitions of Arthur Spitzer, et al, WQ 89-8, p. 21.]

The DTR acknowledges that "[i]n the event the Port District's tenants, past and present, have sufficient financial resources to clean up the Shipyard Sediment Site and comply with the Order, then the San Diego Water Board may modify its status to secondarily responsible party in the future." (DTR §11.2, at pp. 11-4 to 11-5.) This anticipated modification is appropriate and should be implemented because there is substantial evidence of the Port District's tenants' abilities to fund the Order. In the same fashion, the evidence illustrates that the Port District's tenants are complying with the Order.

ID 21

#### The Port's Tenants Have Sufficient Assets to Conduct the Cleanup

The Port's tenants have more than sufficient assets to conduct the cleanup. In fact, prior iterations of the TCAO did not name the Port as a primary discharger because of its determination that the Port's tenants had adequate assets to conduct the cleanup and were cooperating. (SAR 375780, at 375818-375819.) Inexplicably, the latest draft of the TCAO reaches a contrary conclusion without presenting any new facts that would justify this change in position. Having acknowledged the correct legal analysis for determining whether the Port should be primarily or secondarily liable, the CUT bears an initial burden of establishing through evidence the facts necessary to conclude that the Port's tenants do not have adequate assets to fund the cleanup efforts. Yet, no such evidence has ever been presented.

In fact, the evidence establishes beyond question that the Port's tenants have adequate assets to fund the cleanup efforts. The DTR estimates the remedial cleanup and monitoring costs will total \$58.1 million. (DTR §32.7.1, at p. 32-40.) During the discovery period, the Port sought and received responses from its tenants confirming that the tenants have adequate assets, whether in the form of traditional financial assets or insurance assets, to perform the cleanup. As detailed below, the Port's current and historic tenants have more than adequate financial and insurance assets - at least \$800 million. This is exclusive of the available financial and insurance assets of other dischargers such as the Navy and the City of San Diego.

Additionally, the Port's tenants have lease and permit terms obligating the tenants to defend and indemnify the Port against this type of liability. (See, e.g., SAR 159273, 159289 at paragraph 21 [NASSCO Lease]; Exhibit "7" [SDG&E Tidelands Use and Occupancy Permit Excerpt], p. 5, paragraph 10; SAR 159307, 159324 at paragraph 20 [Southwest Marine Lease]; Exhibit "8" [Southwest Marine Lease Amendment No. 4 Changing Name to BAE Systems San Diego Ship Repair, Inc.].) Consequently, the tenants' significant assets would be applicable to the Port's responsibility for any alleged "orphan shares" under these indemnity agreements. There is, therefore, no basis to conclude that the Port's tenants will be unable to cover the costs of remediation.

#### 1. BAE

During the administrative discovery process, BAE stipulated that "it has the financial assets to cover any amounts of the cleanup and remedial monitoring under [the TCAO] which are premised upon BAE's established liability for the time period 1979 to the present with respect to the BAE leasehold only and that are ultimately allocated to BAE." (Exhibit "9" [BAE Stipulation].) Based on its review of BAE's insurance documents, the Port believes BAE has tens of millions of dollars of historic liability coverage that would be potentially applicable to the remediation and monitoring efforts. (Exhibit "10" [Summary of BAE Historic Liability Insurance].)

#### 2. NASSCO

During the administrative discovery process, NASSCO stipulated that "it has the financial assets to cover the amount of the [TCAO] that are ultimately allocated to NASSCO." (Exhibit "11" [NASSCO Stipulation].) Additionally, based on its review of relevant documents, the Port believes that NASSCO has hundreds of millions of dollars of historic liability coverage that would be potentially applicable to the remediation and monitoring efforts. (Exhibit "12" [Summary of NASSCO Historic Liability Insurance].)

#### 3. SDG&E

During the administrative discovery process, SDG&E produced documentation of its insurance profile. Based on its review of these and other relevant documents, the Port believes that SDG&E has hundreds of millions of dollars of liability coverage that would be potentially applicable to the remediation and monitoring efforts. (Exhibit "13" [Summary of SDG&E Historic Liability Insurance].)

#### 4. Campbell

During the administrative discovery process, Campbell produced documents regarding its insurance profile. Based on its review of these and other relevant documents, the Port

believes that Campbell has tens of millions of dollars of liability coverage that would be potentially applicable to the remediation and monitoring efforts. (Exhibit "14" [Summary of Campbell Historic Liability Insurance].)

#### 5. Star & Crescent Boat Company

Based on its review of relevant documents, the Port believes that Star & Crescent has millions of dollars of liability coverage that would be potentially applicable to the remediation and monitoring efforts. (Exhibit "15" [Summary of Star & Crescent Boat Company Historic Liability Insurance].) Additionally, Star & Crescent has stipulated that it has assets totaling between \$750,000 and \$1 million. (Exhibit "16" [Star & Crescent Stipulation].) Given Star & Crescent's likely limited share of liability for the Shipyard Sediment Site in comparison to the other dischargers, the combination of insurance and financial assets eliminate any likelihood that there will be any "orphan share" assigned to the Port.

The Port is aware that the Star & Crescent entity that is currently named in the TCAO and DTR disputes its successor liability for the other predecessor entities that operated at the Shipyard Sediment Site. However, this dispute does not present the risk of significant "orphan share" liability that could potentially be assigned to the Port. Regardless of whether the current Star & Crescent entity is liable for the earlier operations at the Shipyard Sediment Site, the identified insurance assets would still apply, so long as the insured entity is named as a discharger under the TCAO and DTR. Thus, if the TCAO and DTR were amended to name all of the potentially liable entities - San Diego Marine Construction Company, Star and Crescent Boat Company and Star & Crescent Investment Co. — the insurance assets should be available to address directly any established liability, whether or not these entities are still in existence. (See, California Insurance Code §11580(b)(2).)

ID 22

#### The Port's Tenants Are Cooperative

In addition to possessing more than adequate financial assets to conduct the remediation, the Port's tenants are currently cooperating with the Regional Board. Although the tenants have been proposing a remedial approach that differs in some respects from the remedial approach proposed by the CUT, the process is "proceeding cooperatively." (Exhibit "5" [Barker Deposition], Vol. III, 489:20-490:14.)

#### IV. There is no Evidence of Port Non-Cooperation

In contrast to the extensive evidence provided above regarding the Port's history of prior cooperation with the Regional Board in achieving remediation of numerous environmental challenges throughout the San Diego Bay area and cooperation with the Regional Board in the specific context of this matter, the CUT has contended in its

administrative discovery responses that the Port was named as a discharger because it has not cooperated with the CUT during this process.

The Port notes that the allegation of non-cooperation is not contained in the TCAO or DTR. This absence confirms that, at least as of the date of the most recent TCAO and DTR, no issue regarding the Port's cooperation existed. In fact, the concern regarding Port cooperation is not grounded in fact. When asked to identify the basis for the allegations of non-cooperation, the witnesses testified to concerns that the Port was not supporting the remedial footprint and was not going to produce witnesses to confirm this support. (Exhibit "5" [Barker Deposition], Vol. III, 520:7-21, 521:23-522:24; Exhibit "1" [Gibson Deposition], 33:9-22.) As detailed above, the Port has produced expert witnesses to support the remedial footprint. Likewise, the witnesses testified that the Port had not been supportive of efforts to locate a site for dewatering or disposal of the dredged sediments. (Exhibit "5" [Barker Deposition], Vol. III, 523:4-21.) Again, as noted above, the Port is working with the CUT to explore solutions to this issue and is working to provide appropriate support in the CEQA process. (See, Exhibit "5" [Barker Deposition], Vol. III, 527:23-529:6.)

The only other basis for the allegation of non-cooperation was the Port's decision to withdraw from the mediation process. (Exhibit "1" [Gibson Deposition], 33:9-34:10, 44:5-13; Exhibit "6" [Carlisle Deposition], 110:20-23.) However, as noted, the Port's withdrawal from a voluntary mediation process that it initially proposed is an inappropriate basis for naming the Port as a primary discharger, as a matter of law. Further, any implication that the mediation withdrawal constitutes Port non-cooperation or opposition to the TCAO process is directly rebutted by the Port's cooperation cited above. In sum, the Port has provided and continues to provide appropriate cooperation during the TCAO process.

#### ID 24

##### The Port Has not Discharged Contamination from its MS4 Facilities

As a secondary basis for Port designation, the TCAO and DTR allege that the Port should be named as a discharger based upon its ownership and operation of MS4 facilities that have purportedly discharged contamination. Specifically, the TCAO and DTR allege that MS4 facilities owned or operated by the Port have discharged through the SW4 and SW9 outfalls and minor storm drains. However, the evidence in the record does not support this basis for Port discharger liability.

#### ID 26

##### The Port Does not Own or Operate SW4 or SW9

The DTR states that the Port "operates the following MS4 storm drains which convey urban runoff from source areas up-gradient of the Shipyard Sediment Site's property and discharge directly or indirectly into San Diego Bay within the NASSCO and BAE Systems leasehold: ... Storm Drain SW4; Storm Drain SW9." (DTR §11.3.1, at pp. 11-5 to 11-7.) Elsewhere, the DTR alleges that the Port has discharged pollutants 'through its



SW4 ... and SW9 MS4 conduit pipes, as well as other minor drains on its tidelands property and watershed." (DTR §11.4, at p. 11-8.)

These statements are incorrect. The Port does not own or operate the SW4 or SW9 outfall or the MS4 facilities leading to these outfalls. Rather, as the CUT has acknowledged in its administrative discovery responses, both outfalls (SW4 and SW9) and related MS4 facilities are operated by the City under an easement, (Exhibit "17" [CUT Discovery Responses Excerpts], Responses to Special Interrogatories 28, 30.) The City has similarly acknowledged that its "storm drain system enters the NASSCO leasehold at the foot to 28\* Street and terminates at the southeasterly corner" where it "discharges into Chollas Creek" at the SW9 outfall. (See, SAR 158787, 158971, 158806 [2004 City Storm Water Pollution Prevention Program Report].) The City has an easement for the MS4 facilities that terminate at the SW4 outfall. (Exhibit "18" [City Easement].) Moreover, the City retained easements for "all water, sewer and drainage facilities, known or unknown" located within the tidelands when the City first conveyed the tidelands in trust to the Port. (Exhibit "19" [Conveyance].) Because there is no evidence the Port has ever owned or operated SW4 and SW9 or the MS4 facilities that lead directly to these outfalls, the Port cannot be held liable for discharges from this portion of the MS4. (Exhibit "20" paragraph 7 [Collacott Declaration].)

The Cleanup Team's administrative discovery responses clarify that the TCAO and DTR "do not allege that the Port District manages or operates the portion of the City of San Diego's MS4 that drains to" SW4 and SW9. (Exhibit "17" [CUT Discovery Responses Excerpts], Responses to Special Interrogatories Nos. 28, 30.) Rather, the contention is that the Port "is responsible for controlling pollutants into and from its own MS4 system" and that "the Port District cannot passively allow pollutants to be discharged through its MS4 and into another Copermitttees' MS4s, like the City of San Diego." (Id [emphasis added].) Yet, neither the DTR nor the administrative discovery responses identify what part of the MS4 owned or operated by the Port would ultimately lead to SW4 or SW9, much less how such MS4 facilities have discharged pollutants to SW4 or SW9.

#### ID 27

There is no Evidence that the Port's MS4 Facilities are Discharging Pollutants to the San Diego Bay

The DTR contains no evidence that Port discharges from its MS4 are contributing to the Shipyard Sediment Site contamination.

#### ID 28

There is no Evidence that SW4 and SW9 are Discharging Contaminants to the Shipyard Sediment Site

The TCAO and DTR fail to provide evidentiary support for the conclusion that SW4 and SW9 have discharged contaminants to San Diego Bay and the Shipyard Sediment Site. In fact, the DTR acknowledges that "no monitoring data is available" for either SW4 or

SW9. (DTR §§11.6.4, at p. 11-13 [SW4]; 11.6.5, at p. 11-15 [SW9].) In lieu of actual monitoring results, the DTR simply concludes that "it is highly probable that historical and current discharges from th[ese] outfalls have discharged" various contaminants. (Id.) Reliance upon assumption rather than evidence as a basis for liability is legally unsound.

In *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2010) 2011 U.S.App.LEXIS 4647, 41 Env.L.Rptr. 20109, the claimant alleged the co-permittees on an NPDES permit had discharged various pollutants in violation of the permit. (Exhibit "21" [NRDC Case].) The claimant argued initially that the "measured exceedances in the Watershed Rivers ipso facto establish Permit violations by Defendants." (NRDC, supra, at \*44.) However, the Ninth Circuit noted that because "the Clean Water Act does not prohibit 'undisputed' exceedances; it prohibits 'discharges' that are not in compliance with the Act (which means in compliance with the NPDES) ... responsibility for those exceedances requires proof that some entity discharged a pollutant." (Id, at \*44-45.)

Against this backdrop, the Ninth Circuit found that "the primary factual dispute between the parties is whether the evidence shows any addition of pollutants by Defendants" to the waterways. (NRDC, supra, at \*45.) The claimant asserted that because "the monitoring stations are downstream from hundreds of miles of storm drains which have generated the pollutants being detected" it was "irrelevant which of the thousands of storm drains were the source of polluted stormwater - as holders of the Permit, Defendants bear responsibility for the detected exceedances." (Id, at \*46.) The Ninth Circuit found this view unsatisfactorily simplistic as it "did not enlighten the district court with sufficient evidence for certain claims and assumed it was obvious to anyone how stormwater makes its way from a parking lot in Pasadena into the MS4, through a mass-emissions station, and then to a Watershed River." (Id, at \*47.)

Ultimately, the Ninth Circuit found adequate evidence of discharges for two of the rivers, where mass emissions stations detecting the exceedances were located in a portion of the MS4 "owned and operated" by the defendant in question. (NRDC, supra, at \*51-52.) In contrast with that conclusion, the Ninth Circuit found that "it is not possible to mete out responsibility for exceedances detected" in these waterways. (Id, at 52.) The Ninth Circuit was "unable to identify the relationship between the MS4 and these mass-emissions stations" and noted that "it appears that both monitoring stations are located within the rivers themselves." (Id.) The Ninth Circuit concluded that "[i]t is highly likely, but on this record nothing more than assumption, that polluted stormwater exits the MS4 controlled by the [defendants], and flows downstream in these rivers past the mass-emissions stations." (Id.) However, this assumption was inadequate because the claimant was "obligated to spell out this process for the district court's consideration and to spotlight how the flow of water from an ms4 'contributed' to a water-quality exceedance detected at the Monitoring Stations." (Id, at 52-53.)

Based on the foregoing, liability requires evidence the co-permittee "discharged" pollutants from an MS4 facility that the co-permittee owns or operates. Testing or monitoring taken from the affected waterway, rather than from the MS4 system, is not

adequate. This is so regardless of how "probable" or "likely" the assumption that the defendant may have discharged pollutants. In the present case, there is no evidence that SW4 or SW9 discharged any pollutants. Rather, the TCAO and DTR merely assume such discharges as "highly probable" based upon monitoring results from Chollas Creek. This is indistinguishable from the inadequate approach in National Resources Defense Council and cannot form the basis for liability arising out of the ownership or operation of an MS4 system.

ID 28

There is no Evidence that the Port's MS4 Facilities are Discharging Contaminants to the Shipyard Sediment Site

Even if there was adequate evidence that SW4 and SW9 are discharging pollutants, there are no monitoring or test results establishing that there have been discharges from the Port's MS4 facilities into the City MS4 facilities that lead to the outfalls at SW4 and SW9. National Resources Defense Council makes clear that there must be evidence that the specific Port MS4 facilities, not the MS4 system generally, are discharging pollutants. This is true regardless of how "probable" it is that such discharges might be taking place. Contrary to the correct legal standard, the DTR broadly and incorrectly identifies the offending Port MS4 facilities as SW4 and SW9. The DTR contains no factual analysis of any actual Port MS4 facilities, much less the content of the discharges from the Port MS4 facilities. In fact, the Port has only very limited MS4 facilities that lead to SW4 and no MS4 facilities leading to SW9.

Furthermore, the Port's status as co-permittee under the NPDES permit since 1990 does not make it liable for any and all discharges from SW4 and SW9, regardless of whether the Port's MS4 facilities discharged pollutants. Likewise, the Port is not broadly liable under the NPDES permit for its tenants' discharges into a portion of the MS4 system that the Port does not own or operate. There is no language in the NPDES permit that purports to impose such broad joint liability upon the Port. Such an interpretation of the NPDES permit would be contrary to the terms of the Clean Water Act, which is the basis for the NPDES permit. Under the Clean Water Act, a "co-permittee" is defined as "a permittee to an NPDES permit that is only responsible for permit conditions relating to the discharge for which it is operator." (40 Code of Federal Regulations § 122.26(b)(1).) This is further reflected in the analysis in National Resources Defense Council, in which the Ninth Circuit focused on and required evidence of discharges from specific MS4 facilities owned and operated by the defendants, not from the MS4 system generally.

In sum, the Port is responsible only for discharges from MS4 facilities that it owns or operates. The Port's status as co-permittee under the NPDES permit does not support the conclusion that the Port owns or operates the entire MS4 system. Likewise, the Port's status as trustee of tidelands property does not support the conclusion that the Port owns or operates all MS4 facilities located on that property. In the absence of evidence linking discharges of pollutants from a specific portion of the MS4 system that the Port owns or operates, the Port is not responsible under the NPDES permit for those discharges.

ID 286

Comment by the City of San Diego

There is sufficient evidence to conclude that the port has responsibility for discharges from its MS4 facilities.

In its comments submitted on May 26, 2011, the Port argues that because it does not own SW4 and SW9 of the MS4 permits, that its status as co-permittee under the NPDES permit for MS4 discharges does not make it liable for discharges into or from that part of the MS4 system (the San Diego Unified Port District's Submission of Comments, Evidence and Legal Argument, p. 13-16).

The MS4 permit requires all co-permittees to prohibit discharges into its MS4 system. The agreement between the co-permittees is that each co-permittee will implement programs to prevent discharges to the MS4 that runs through its jurisdiction. The Port District is a unique entity in that it is an overlay entity. The land within the Port District is also incorporated in the City of San Diego. However, the Port District has all rights of inspection and action on the land within its jurisdictional boundaries – namely, the tidelands. The City may have the easement that allows the storm drain to pass through the tidelands to drain the upland areas and tideland areas. But, the Port District is fully responsible, both under the MS4 permit and under its agreements with the co-permittees, to take all necessary actions to prevent discharges of pollutants into the MS4 system that runs through lands that are under the Port District's jurisdiction. Thus, to the extent there is any determination that discharges of the subject pollutants from the MS4 system have caused or contributed to a condition or nuisance or pollution at the Site, the Port should be liable as a Discharger.

ID 395

Comment by NASSCO

Port Comment No. 6: To the extent the CUT would designate the Port as a primary discharger because of perceived non-cooperation grounded in the Port's withdrawal from a voluntary mediation process that it suggested, such a position would be an inappropriate basis for Port primary liability as a matter of law. On the contrary, the Port's commitment to the above principles is reflected its long history of cooperating with the Regional Board in efforts to remediate sites at which the Port is a landlord . . . .

The DTR does not suggest that the Port was named as a primary discharger "because of perceived non-cooperation grounded in the Port's withdrawal from a voluntary mediation . . .", however, the Port provides no legal authority why a failure to cooperate would not be a relevant factor in naming the Port to the TCAO. DTR at 11-1 – 11-5.

ID 396

Comment by NASSCO

Port Comment No. 7: The DTR acknowledges that "[i]n the event the Port District's tenants, past and present, have sufficient financial resources to clean up the Shipyard Sediment Site and comply with the Order, then the San Diego Water Board may modify

its status to secondarily responsible party in the future.” (DTR §11.2, at pp. 11-4 to 11-5.) This anticipated modification is appropriate and should be implemented because there is substantial evidence of the Port District’s tenants’ abilities to fund the Order. . . . the CUT bears an initial burden of establishing through evidence the facts necessary to conclude that the Port’s tenants do not have adequate assets to fund the cleanup efforts. Yet, no such evidence has ever been presented.

It is premature for the Regional Board to determine whether the Port’s tenants, past and present, have sufficient financial resources to cleanup the Site, since those costs have not yet been determined with specificity and work has not yet begun. Until work progresses on the cleanup, it is reasonable for the Regional Board not to distinguish between primarily and secondarily liable parties. See *In re Wenwest, Inc.*, State Water Resources Control Board Order No. WQ 92-13, at 3 n.2.

ID 397

Comment by NASSCO

Port Comment No. 8: In fact, the evidence establishes beyond question that the Port’s tenants have adequate assets to fund the cleanup efforts. . . . Additionally, the Port’s tenants have lease and permit terms obligating the tenants to defend and indemnify the Port against this type of liability. (See, e.g., SAR 159273, 159289 at ¶21 [NASSCO Lease]; . . . .)

Whether a landlord’s lease includes an indemnity clause is not determinative as to whether the landlord should be named primarily or secondarily liable. See *In re Wenwest, Inc.*, State Water Resources Control Board Order No. WQ 92-13, at 7-9 (whether lease includes indemnity clause not included as a factor in determining landlord liability).

Accordingly, it is irrelevant to the Regional Board’s decision to name the Port as primarily liable at this time whether the lease agreement includes indemnity language. Finally, it bears mention that the Port only cites to NASSCO’s lease for the period from January 1, 1995 to December 31, 2040, and not to any prior leases with NASSCO, which contain materially different language with respect to NASSCO’s and the Port’s obligations to one another.

ID 398

Comment by NASSCO

Port Comment No. 9: Additionally, based on its review of relevant documents, the Port believes that NASSCO has hundreds of millions of dollars of historic liability coverage that would be potentially applicable to the remediation and monitoring efforts. (Exhibit “12” [Summary of NASSCO Historic Liability Insurance].)

The information in Port Comments, Exhibit 12 (Summary of NASSCO Historic Liability Insurance) was submitted by the Port in breach of a Protective Order entered in Case No. 09 CV 2275-AJB (BGS) in the United States District Court, Southern District of California, regarding the allocation of costs for the cleanup of the Shipyard Sediment

Site. The Protective Order prohibited the Port from publicly disclosing any information, including insurance policies, that was designated as “protected” information by NASSCO, or from using “protected” information for any purpose other than prosecuting or defending the federal court lawsuit. NASSCO is presently contesting the Port’s publication of NASSCO’s insurance information in a motion pending before Mr. Timothy Gallagher, the Discovery Referee. For these reasons, NASSCO believes that the insurance information in Port Comments, Exhibit 12 is not properly before the Regional Board, and NASSCO may seek the withdrawal or removal of Exhibit 12 from the administrative record following Mr. Gallagher’s ruling on NASSCO’s motion.

ID 399

Comment by NASSCO

Port Comment No. 10: The Port’s tenants are currently cooperating with the Regional Board. Although the tenants have been proposing a remedial approach that differs in some respects from the remedial approach proposed by the CUT, the process is “proceeding cooperatively.” (Exhibit “5” [Barker Deposition], Vol. III, 489:20-490:14.)

It is premature for the Regional Board to determine whether the Port’s tenants, past and present, are cooperating with the Regional Board as work has not yet begun. Until work progresses on the cleanup, it is reasonable for the Regional Board not to distinguish between primarily and secondarily liable parties. See *In re Wenwest, Inc.*, State Water Resources Control Board Order No. WQ 92-13, at 3 n.2.

Furthermore, as presented in NASSCO’s Initial Comments, NASSCO maintains that monitored natural attenuation is the proper remedy for the Site. This position differs materially from the TCAO and DTR under consideration by the Regional Board.

ID 400

Comment by NASSCO

Port Comment No. 11: There is no evidence of Port non-cooperation.

See NASSCO’s Comment No. 369 (See Appendix B, Comment ID 395), Replying to Port Comment No. 6.

ID 401

Comment by NASSCO

Port Comment No. 12: The Port does not own or operate SW4 or SW9 outfall or the MS4 facilities leading to these outfalls. . . . Rather, the contention is that the Port is “responsible for controlling pollutants into and from its own MS4 system” and that “the Port District cannot passively allow pollutants to be discharged through its MS4 and into another Copermittees’ MS4s, like the City of San Diego.” (Exhibit “17” [CUT Discovery Response Excerpts], Responses to Special Interrogatories Nos. 28, 30. [emphasis in the original].) Yet, neither the DTR nor the administrative discovery responses identify what part of the MS4 owned or operated by the Port would ultimately lead to SW4 or SW9, much less how such MS4 facilities have discharged pollutants to SW4 or SW9.

The Port's comments do not allege that storm water discharges from SW4 and SW9 do not contain relevant COCs, and the Port presents no affirmative evidence to show that they do not. Instead, like the City, the Port attempts to skirt the issue by simply claiming that the DTR does not provide sufficient support.

In fact, the Port's own most recent Jurisdictional Urban Runoff Management Program ("JURMP") document admits that the Port MS4 facilities have the potential to generate pollutants, including bacteria, gross pollutants, metals, nutrients, oil and grease, organics, pesticides, sediment, and trash. Attachment D, San Diego Unified Port District, Jurisdictional Urban Runoff Management Program (May 2008) ("2008 Port JURMP") Table 6-2 at 6-4. The JURMP goes on to state that the "MS4 receives pollutants generated by motor vehicles, namely, heavy metals, oil and grease, and other toxic pollutants from engine exhaust, brake linings, and leaking fluids. Waste liquids, such as oil and paint, can also be illegally dumped into conveyance system structures. Illegal connections can be made to the MS4 and potentially introduce a wide variety of pollutants to the system. Street curbs and gutters, stormwater inlets, culverts and channels typically collect litter discarded in urban areas. As such, all of these pollutants can reach the MS4 with each rainfall event, and in turn, be carried to receiving water bodies." *Id.* at 6-7. It also admits that "[u]rban runoff also appears to be a significant contributor to the creation and persistence of Toxic Hot Spots in San Diego Bay," including "the mouth of Chollas Creek . . ." *Id.* at 1-6 – 1-7. This evidence substantiates the Regional Board's conclusion that the Port is a discharger based on its historical storm water discharges to the Site.

Furthermore, the Port's JURMP indicates that the Port has a sophisticated GIS map of its storm drains, which is not publicly available but could easily have been used by the Port to generate the necessary information to demonstrate whether the Port's MS4s connect to SW4 and/or SW9. See Attachment D, 2008 Port JURMP Table 6-2 at 6-4; Attachment E, Karen Richardson, GIS Gives Port a Common Operating Picture, *ArcUser* (Winter 2010) at 33 ("PortGIS Utilities is the central clearinghouse for the port's utilities data, including . . . storm drain . . . lines"). Accordingly, it is unfair for the Port to assert that the DTR and TCAO are insufficient because they do not specify what part of the Port's MS4 system connects to SW4 and/or SW9 when that information is uniquely in the possession of the Port itself.

ID 402

Comment by NASSCO

Port Comment No. 13: The DTR contains no evidence that Port discharges from its MS4 are contributing to the Shipyard Sediment Site contamination.

See NASSCO's Comment No. 375, 377 (See Appendix B, Comment IDs 401, 405),  
Replying to Port Comment No. 12 and 14.

ID 403

Comment by NASSCO

Port Comment No. 14: The TCAO and DTR fail to provide evidentiary support for the conclusion that SW4 and SW9 have discharged contaminants to San Diego Bay and the Shipyard Sediment Site. In fact, the DTR acknowledges that “no monitoring data is available” for either SW4 or SW9. (DTR §§11.6.4, at p. 11-13 [SW4]; 11.6.5, at p. 11-15 [SW9].)

The Port contends that there is “no [e]vidence” that storm water outfalls SW4 and SW9 are discharging contaminants to the Site. The Port bases this claim on the fact that there is no monitoring data available from either SW4 and SW9 to indicate specific quantities of COCs in the runoff.

The Port’s claim that there is “no [e]vidence” goes too far because, as noted in the DTR, urban runoff itself is classified as a “waste” under the California Water Code § 13050(d). DTR at 11-8; see also Cal. Water Code §§ 13392 (State and Regional Boards to coordinate with Departments of Public Health and Fish & Game to develop “new programs to reduce urban and agricultural runoff”); 13396.7(a) (commissioning a study to determine adverse health effects of urban runoff on swimmers at urban beaches). In fact, the DTR includes substantial evidence that urban runoff in San Diego contains COCs at the Site, including “total suspended solids (TSS), sediment (due to anthropogenic activities), pathogens (e.g., bacteria, viruses, protozoa), heavy metals (e.g., copper, lead, zinc, and cadmium), petroleum products and polynuclear aromatic hydrocarbons (PAHs and HPAHs), synthetic organics (e.g., pesticides, herbicides, and PCBs), nutrients (e.g., nitrogen and phosphorus fertilizers), oxygen-demanding substances (decaying vegetation, animal waste), and trash.” DTR at 11-8; see also 4-10 (San Diego County Municipal Copermittees 2002-2003 Urban Runoff Monitoring Final Report submitted by the City indicating that “elevated levels of zinc, copper, and lead are present in the urban runoff outflow discharged from Chollas Creek into San Diego Bay”).

Furthermore, the DTR demonstrates that samples taken in the SW4 catch basin, and laterals entering the catch basin, “indicate the presence of both PCBs and PAHs entering and exiting the municipal storm drain system catch basin . . . .” DTR at 4-16. Far from suffering from a lack of evidence, the DTR has presented substantial evidence that San Diego urban runoff contains relevant COCs, but simply did not take the extra step to quantify the amount of COCs that actually are present in storm water flows as they exit the SW4 and SW9 outfalls.

Notably, the Port’s comments do not allege that storm water discharges from SW4 and SW9 do not contain relevant COCs, and the Port presents no affirmative evidence to show that they do not. Instead, like the City, the Port attempts to skirt the issue by simply claiming that the DTR does not provide sufficient support.

Furthermore, the Port’s citation to *Natural Resources Defense Council v. County of Los Angeles*, 636 F.3d 1235 (9th Cir. 2011) (“NRDC”), is unavailing with respect to allocating responsibility for storm water contamination to sediment to the Port. This is so because NRDC is a case under the Clean Water Act concerning whether a NPDES permittee was guilty of violating NPDES permit limits. Here, the issue is not whether the



Port violated NPDES permit limits, but rather, whether the Port discharged COCs to the Site that have contaminated sediment. In fact, the DTR does not allege that the Port has violated its NPDES permit, but rather, that the Port has discharged storm water containing contaminants to San Diego Bay, and that the “urban storm water containing waste that has discharged from the on-site and off-site MS4 has contributed to the accumulation of pollutants in the marine sediments at the Shipyard Sediment Site to levels, that cause, and threaten to cause, conditions of pollution, contamination, and nuisance by exceeding applicable water quality objectives for toxic pollutants in San Diego Bay.” DTR at 11-1 – 11-2. As noted above, the Port fails to allege that storm water discharges from SW4 and SW9 do not contain relevant COCs.

Finally, as also noted in the DTR, “[i]n the absence of such direct evidence, the San Diego Water Board may consider relevant direct or circumstantial evidence in determining whether a person shall be required to clean up waste and abate the effects of a discharge or a threat of a discharge under CWC section 13304.” DTR at 10-13, citing State Water Resources Control Board Resolution 92-49, Policies and Procedures for the Investigation and Cleanup and Abatement of Discharges under Water Code Section 13304, § I.A (directing the Regional Boards to use “any relevant evidence, whether direct or circumstantial”, when determining whether a party should be required to investigate or cleanup a discharge of waste). Accordingly, even if storm water sampling data from SW4 and SW9 is unavailable, it is proper for the Regional Board to consider and rely on other direct and circumstantial evidence that leads to the conclusion that the Port’s storm water discharges have contaminated the NASSCO shipyard.

ID 404

Comment by NASSCO

Port Comment No. 15: Even if there was adequate evidence that SW4 and SW9 are discharging pollutants, there are no monitoring or test results establishing that there have been discharges from the Port’s MS4 facilities into the City MS4 facilities that lead to the outfalls at SW4 and SW9. . . . In fact, the Port has only very limited MS4 facilities that lead to SW4 and no MS4 facilities leading to SW9.

See NASSCO’s Comment No. 377 (See Appendix B, Comment ID 403), Replying to Port Comment No. 14.

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Comment by BAE Systems

BAE Systems San Diego Ship Repair, Inc.’s reply to the San Diego Unified Port District’s comments.

## I. INTRODUCTION AND FACTUAL BACKGROUND

### A. Port District as Lessor

From the early 1900s until 1962, the City owned and leased what is now the BAE Systems Leasehold to a host of industrial tenants. The Port District, which was created by statute in 1962, now holds and manages the BAE Systems Leasehold as trust property

on behalf of the People of the State of California. The Port District likewise leased the BAE Systems Leasehold to industrial tenants unrelated to BAE Systems from 1962 to 1979 (1985 for the South end of the yard).

The lease agreement between BAE Systems and the Port District requires that BAE Systems use the leasehold exclusively for shipbuilding and repair and related marine activities, authorizes the Port District to suspend operations under certain circumstances, prohibits BAE Systems from assigning or subleasing the site without the Port District's permission, permits the Port District to inspect the leasehold, permits the Port District to approve or deny termination of the lease by BAE Systems, and permits the Port District to terminate the lease for violations of the lease's terms and conditions. (See SAR 057580-057608 [1979 Southwest Marine Lease]; SAR 057609-057640 [Southwest Marine Agreement for Amendment of Lease No. 1].) The lease further acknowledges that BAE Systems' tenancy provides to the community water front employment, tax revenue, as well as lease income. (Id.) A number of industrial tenants unrelated to BAE Systems previously leased the premises under lease terms similar to the Port District's lease with BAE Systems. Certain of those entities are defunct, recalcitrant and/or not participating in these proceedings.

In addition to its management of the land currently identified as the BAE Systems Leasehold, the Port District also manages land currently occupied by NASSCO, as well as the cooling water tunnels for SDG&E's former Silver Gate Power Plant. (TCAO Finding 11; DTR § 11.1.)

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BAE Systems San Diego Ship Repair, Inc.'s reply to the San Diego Unified Port District's comments

## INTRODUCTION AND FACTUAL BACKGROUND

### Port District's Primary Liability as Owner and Operator

Because the Port District (1) was responsible for the use and maintenance of the land currently leased by NASSCO, BAE Systems, and SDG&E and the land formerly leased by San Diego Marine Construction Co., Star & Crescent and Campbell; (2) had knowledge of the potential for discharges from the leased properties to materially contribute to accumulations of pollutants in the San Diego Bay; and (3) had the requisite degree of control over its tenants' activities, the DTR correctly concludes that the "the Port District caused or permitted waste to be discharged into San Diego Bay, creating a condition of pollution and/or nuisance in the Bay at the Shipyard Sediment Site . . . ." (TCAO Finding 11; DTR § 11.1.) As such, the DTR names the Port District as a "discharger, . . . consistent with its responsibility for the actions, omissions and operations of its tenants." (Id.)

As a separate and independent basis for primary liability, the Port District also owns and operates a municipal storm sewer system (MS4). (TCAO Finding 11; DTR § 11.3.) The Port District is a co-permittee of current and prior NPDES Storm Water Permits that

regulate the MS4 drains which outfall on the BAE Systems Leasehold (SW4) and the NASSCO Leasehold (SW9). (Id.) The DTR concludes that the Port District, through its MS4 conveyances, has discharged urban storm water containing waste directly to San Diego Bay at the Shipyard Sediment Site. (TCAO Finding 11; DTR § 11.4.) The Port District admits the same. (Port District comments, at 17.)

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BAE Systems San Diego Ship Repair, Inc.'s reply to the San Diego Unified Port District's comments

## II. LEGAL STANDARD FOR NAMING DISCHARGERS

In 1969, the California legislature enacted the Porter-Cologne Water Quality Control Act, Cal. Water Code §§ 13000-14958 (hereinafter, the "Act"), with the declared objective of ensuring "that the quality of all the waters of the state shall be protected for use and enjoyment by the people of the state." Cal. Water Code § 13000. With this objective in mind, the Act grants the Regional Board broad latitude to issue Cleanup and Abatement Orders ("CAOs") when necessary to protect California's valuable and limited water resources from contamination. Cal. Water Code § 13304(a). Specifically, the Act provides that the Regional Board may order cleanup and abatement by the following: (1) "any person who has discharged or discharges waste into the waters of this state in violation of any waste discharge requirement or other order or prohibition issued by a regional board or the state board;" or (2) any person "who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance." Id.

The regulations governing the investigation and issuance of CAOs further require that the Regional Board name other dischargers to the maximum extent permitted by law. See 23 Cal. Code Regs. § 2907; See also State Water Board Resolution No. 92-49, "Policies and Procedures for Investigation and Cleanup and Abatement of Discharges under Water Code Section 13304," at § II(A)(4).

The Regional Board is granted this broad authority precisely because of situations, such as the one here, where contamination is discovered many years after the events causing the contamination. As stated by a leading treatise on California environmental law: "Due to the passage of time and the difficulty of interpreting hydrogeologic evidence, it often is impossible to establish who is responsible for the contamination with a great degree of certainty." Kenneth A. Manaster and Daniel P. Selmi, California Environmental Law and Land Use Practice, § 32.32(1)(a), at p. 32-42.

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BAE Systems San Diego Ship Repair, Inc.'s reply to the San Diego Unified Port District's comments

## III. THE DTR PROPERLY CONCLUDES THAT THE PORT DISTRICT SHOULD BEAR PRIMARY RESPONSIBILITY

The DTR properly concludes that the Port District “should not bear merely secondary responsible at this time.” The DTR finds that the Port District should be held responsible “to the extent the Port’s tenants, past and present, have insufficient financial resources to cleanup the Shipyard Sediment Site and/or fail to comply with the order.” (TCAO Finding 11; DTR § 11.2.)

The Port District does not appear to dispute that it should be named as a discharger due to its capacity as a landlord of tenants identified in the TCAO as dischargers. (Port District Comments at 7.) Nevertheless, the Port District contends that it is entitled to status as a secondarily responsible party because “[t]he Port’s tenants have more than sufficient assets to conduct the cleanup.” (Id. at 8.) There are a number of issues with the Port District’s position that render it incorrect.

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BAE Systems San Diego Ship Repair, Inc.’s reply to the San Diego Unified Port District’s comments

THE DTR PROPERLY CONCLUDES THAT THE PORT DISTRICT SHOULD BEAR PRIMARY RESPONSIBILITY

A. The Port District Bears the Burden of Demonstrating That its Current and Former Tenants Have Sufficient Assets to Conduct the Cleanup

As an initial matter, the Port District’s comments reflect a fundamental misunderstanding of the allocation of burdens in a secondary liability inquiry. The Port District asserts that the prior iterations of the TCAO did not name the Port District as a primary discharger “because of its determination that the Port’s tenants had adequate assets to conduct the cleanup and were cooperating.” (Port District Comments at 8.) To the contrary, the prior iterations of the TCAO noted only that there was “no evidence at this time indicating that [the Port’s tenants] have insufficient financial resources to cleanup the Shipyard Sediment Site.” (SAR 375780, at 372818-375819.) These prior iterations improperly placed the burden of demonstrating the Port District’s entitlement to secondary liability status on the Port District’s tenants. The Presiding Officer, however, has correctly ruled that as the party seeking status as a secondarily responsible party, it is the Port District’s burden to demonstrate that its current and former tenants have sufficient assets to cover the cleanup. (October 27, 2010 Order Reopening Disc. Period, at § III.)

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BAE Systems San Diego Ship Repair, Inc.’s reply to the San Diego Unified Port District’s comments

THE DTR PROPERLY CONCLUDES THAT THE PORT DISTRICT SHOULD BEAR PRIMARY RESPONSIBILITY

B. The Port District has Failed to Meet its Burden

The DTR's conclusion that the Port District should be named primarily responsible is correct because the Port District has failed to meet its burden of establishing that equitable reasons justify imposing secondary liability. Secondary liability is appropriate, if at all, in cases where there are equitable reasons that justify imposing different liability on the relevant parties. See, e.g., *In the Matter of the Petitions of Arthur Spitzer et al.*, Order No. 89-8, at p. 25 (holding that it would be inappropriate to name a successor entity as "secondarily" liable when its predecessor entity released contaminants which polluted the waters of the State).

#### 1. BAE Systems has No Liability for Any Pre-1979 Discharges Including "Orphan Shares"

BAE Systems does not dispute, and in fact has stipulated, that it has the financial assets to cover amounts of the cleanup and remedial monitoring under the TCAO which are based on BAE Systems' post 1979 tenancy at the Leasehold and which are ultimately allocated to BAE Systems. The Port District erroneously asserts that it believes BAE Systems should also have to fund cleanup and remedial monitoring costs that are attributable to former tenants of the BAE Systems Leasehold who are unable or unwilling to pay for their own share of the cleanup effort. That position is factually and legally incorrect.

Here, BAE Systems is not the successor entity to any of the entities that operated on the BAE Systems Leasehold prior to 1979. BAE Systems had no connection to the BAE Systems Leasehold prior to 1979 when it entered into its lease with the Port District. Accordingly, BAE Systems is not a "discharger" under section 13304 of the Act for any pre-1979 discharges. The Port District, on the other hand, remains primarily liable for any pre-1979 discharges to the extent its tenants for any applicable time period are unable or unwilling to fund the cleanup of discharges attributable to such time period.

Where the operator responsible for the discharge is no longer in existence or not cleaning up the site, thus creating a so called "orphan share," the landowner is considered the "discharger" and is primarily liable for remediating the site. In the *Matter of the Petitions of Aluminum Company of America et al.*, Order No. 93-9, at pp. 16-18. "The Board has cited several factors which are appropriate for the Regional Water Boards to consider in determining whether a party should be held secondarily liable. These include: (1) whether or not the party initiated or contributed to the discharge; and (2) whether those parties who created or contributed to the discharge are proceeding with cleanup." *Id.* at p. 16 (citations omitted). As the DTR properly concludes, both factors cut against finding the Port District merely secondarily liable. As discussed above, the lease provisions gave the Port District significant control over the activities of the former tenants of the BAE Systems Leasehold. By permitting these entities to discharge, unabated, for a number of years, the Port District contributed to the discharge. As to the second factor, the ability of all of the parties to pay for their respective shares of the cleanup is far from clear at this time. Even the Port District concedes as much, noting that "the Star & Crescent entity that is currently named in the TCAO and DTR disputes its successor liability for the other predecessor entities that operated at the Shipyard Sediment Site." (Port District's comments at 11.) Indeed, the successor liability analysis.

utilized in the DTR to find Star & Crescent to be the successor to San Diego Marine Construction Company's liability is debatable, and is the subject of a pending motion for summary judgment by Star & Crescent in the federal action. Thus, to the extent these entities are not and cannot comply with the CAO, which certainly appears likely at least with respect to San Diego Marine Construction Company (1962-1972), and potentially Campbell (1972-1979), the Port District is responsible. Accordingly, it is appropriate for the Port District to be considered primarily liable for compliance with the TCAO unless and until those parties fully comply with the final order.

Although it appears to concede liability for any "orphan shares," the Port District attempts to escape liability by claiming that its tenants, including BAE Systems, "have lease and permit terms obligating the tenants to defend and indemnify the Port against this type of liability." (Port District's comments at 9.) With respect to BAE Systems, this is patently false. The Hold Harmless provision in the Southwest Marine lease upon which the Port District relies, was superseded and replaced entirely with a different Hold Harmless provision that precludes the Port District's argument. The Second Amendment to the lease expressly amends the First Amendment by "deleting therefrom Paragraphs...21...in [its] entirety and substituting in lieu thereof Paragraphs...21...as follows." (See Second Amendment to Southwest Marine Lease, at ¶ 21.) It then states:

21. HOLD HARMLESS: Lessor, and its agent, officers, and employees shall, to the full extent allowed by law, be held by Lessee free and harmless from and indemnified against any liability pertaining to or arising out of the use and operation of the premises by Lessee and any costs of expenses incurred on account of any claim or claims therefore, including reasonable attorney's fees. Nothing herein is intended to exculpate Lessor from its sole active negligence or willful misconduct.

(Id. (emphasis added).) This Hold Harmless provision requires only that BAE Systems indemnify and hold harmless the Port District for liability arising out of BAE Systems' use and operation of the premises, not prior lessees' use and operation of premises. A written modification of the terms of a contract "supersedes those terms to which it relates." *Thiele v. Merrill Lynch, Pierce, Fenner & Smith*, 59 F. Supp. 2d 1060, 1064 (S.D. Cal. 1999). Because the Hold Harmless Provision in the Second Amendment completely superseded all prior Hold Harmless Provisions, BAE Systems has no obligation to defend and indemnify the Port District for any liability arising out of any "orphan shares."

## 2. Mere Reference to Historical Insurance Policy Limits Fails to Demonstrate Applicability or Availability of Any Assets

The Port District asserts, without support, that it "believes BAE has tens of millions of dollars of historic liability coverage that would be potentially applicable to the remediation and monitoring efforts." (Port District's comments at 9 (emphasis added).) As support for its "belief," the Port District relies exclusively on a summary of "BAE Historic Liability Insurance" that it includes in its comments to the Regional Board. The

same reliance is made with respect to historical insurance summaries for other parties, also prepared by the Port District.

However, the Port District merely cites to what it says are policy limits for historical policies. The Port District makes no showing whatsoever (1) whether the policy provides actual coverage for the claims and anticipated obligations at issue here, (2) whether the insurer is defunct or insolvent, (3) whether any policy amounts have been sold back or are otherwise unavailable, and (4) most importantly, whether any insurer for any party has actually accepted coverage for indemnity obligations. This lack of evidence is unsurprising, as courts have consistently held that the obligation to indemnify does not arise until the insured's underlying liability is established. See, e.g., *Montrose Chemical Corp. v. Admiral Ins. Co.*, 10 Cal. 4th 645, 659 n.9 (1995). Without any such evidence or showing, the Port District's "belief" as to BAE Systems' and other dischargers' "potential" insurance assets is unsupported, insufficient, and certainly is not evidence upon which the Regional Board can or should change the Port District's status to that of a secondarily responsible party.

The Regional Board has a broad duty to name all dischargers in CAOs to the maximum extent permitted by the Water Code. Because the Port District has failed to demonstrate that its tenants, including BAE Systems, are obligated to conduct the cleanup attributable to any orphan shares or have sufficient assets to do so, the DTR's conclusion that the Port be named a primarily responsible party is correct.

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BAE Systems San Diego Ship Repair, Inc.'s reply to the San Diego Unified Port District's comments

#### THE DTR PROPERLY CONCLUDES THAT THE PORT DISTRICT SHOULD BEAR PRIMARY RESPONSIBILITY

##### C. Any Change in the Port District's Liability Status Would be Premature

It is premature for the Regional Board to determine whether the Port District's current and historical tenants have sufficient financial resources to remediate the Site because the remediation costs have not yet been finally or specifically determined. Until the remediation is underway, it is inappropriate for the Regional Board to alter the primarily versus secondarily liability of designated parties. See *In re Wenwest, Inc.*, State Water Resources Control Board Order No. WQ 92-13, at 3 n.2. Moreover, it cannot be determined whether any designated party "fails to comply with the order" unless and until the final CAO has been issued and a party fails to comply with those directives. (DTR § 11.2.) It is the Port District's burden to establish it is not primarily liable. See § III-A, *infra*. The Port District has failed to meet its burden.

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BAE Systems San Diego Ship Repair, Inc.'s reply to the San Diego Unified Port District's comments

IV. THE DTR PROPERLY CONCLUDES THAT THE PORT DISTRICT'S MS4 FACILITIES HAVE AND ARE DISCHARGING WASTE TO SAN DIEGO BAY CREATING POLLUTION, CONTAMINATION AND NUISANCE CONDITIONS

The Port District contends that it cannot be named as a discharger as a result of its ownership of its MS4 facilities because “[t]he DTR contains no evidence that Port discharges from its MS4 are contributing to the Shipyard Sediment Site contamination.” (Port District’s comments at 15.) “There is no evidence that SW4 or SW9 discharged any pollutants,” the Port District claims. (Id. at 17.) The Port District’s positions, however, are incorrect. There is substantial and reasonable evidence to support the DTR’s assertion that the Port District’s discharges into and through the SW4 storm drain outfall have contributed to elevated levels of pollution at the BAE Systems Leasehold.

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BAE Systems San Diego Ship Repair, Inc.’s reply to the San Diego Unified Port District’s comments

THE DTR PROPERLY CONCLUDES THAT THE PORT DISTRICT'S MS4 FACILITIES HAVE AND ARE DISCHARGING WASTE TO SAN DIEGO BAY CREATING POLLUTION, CONTAMINATION AND NUISANCE CONDITIONS

A. Regional Boards Should Review Evidence with a View Towards Liability

To be named as a discharger, all that is required is “sufficient evidence” of responsibility. See The State Board Water Quality Enforcement Policy, No. 2002-0040, (Feb. 19, 2002). To this end, “a regional water board shall “[u]se any relevant evidence, whether direct or circumstantial” in order to establish the source of a discharge. State Water Board Resolution No. 92-49, at § II(A) (emphasis added). The resolution provides a number of potential sources of evidence, including site characteristics and location in relation to other potential sources of a discharge; hydrologic and hydrogeologic information, such as differences in upgradient and downgradient water quality; industry-wide operational practices that have led to discharges, such as conveyance systems; and physical evidence, such as analytical data. (Id.)

In light of the Act’s declared objective and the broad discretion granted to regional water boards by the Act and its implementing regulations, State Water Board decisions suggest that a regional water board should look at evidence with a view toward finding liability. According to the State Water Board, “[g]enerally speaking it is appropriate and responsible for a Regional Board to name all parties for which there is reasonable evidence of responsibility, even in cases of disputed responsibility.” See, e.g., Exxon Company U.S.A. et al., Order No. 85-7, at 11 (SWRCB 1985) (noting further that “substantial evidence” means “credible and reasonable evidence which indicates the named party has responsibility”); Stinnes-Western Chemical Corp., Order No. 86-16, at 12 (SWRCB 1986) (same).

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BAE Systems San Diego Ship Repair, Inc.'s reply to the San Diego Unified Port District's comments

THE DTR PROPERLY CONCLUDES THAT THE PORT DISTRICT'S MS4 FACILITIES HAVE AND ARE DISCHARGING WASTE TO SAN DIEGO BAY CREATING POLLUTION, CONTAMINATION AND NUISANCE CONDITIONS

B. NRDC is Inapposite and Does Not Apply the Evidentiary Standard Applicable in Administrative CAO Proceedings

The Port District heavily relies on *Natural Res. Def. Council, Inc. v. County of Los Angeles*, 636 F.3d 1235 (9th Cir. 2011) (hereafter "NRDC") to argue that the evidence upon which the DTR relies is inadequate. This case is of no relevance here. In NRDC, the plaintiffs sought to impose liability on municipal defendants for violations of the Federal Clean Water Act for what the plaintiffs contended were exceedances of the water-quality standards contained in the defendants' respective NPDES permits. (*Id.*) The evidence required to demonstrate an unlawful exceedance is different from the evidence required to be named as a discharger in a cleanup and abatement order. As noted, the Regional Board has broad discretion to name dischargers in a cleanup and abatement order, and all that is required to exercise that discretion is "credible and reasonable evidence which indicates the named party has responsibility." See, e.g., *Exxon Company U.S.A. et al.*, Order No. 85-7, at 12 (SWRCB 1985). It is for this reason that courts review agency decisions under an abuse of discretion standard. See *Topanga Association for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 515 (1974) (noting that the agency which renders the challenged decision is only required to "set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order"). Thus, the Ninth Circuit's assessment of the degree of proof necessary to hold an entity liable for a NPDES Permit exceedance has no bearing on the evidence required to name the Port District as a discharger in the TCAO, and consequently *Natural Res. Def. Council* is fundamentally distinguishable and should be disregarded.

Moreover, *Natural Res. Def. Council* is inapposite because it is an action brought under the Clean Water Act centered on whether a NPDES permittee had violated the NPDES permit limits. Conversely, in the instant action, the issue is whether the Port District discharged contaminants to the Site that have contributed to the contamination. The DTR makes clear that urban runoff from the Port's MS4 facilities has been discharged to the Site, contributing to the contamination by exceeding applicable water quality objectives for the Bay. (DTR, Finding 11.) The DTR does not allege the Port District violated its NPDES permit.

Even if the *Natural Res. Def. Council* case has any applicability to these proceedings, the Ninth Circuit's ruling does not relieve the Port District of liability for contaminants it conveyed to the San Diego Bay. The Ninth Circuit made clear that the Clean Water Act "does not distinguish between those who add and those who convey what is added by others—the Act is indifferent to the originator of water pollution." NRDC, 636 F.3d

1235, 1252-53. In fact, according to the Ninth Circuit, the Clean Water Act bans “the discharge of any pollutant by any person” regardless of whether that “person” was the root cause or merely the current superintendent of the discharge.” *Id.* at 1253 (internal quotations and citation omitted). Thus, as the Fifth Circuit has held, so long as the MS4 is “the means by which the pollutants are ultimately deposited into a navigable body of water,” the party can be held liable for those discharges, regardless of any permit. *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45-46 (5th Cir. 1980).

Accordingly, so long as there is sufficient evidence, either direct or circumstantial, to find that the Port District’s SW4 outfall has contributed to elevated levels of pollution at the Site, the DTR’s conclusion is correct.

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BAE Systems San Diego Ship Repair, Inc.’s reply to the San Diego Unified Port District’s comments

THE DTR PROPERLY CONCLUDES THAT THE PORT DISTRICT’S MS4 FACILITIES HAVE AND ARE DISCHARGING WASTE TO SAN DIEGO BAY CREATING POLLUTION, CONTAMINATION AND NUISANCE CONDITIONS

C. Substantial and Reasonable Evidence Supports the DTR’s Assertion That the Port District’s SW4 Outfall has Contributed to Elevated Levels of Pollution at the Site

The DTR properly concludes that the Port District’s SW4 outfall has contributed to elevated levels of pollution at the BAE Systems Leasehold. The Port District does not dispute that it has MS4 facilities that lead to SW4. (Port District’s comments at 17.) In fact, the Port District’s (untimely) proffered expert opinion of Mr. Collacott admits that the “portion of the Port District that is not leased to tenants and is tributary to outfall SW4 is limited to portions of Belt Street (approx. 1 acre) consisting of an estimated one-half mile (1/2 mile street) of curb and gutter, four storm drain inlets, and an estimated 770 feet of underground storm drains 24-inches in diameter and smaller.” (Declaration of Robert Collacott In Support of the San Diego Unified Port District’s Submission of Comments, Evidence and Legal Argument, at 4:9-14.) Presumably the Port District has owned and operated this tributary system to outfall SW4 since 1962.

SW4 has historically received runoff from Belt Street (among other areas). (DTR, p. 11-6.) That fact, coupled with the Port District’s own statements regarding the scope of portions of its MS4 facilities, reflects an admission by the Port District that municipal wastewater from its own MS4 facilities is discharged into SW4 where it is discharged to the Site at the BAE Leasehold. As reflected below, substantial and reasonable evidence exists that supports the DTR’s MS4 allegations and findings against the Port District. Importantly, “a regional water board shall “[u]se any relevant evidence, whether direct or circumstantial” in order to establish the source of a discharge. State Water Board Resolution No. 92-49, at § II(A) (emphasis added).

1. 2009 SW4 Sampling Data Detects PCBs, Copper, TBT and Mercury

On December 7, 2009, water quality data from SW4 were collected from a manhole on the BAE leasehold. (Calscience Environmental Laboratories, 2009). This sample was collected from the first manhole inside the BAE Systems leasehold, prior to any possible input from the site. Laboratory analyses included a congener-level analysis of PCBs. Multiple congeners were detected, and the highest concentrations were of penta- and hexa-chlorinated biphenyls, similar to the profile of Aroclor 1254. (Id.) Copper, mercury, and TBT were also measured and detected in the urban stormwater conveyed by SW4. (Id.) These data indicate that as of 2009 there was an ongoing source of PCBs, copper, mercury and TBT from urban runoff that discharged to the Site at SW4. No data suggests that contaminants found in late 2009 have dissipated, nor have upland source control measures been established, and therefore it is reasonable to conclude that MS4 and outfall SW4 remain an ongoing source of these COCs to the Site.

2. 2005 SW4 Sampling Data from City Investigation Detects PCBs and PAHs  
Further evidence of discharges from storm drain SW4 into the Shipyard sediment site is provided by the results of a sampling investigation conducted by the City of San Diego. As described in the DTR (section 4.7.2), on October 3, 2005, the City conducted an investigation and observed evidence of an illegal discharge into the SW4 catch basin on the north side of Sampson Street between Belt Street and Harbor Drive, approximately 10 feet east of the railroad line that runs parallel with Belt Street. Specifically, the catch basin is located immediately to the east of the BAE Systems' parking lot and the SDG&E Silver Gate Power Plant, which is adjacent to the parking lot. As noted above, the Port District admits that its own MS4 facilities drain the Belt Street area and discharge to the Bay via SW4.

During the City's investigation, three sediment samples were collected and analyzed for PCBs and polycyclic aromatic hydrocarbons (PAHs). The first sample was collected from inside and at the base of a six-inch lateral entering the catch basin from the east. The second sample was collected from inside and at the base of the 12-inch lateral entering the catch basin from the north. The third sample was collected from the 18-inch pipe exiting the catch basin. The results of these three samples, presented in DTR Table 4-4, indicate the presence of PCBs and PAHs entering and exiting the municipal storm drain system catch basin. The results of this sampling show significant concentrations of Aroclor 1254 and 1260. (DTR Table 4-4.) The Port District has cited no evidence or even argument to the contrary. Thus this data is further evidence of the Port District's illicit discharges of contaminants through its MS4 facilities that discharged directly to the Site.

3. 2001 SW4 Sampling Data Detects TBT, Copper and Mercury  
On November 29, 2001, water quality data from SW4 were collected from a manhole on the BAE leasehold. (AMEC, 2001). This sample was collected from the first manhole inside the BAE Systems leasehold, prior to any possible input from the site. TBT, copper, and mercury were all measured and detected in the urban stormwater conveyed by SW4. (Id.) These data indicate that as of late 2001 there was an ongoing source of TBT, copper, and mercury from urban runoff that discharged to the Site at SW4. No data suggests that contaminants found in late 2001 have dissipated, nor have upland source

control measures been established, and moreover the 2009 SW4 data again detects these same COCs in addition to PCBs, and therefore it is reasonable to conclude that MS4 and outfall SW4 remain ongoing sources of these COCs to the Site.

#### 4. Historical Discharges by the Port District into SW4 have Significantly Contributed to Contamination at the Site

In 1974 the Southern California Coastal Water Research Project ("SCCWRP") published the results of an EPA-funded study entitled "Marine Inputs from Polychlorinated Biphenyls and Copper from Vessel Antifouling Paints." (Young et al., 1974.) The project surveyed the usage of PCB-containing hull paint on recreational, commercial, and Navy vessels in San Diego Bay and other southern California bays, and also collected data on PCB releases in municipal wastewater and storm runoff. (Id.)

Contrasting the PCB mass release rates for different sources (Table 12 in Young et al. 1974) shows that municipal wastewater was a major source of Aroclor 1254 to San Diego Bay, contributing more than 99.9 percent of total PCBs. Thus, as of 1974, municipal wastewater carried by the Port District's MS4 system and discharged via SW4 was a significant source of PCB contamination at the BAE Leasehold. (Id.) The Port District identifies no study or data indicating that the sources of PCBs to the San Diego Bay was by any means other than those identified by Young, et al. Absent findings to the contrary, it is reasonable to conclude that the Port District was a significant contributor of PCBs to the San Diego Bay at least from its creation in 1962 through the 1974 date of the SCCWRP study, and likely longer.

#### 5. EPA Guidance Confirms that Waste Water Discharged by the Port District into SW4 has Significantly Contributed to Contamination at the Site

Relevant EPA guidance supports the DTR's findings with respect to waste in urban storm water discharged by the Port District into the SW4 outfall at the BAE Leasehold. In 1983 the EPA published "Results of the Nationwide Urban Runoff Program." The Executive Summary states that among the many objectives of the National Urban Runoff Program ("NURP") was to develop analytical methodologies to examine "the quality characteristics of urban runoff, and similarities or differences at different urban locations" and "the extent to which urban runoff is a significant contributor to water quality problems across the nation." (EPA, Results of the Nationwide Urban Runoff Program, Executive Summary at p. 1.) "The NURP studies have greatly increased our knowledge of the characteristics of urban runoff, its effects upon designated uses, and of the performance efficiencies of selected control measures." (Id. at p. 2.) The NURP Final Report reached several relevant conclusions, including:

- "Heavy metals (especially copper, lead and zinc) are by far the most prevalent priority pollutant constituents found in urban runoff. End-of-pipe concentrations exceed EPA ambient water quality criteria and drinking water standards in many instances. Some of the metals are present often enough and in high enough concentrations to be potential threats to beneficial uses." (Id. at p. 5.)

- "Total suspended solids concentrations in urban runoff are fairly high in comparison with treatment plant discharges. Urban runoff control is strongly indicated where water quality problems associated with TSS, including build-up of contaminated sediments, exist." "[T]he problem of contaminated sediment build-up due to urban runoff...undeniable exists." (Id. at p. 6.)
- "A summary characterization of urban runoff has been developed and is believed to be appropriate for use in estimating urban runoff pollutant discharges from sites where monitoring data are scant or lacking, at least for planning level purposes." (Id. at p. 7.)

With respect to this last conclusion regarding the development of a summary characterization, the NURP Report states that "[a]lthough there tend to be exceptions to any generalization, the suggested summary urban runoff characteristics given in Table 6-17 of the report are recommended for planning level purposes as the best estimates, lacking local information to the contrary." (Id. at p. 7.) "[I]n the absence of better information the data given in Table 6-17 are recommended for planning level purposes as the best description of the characteristics of urban runoff." (EPA, Results of the Nationwide Urban Runoff Program, Volume I – Final Report, at p. 6-43.) Those characteristics of urban runoff include the presence of significant levels of pollutants including total suspended solids, heavy metals, inorganics, and pesticides. (Id., at Tables 6-17 through 6-21.) The NURP data supports and confirms the DTR's assertion that:

"The Port District has caused or permitted the discharge of urban storm water pollutants directly to San Diego Bay at the Shipyard Sediment Site. The pollutants include metals (arsenic, cadmium, chromium, copper, lead, mercury, nickel, silver, and zinc), TSS, sediment (due to anthropogenic activities), petroleum products, and synthetic organics (pesticides, herbicides, and PCBs) through its SW4 (located on the BAE Systems leasehold) and SW9 (located on the NASSCO leasehold) MS4 conduit pipes." (DTR, § 11.4.)

The NURP data also supports and confirms the DTR's assertion that "it is highly probable that historical and current discharges from [SW4] outfall have discharged heavy metals and organics to San Diego Bay at the Shipyard Sediment Site." (DTR § 11.6.4.)

## **Response 11.1**

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### **Summary Of Arguments And Recommendations.**

The Port District argues that it should be named secondarily liable as a public-agency landowner because its current and former tenants have sufficient financial resources to undertake the cleanup the TCAO requires, and because those tenants are cooperating with the TCAO. The Port District further contends that it should not be named as a discharger because there is no substantial evidence to support the finding it caused or contributed to the condition of pollution or nuisance that exists at the Shipyard Sediment Site because of its responsibilities for discharges from its MS4 system. BAE Systems and NASSCO

counter that the Port District has failed to demonstrate that all of its current and former tenants have the financial resources to pay their respective fair shares of cleanup costs. They further argue that the cleanup is not progressing, and that a number of dischargers named in the order are not cooperating with the TCAO and, in fact, are contesting its adoption. The City of San Diego, BAE Systems and NASSCO all argue the Port District should be named as a discharger because substantial evidence in the record supports the finding that it is responsible for discharges of relevant COCs from its MS4 system, which discharges have contributed to the condition of pollution or nuisance at the Site. **Because some former Port District Tenants may not have sufficient financial resources to account for their fair shares of cleanup costs, and because the cleanup is not progressing and a number of named dischargers are contesting the TCAO, the Port District should remain a primarily – not a secondarily – responsible party. Moreover, because substantial record evidence supports the finding that the Port District is legally responsible for the discharge of wastes through its MS4 system, it should remain a discharger under the TCAO.**

#### **Legal Standards.**

All commentators and the Cleanup Team agree that there must be substantial evidence in the record to support naming the Port District as a discharger. As California's Supreme Court observed, substantial evidence is evidence of "ponderable legal significance," which is "reasonable in nature, credible and of solid value." *Ofsevit v. Trustees of California State Universities and Colleges* (1978) 21 Cal.3d 763, 773, n. 9. "Substantial evidence" means facts, reasonable assumptions based on facts and expert opinions supported by facts. *Friends of Davis v. City of Davis* (2000) 83 Cal.App.4<sup>th</sup> 1004, 1019. Importantly, an agency may also rely on the opinion of its staff in reaching decisions, and "the opinion of staff has been recognized as constituting substantial evidence." *Browning-Ferris Industries v. City Council* (1986) 181 Cal.App.3d 852, 866 citing *Coastal Southwest Dev. Corp. v. California Coastal Zone Conservation Com.* (1976) 55 Cal.App.3d 525, 535-536.

The Port District faithfully cites governing State Water Board precedent on whether a landowner should be named as primarily, as opposed to secondarily liable, but fails to faithfully apply the facts at hand. It also fails to properly apply the substantial evidence standard with respect to facts in the record, reasonable assumptions based on those facts, and expert and staff opinions based on those facts regarding its responsibility for discharges of relevant COCs from its MS4 system.

#### **The Port District Should Remain A Primarily Responsible Discharger Because Of Potential Gaps In Tenants' Financial Resources.**<sup>1</sup>

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<sup>1</sup> The Port District provides a lengthy discussion of its alleged history of cooperation with the San Diego Water Board on other cleanup projects, as well as its purported cooperation with the TCAO. The arguments in this vein are apparently provided to address the Cleanup Team's responses to the Port District's discovery requests regarding changes in circumstances between prior iterations of the TCAO and the current iteration. As NASSCO points out in its rebuttal comments, the DTR does not suggest that the Port was named as a primary discharger because of perceived non-cooperation grounded in the Port's

The Port District does not dispute that the TCAO establishes the elements for naming it as a discharger under applicable State Water Board landowner liability precedent. *See* DTR, § 11, p. 11-2, n. 102. Rather, it argues that it should be named secondarily liable. A public-agency landowner may be named secondarily liable if, but only if, its current and former tenants have the financial resources to undertake the cleanup *and* those tenants are cooperating with and implementing the applicable cleanup order. *In the Matter of Petitions of Wenwest, Inc., et al., (Wenwest)* State Water Board Order No. WQ 92-13, p. 9; *In the Matter of the Petitions of Arthur Spitzer, et al., (Spitzer)* State Water Board Order No. WQ 89-8, p. 21. As the Presiding Officer for these proceedings has previously articulated, the Port District bears the burden of proving the two elements. 10/27/10 Order Reopening Discovery Period, § III. Importantly, when reviewing the question of whether to name a party as a discharger under a cleanup and abatement order, regional water boards are to name parties to the maximum extent permitted by law. *See* 23 Cal. Code Regs., § 2907; Resolution No. 92-49, § II (A)(4).

The Port District goes to great lengths to try to demonstrate that its current and former tenants have the financial resources to accomplish the cleanup proposed in the TCAO, introducing insurance policies and stipulations by some of its current tenants into the record. But, even if admissible, these facts are insufficient to meet the Port's burden to establish that each of the Port District's former and current tenants have the financial resources to satisfy their respective fair shares of responsibility. *See In the Matter of Petitions of Aluminum Company of America et al.,* State Water Board Order No. WQ-93-9, pp. 16-18 [where an operator no longer in existence is responsible for cleaning up a site, creating an "orphan share" or liability, the landowner becomes primarily responsible for the orphaned liability].

There is considerable controversy over which, if any, discharger named in the TCAO is responsible for discharges from the current BAE Systems leasehold from 1962 through 1979. BAE Systems contends it is responsible for discharges from 1979 to the present only. Star & Crescent Boat claims it has no responsibility for any discharges at the Site. Campbell Industries, Inc. claims it has responsibility for discharges from 1972 through 1979 only. Thus, even if the Port District could establish that Campbell Industries, Inc. and Star & Crescent Boat have sufficient financial resources to pay their respective fair shares of responsibility, which it cannot, the potential for an orphaned operator share of responsibility still requires the Port District to be named as a primarily responsible party under the State Water Board's guiding landowner liability precedents.

Moreover, the Port District's provision of potential insurance coverage "financial resources" for Star & Crescent Boat and Campbell Industries, Inc., among others, is not evidence of the ability to satisfy cleanup costs. The Port District's summary of potential insurance assets does not and cannot establish; (1) whether the policies summarized actually provide coverage for the cleanup costs; (2) whether the insurer is dissolved or insolvent; (3) whether any policy amounts have been sold back or have already been

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withdrawal from a voluntary mediation. Rather, the Port is named as a primary discharger based on an application of facts in the record to applicable legal precedents governing the issue.

depleted; or (4) whether any insurer has agreed to indemnify the insureds. As BAE Systems points out, it is not surprising this evidence has not been provided by the Port District since the obligation to indemnify an insured for loss does not arise until the insured's underlying liability is established. See *Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4<sup>th</sup> 645, 659 n.9. That is, the TCAO must be adopted before insurers actually recognize a potential duty to indemnify.

The Port District also argues that it has indemnity agreements with its tenants which require them to reimburse it for cleanup costs. As NASSCO correctly observes, whether a lease includes an indemnity clause is not determinative as to whether the landlord should be named primarily or secondarily liable. See *In re Wenwest, Inc., supra*, State Water Board Order No. WQ 92-13, pp. 7-9. Here, the indemnity clauses are irrelevant for a number of reasons. First, the Port District has not introduced indemnity agreements into the record for all of its current and former tenants. Second, even assuming, solely *arguendo* that the Port District has iron-clad indemnity agreements with all its current and former tenants, those indemnity agreements are only as good as the current and former tenants are solvent. Accordingly, the indemnity argument resolves nothing since it is unclear whether dissolved corporate dischargers such as Campbell Industries, Inc. and San Diego Marine Construction Company, and successor corporations such as Star & Crescent actually have sufficient financial resources with which to indemnify the Port District.

It bears noting that the issues relating to allocation of fair shares of responsibility for cleanup costs under the TCAO are currently being litigated by the dischargers in federal district court. Based on the current state of the record, it is premature to conclude that all of the Port District's current and former tenants have sufficient financial resources to undertake their respective fair shares of cleanup costs under the TCAO.

#### **The Port District Should Remain A Primarily Responsible Discharger Because No Cleanup Is Taking Place.**

Even if it could be demonstrated that the Port District's current and former tenants have the financial resources to undertake the TCAO, it would still be appropriate to name the Port District as a primarily responsible party because no work is progressing on the cleanup, and at least some of the Port District's current and former tenants are not cooperating with or supporting the TCAO. See *In re Spitzer, supra*, at p. 9 [landowner responsible for cleanup if lessor fails to cleanup]; *In re Wenwest, supra*, p. 3. n. 2 [upholding regional board's initial decision to name landowner primarily responsible, but agreeing to change status of landowner to secondarily liable where lessee making progress on cleanup]. The Port District's claim that its current and former tenants are cooperating with and implementing the TCAO is false. As EHC and Coastkeeper continuously point out in these proceedings, the San Diego Water Board has been trying to accomplish a cleanup at the Shipyard Sediment Site for over ten years. So far, no "progress on the cleanup" has taken place. SDGE disputes the TCAO's cleanup levels and its own liability. NASSCO admits to liability, but disputes the alternative cleanup levels. BAE Systems admits to some liability, disputes some liability, and disputes the



alternative cleanup levels. Star& Crescent disputes its liability. The Port District itself argues that the alternative cleanup levels are not stringent enough and the cleanup footprint should be expanded. These facts can in no way be construed as “progress on the cleanup” is being made.”

In sum, based on this record, it is premature to find that the Port District should be secondarily responsible. If the TCAO is successfully adopted and becomes final, and if the Port District’s current and former tenants begin to make “progress on the cleanup” as was the case in *Wenwest*, then and only then may it be time to find the Port District secondarily responsible.

### **Substantial Evidence Supports Naming The Port District As A Discharger Under Its MS4 Permit.<sup>2</sup>**

In addition to the case and statutory law set forth above governing what may constitute substantial evidence, Resolution No. 92-49 further animates the types of evidence that may be considered substantial when naming dischargers in a cleanup and abatement order, including direct or circumstantial evidence. Resolution No. 92-49, § I (A). Such direct or circumstantial evidence includes site characteristics and location in relation to other potential sources of discharge and hydrologic and hydrogeologic information, such as differences in upgradient and downgradient water quality. *Id.*, at §§ I (A)(2), (3). The Port District claims it does not own or operate any part of the MS4 system that discharges through storm water outfalls SW04 and SW09, and that, even if it did, there is no substantial evidence to support the finding that relevant COCs were discharged through that system. Both arguments fail.

The Port District’s argument that it does not own or operate any of those portions of the MS4 system that outfall through SW04 and SW09 is based on the erroneous assertion that the City of San Diego’s retention of an easement for its MS4 system to pass through the Port District’s tideland properties foisted the responsibility for discharges from the tideland properties onto the City. The Port District is wrong. The City of San Diego correctly observed in its rebuttal comments that the Port District is a unique entity that overlays the City’s jurisdictional boundaries. The Port District has all rights and obligations of inspection and action with respect to the MS4 within its jurisdictional boundaries – namely the tidelands. Indeed, the MS4 permit issued by the San Diego Water Board recognizes this. The City’s easements merely allow its storm drains to pass through the tidelands to drain the upland areas into San Diego Bay. The Port District is fully responsible under the MS4 permit and its agreements with the co-permittees to take all necessary actions to prevent discharges of pollutants into the MS4 system from the tidelands areas, including both public areas *and* those leased to other entities. But, as outlined below, there is substantial evidence that relevant COCs were conveyed by the Port District’s MS4 system to the Shipyard Sediment Site.

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<sup>2</sup> There is some overlap with the discussion in these Response to Comments under Finding 4 relating to the City of San Diego’s responsibility for its discharges from its portion of the MS4 system. Relevant portions of that response are incorporated herein by this reference.

The Port District argues that the DTR's finding that relevant COCs were discharged from the tidelands area to the MS4 system and then into the Site through outfalls SW04 and SW09 is not supported by substantial evidence. The Port District relies heavily on *Natural Resources Defense Council, Inc. v. County of Los Angeles* (9<sup>th</sup> Cir. 2011)(NRDC), 636 F.3d 1235 to support its argument. The case is not on point. *NRDC* specifically addresses the evidentiary threshold required for finding that an NPDES permittee exceeded the parameters of its permit. That inquiry necessarily requires some quantification of the discharged constituent since some level of discharge is permitted. The TCAO does not allege that the Port District violated its permit. Rather, the inquiry is whether substantial evidence supports the finding that the Port District caused or contributed COCs to the condition of pollution or nuisance at the Shipyard Sediment Site through its discharges from the MS4 system in the tidelands that it owns and operates. Even the *NRDC* court made it clear that those who convey pollutants to waters of the United States, even if initially "added" by others, are liable under the Clean Water Act. *Id.*, at 1252-1253. As BAE Systems correctly notes, so long as there is substantial evidence, direct or circumstantial, that the Port District caused or contributed to the condition of pollution or nuisance at the Site, it is properly named as a discharger under the TCAO.

Critically, the Port District fails to faithfully cite all of the substantial record evidence, direct and circumstantial, that supports the finding that it is responsible for discharges of relevant COCs through that portion of the MS4 system that lies within the tidelands.

First, the Port District admits that it has "limited" storm water collection facilities that are not part of its tidelands properties leased to tenants and that lead to SW04. *See* Declaration of Robert Collacott, p. 4:9-14 [Port District operates one half mile of street curb and gutter, four storm drain inlets and an estimated 770 feet of underground storm drains 24-inches in diameter and smaller that drain to SW04].<sup>3</sup> It must be noted that the Port District's attempt to limit the MS4 system for which it is responsible to that which is not part of its tidelands leases to other entities is improper. The Port District is responsible for all storm water runoff collected from the tidelands area, whether it falls outside or within one of its leaseholds. The Port District's Jurisdictional Urban Runoff Management Plan (JURMP) admits the MS4 facilities, such as the one described by its Robert Collacott, have the potential to generate pollutants, including bacteria, gross pollutants, metals, nutrients, oil and grease, organics, pesticides, sediments and trash. May 2008 JURMP, Table 6-2. All of these pollutants can reach the MS4 system with each rainfall event and, in turn, be carried to receiving water bodies. *Id.*, at p. 6-7. U.S. EPA documents cited by BAE Systems further establish that heavy metals, particularly copper, lead and zinc are priority pollutants found in urban runoff and total suspended solids are high in comparison to other point source discharges. This evidence is incorporated herein by this reference as if set forth in full. These pieces of evidence

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<sup>3</sup> NASSCO notes that despite the ability to do so, the Port District fails to provide a GIS-based map that would show that storm water is not collected from the tidelands area and discharged through SW09. The TCAO alleges that it is. Because of the site characteristics of the area, it is reasonable to infer that SW09 does drain urban runoff from industrial facilities in the tidelands area leased by the Port District to others. As discussed above, it is also reasonable to assume that such runoff contains relevant COCs.

constitute circumstantial evidence of the Port District's contribution of relevant COCs to the Site. Stated somewhat differently, the evidence supports a finding that relevant COCs are commonly discharged in urban runoff, and that the Port District operates a conveyance at Belt Street that presents a plausible pathway for those COCs to be discharged.

Second, the Port District's leasehold to BAE Systems, which is within its jurisdictional tidelands area, directly overlies the SW04 outfall at the Shipyard Sediment Site. As the DTR already documents, relevant COCs, including PCBs and PAHs have been detected in the SW04 catch basin and laterals entering the catch basin. In 2009, samples were collected from a manhole on BAE's property that drains directly through SW04. The samples established the presence of PCBs, copper, mercury and TBT. In 2005, as described in the DTR, samples taken from the catch basin on the north side of Sampson Street between Belt Street and Harbor Drive (that portion over which the Port District admits responsibility) tested positive for PCBs and PAHs. This is direct evidence of COCs being present in the Port District's Belt Street MS4 conveyance, for which it admits responsibility. In 2001, water quality data was collected from the first manhole inside the BAE Systems leasehold that drains to SW04, which samples contained TBT, copper and mercury. It is reasonable to assume, based on the "site characteristics" (Resolution No. 92-49 I (A)(2)) and these facts documenting the detection of relevant COCs in manholes directly upgradient from the SW04 outfall, that COCs were discharged through SW04 after having been collected from the tidelands area. This makes the Port District a responsible party under *NRDC* because it is responsible for conveying wastes through its MS4 system to the Site.

As counsel for SDG&E, Jill A. Tracy notes in SDG&E's June 23, 2011 Rebuttal, "the state and regional boards are precluded from apportioning responsibility for remedial activities under a CAO." 6/23/11 SDG&E Rebuttal, pp. 10-11. Ms. Tracy argues that if the San Diego Water Board were to rescind its designation of the Port District as a named discharger under the TCAO, it would "become engaged in a *de facto* allocation of harm." *Id.* Whether the Port District should be named primarily responsible as a landowner, or whether it is entitled to indemnity from its current and former lessees for storm water and/or other discharges of relevant COCs, to the extent those entities are still viable, is best decided in an allocation proceeding such as the current federal litigation, not in this administrative forum. Accordingly, the Port District should remain a named discharger under the TCAO.

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**Attachment O**

**Excerpts from California Regional Water Quality Control Order  
No. R9-2007-0001, NPDES No. CAS0108758**

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD**  
**SAN DIEGO REGION**  
**ORDER NO. R9-2007-0001**  
**NPDES NO. CAS0108758**  
**WASTE DISCHARGE REQUIREMENTS**  
**FOR DISCHARGES OF URBAN RUNOFF FROM**  
**THE MUNICIPAL SEPARATE STORM SEWER SYSTEMS (MS4s)**  
**DRAINING THE WATERSHEDS OF THE COUNTY OF SAN DIEGO,**  
**THE INCORPORATED CITIES OF SAN DIEGO COUNTY,**  
**THE SAN DIEGO UNIFIED PORT DISTRICT,**  
**AND THE SAN DIEGO COUNTY REGIONAL AIRPORT AUTHORITY**

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Attachment A – Basin Plan Prohibitions

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RECEIVING WATERS AND URBAN RUNOFF MONITORING AND REPORTING  
PROGRAM NO. R9-2007-0001

The California Regional Water Quality Control Board, San Diego Region (hereinafter Regional Board), finds that:

#### A. BASIS FOR THE ORDER

1. This Order is based on the federal Clean Water Act (CWA), the Porter-Cologne Water Quality Control Act (Division 7 of the Water Code, commencing with Section 13000), applicable state and federal regulations, all applicable provisions of statewide Water Quality Control Plans and Policies adopted by the State Water Resources Control Board (SWRCB), the Water Quality Control Plan for the San Diego Basin adopted by the Regional Board, the California Toxics Rule, and the California Toxics Rule Implementation Plan.
2. This Order renews National Pollutant Discharge Elimination System (NPDES) Permit No. CAS0108758, which was first issued on July 16, 1990 (Order No. 90-42), and then renewed on February 21, 2001 (Order No. 2001-01). On August 25, 2005, in accordance with Order No. 2001-01, the County of San Diego, as the Principal Permittee, submitted a Report of Waste Discharge (ROWD) for renewal of their MS4 Permit.

#### B. REGULATED PARTIES

1. Each of the persons in Table 1 below, hereinafter called Copermittees or dischargers, owns or operates a municipal separate storm sewer system (MS4), through which it discharges urban runoff into waters of the United States within the San Diego Region. These MS4s fall into one or more of the following categories: (1) a medium or large MS4 that services a population of greater than 100,000 or 250,000 respectively; or (2) a small MS4 that is "interrelated" to a medium or large MS4; or (3) an MS4 which contributes to a violation of a water quality standard; or (4) an MS4 which is a significant contributor of pollutants to waters of the United States.

Table 1. Municipal Copermittees

|                           |                                     |
|---------------------------|-------------------------------------|
| 1. City of Carlsbad       | 12. City of Oceanside               |
| 2. City of Chula Vista    | 13. City of Poway                   |
| 3. City of Coronado       | 14. City of San Diego               |
| 4. City of Del Mar        | 15. City of San Marcos              |
| 5. City of El Cajon       | 16. City of Santee                  |
| 6. City of Encinitas      | 17. City of Solana Beach            |
| 7. City of Escondido      | 18. City of Vista                   |
| 8. City of Imperial Beach | 19. County of San Diego             |
| 9. City of La Mesa        | 20. San Diego Unified Port District |
| 10. City of Lemon Grove   | 21. San Diego County Regional       |
| 11. City of National City | Airport Authority                   |

#### C. DISCHARGE CHARACTERISTICS

1. Urban runoff contains waste, as defined in the California Water Code (CWC), and pollutants that adversely affect the quality of the waters of the State. The discharge of urban runoff from an MS4 is a "discharge of pollutants from a point source" into waters of the U.S. as defined in the CWA.
2. The most common categories of pollutants in urban runoff include total suspended solids, sediment (due to anthropogenic activities); pathogens (e.g., bacteria, viruses, protozoa);

heavy metals (e.g., copper, lead, zinc and cadmium); petroleum products and polynuclear aromatic hydrocarbons; synthetic organics (e.g., pesticides, herbicides, and PCBs); nutrients (e.g., nitrogen and phosphorus fertilizers), oxygen-demanding substances (decaying vegetation, animal waste), and trash.

3. The discharge of pollutants and/or increased flows from MS4s may cause or threaten to cause the concentration of pollutants to exceed applicable receiving water quality objectives and impair or threaten to impair designated beneficial uses resulting in a condition of pollution (i.e., unreasonable impairment of water quality for designated beneficial uses), contamination, or nuisance.
4. Pollutants in urban runoff can threaten human health. Human illnesses have been clearly linked to recreating near storm drains flowing to coastal waters. Also, urban runoff pollutants in receiving waters can bioaccumulate in the tissues of invertebrates and fish, which may be eventually consumed by humans.
5. Urban runoff discharges from MS4s often contain pollutants that cause toxicity to aquatic organisms (i.e., adverse responses of organisms to chemicals or physical agents ranging from mortality to physiological responses such as impaired reproduction or growth anomalies). Toxic pollutants impact the overall quality of aquatic systems and beneficial uses of receiving waters.
6. The Copermitees discharge urban runoff into lakes, drinking water reservoirs, rivers, streams, creeks, bays, estuaries, coastal lagoons, the Pacific Ocean, and tributaries thereto within ten of the eleven hydrologic units (watersheds) comprising the San Diego Region as shown in Table 2 below. Some of the receiving water bodies have been designated as impaired by the Regional Board and the United States Environmental Protection Agency (USEPA) in 2002 pursuant to CWA section 303(d). Also shown below are the watershed management areas (WMAs) as defined in the Regional Board report, Watershed Management Approach, January 2002.

Table 2. Common Watersheds and CWA Section 303(d) Impaired Waters

| REGIONAL BOARD WATERSHED MANAGEMENT AREA (WMA) | HYDROLOGIC UNIT(S)       | MAJOR SURFACE WATER BODIES  | 303(d) POLLUTANT(S) OF CONCERN OR WATER QUALITY EFFECT   | COPERMITTEES  |
|--|--------------------------|---|--|---|
| Santa Margarita River                          | Santa Margarita (902.00) | Santa Margarita River and Estuary, Pacific Ocean  | 1. Eutrophic<br>2. Nitrogen<br>3. Phosphorus<br>4. Total Dissolved Solids  | 1. County of San Diego  |
| San Luis Rey River                             | San Luis Rey (903.00)    | San Luis Rey River and Estuary, Pacific Ocean   | 1. Bacterial Indicators<br>2. Eutrophic<br>3. Chloride<br>4. Total Dissolved Solids                                | 1. City of Escondido<br>2. City of Oceanside<br>3. City of Vista<br>4. County of San Diego  |
| Carlsbad                                       | Carlsbad (904.00)        | Batiquitos Lagoon<br>San Elijo Lagoon<br>Agua Hedionda Lagoon<br>Buena Vista Lagoon<br>And Tributary Streams<br>Pacific Ocean | 1. Bacterial Indicators<br>2. Eutrophic<br>3. Sedimentation/Siltation<br>4. Nutrients<br>5. Total Dissolved Solids | 1. City of Carlsbad<br>2. City of Encinitas<br>3. City of Escondido<br>4. City of Oceanside<br>5. City of San Marcos<br>6. City of Solana Beach<br>7. City of Vista<br>8. County of San Diego |

<sup>1</sup> The listed 303(d) pollutant(s) of concern do not necessarily reflect impairment of the entire corresponding WMA or all corresponding major surface water bodies. The specific impaired portions of each WMA are listed in the State Water Resources Control Board's 2002 Section 303(d) List of Water Quality Limited Segments.

| REGIONAL BOARD WATERSHED MANAGEMENT AREA (WMA) | HYDROLOGIC UNIT(S)  | MAJOR SURFACE WATER BODIES                                       | 303(d) POLLUTANT(S) OF CONCERN OR WATER QUALITY EFFECT <sup>1</sup>   | COPERMITTEES  |
|--|---|--|---|---|
| San Dieguito River                             | San Dieguito (905.00)   | San Dieguito River and Estuary, Pacific Ocean                    | 1. Bacterial Indicators<br>2. Sulfate<br>3. Color<br>4. Nitrogen<br>5. Phosphorus<br>6. Total Dissolved Solids  | 1. City of Del Mar<br>2. City of Escondido<br>3. City of Poway<br>4. City of San Diego<br>5. City of Solana Beach<br>6. County of San Diego   |
| Mission Bay                                    | Peñasquitos (906.00)  | Los Peñasquitos Lagoon<br>Mission Bay, Pacific Ocean             | 1. Bacterial Indicators<br>2. Metals<br>3. Eutrophic<br>4. Sedimentation/Siltation<br>5. Toxicity   | 1. City of Del Mar<br>2. City of Poway<br>3. City of San Diego<br>4. County of San Diego  |
| San Diego River                                | San Diego (907.00)  | San Diego River, Pacific Ocean                                   | 1. Bacterial Indicators<br>2. Eutrophic<br>3. pH<br>4. Total Dissolved Solids<br>5. Oxygen (Dissolved)  | 1. City of El Cajon<br>2. City of La Mesa<br>3. City of Poway<br>4. City of San Diego<br>5. City of Santee<br>6. County of San Diego  |
| San Diego Bay                                  | Pueblo San Diego (908.00)<br>Sweetwater (909.00)<br>Otay (910.00) | San Diego Bay<br>Sweetwater River<br>Otay River<br>Pacific Ocean | 1. Bacterial Indicators<br>2. Metals<br>3. Sediment Toxicity<br>4. Benthic Community Degradation<br>5. Diazinon<br>6. Chlordane<br>7. Lindane<br>8. PAHs<br>9. PCBs     | 1. City of Chula Vista<br>2. City of Coronado<br>3. City of Imperial Beach<br>4. City of La Mesa<br>5. City of Lemon Grove<br>6. City of National City<br>7. City of San Diego<br>8. County of San Diego<br>9. San Diego Unified Port District<br>10. San Diego County Regional Airport Authority |
| Tijuana River                                  | Tijuana (911.00)  | Tijuana River and Estuary<br>Pacific Ocean                       | 1. Bacterial Indicators<br>2. Low Dissolved Oxygen<br>3. Metals<br>4. Eutrophic<br>5. Pesticides<br>6. Synthetic Organics<br>7. Trace Elements<br>8. Trash<br>9. Solids | 1. City of Imperial Beach<br>2. City of San Diego<br>3. County of San Diego   |

7. The Copermittees' water quality monitoring data submitted to date documents persistent exceedances of Basin Plan water quality objectives for various urban runoff-related pollutants (diazinon, fecal coliform bacteria, total suspended solids, turbidity, metals, etc.) at various watershed monitoring stations. At some monitoring stations, such as Agua Hedionda, statistically significant upward trends in pollutant concentrations have been observed. Persistent toxicity has also been observed at some watershed monitoring stations. In addition, bioassessment data indicates that the majority of watersheds have Poor to Very Poor Index of Biotic Integrity ratings. In sum, the above findings indicate that urban runoff discharges are causing or contributing to water quality impairments, and are a leading cause of such impairments in San Diego County.
8. When natural vegetated pervious ground cover is converted to impervious surfaces such as paved highways, streets, rooftops, and parking lots, the natural absorption and infiltration abilities of the land are lost. Therefore, runoff leaving a developed urban area is significantly greater in runoff volume, velocity, and peak flow rate than pre-development runoff from the same area. Runoff durations can also increase as a result of flood control and other efforts to control peak flow rates. Increased volume, velocity, rate, and duration of runoff greatly accelerate the erosion of downstream natural channels. Significant declines in the biological integrity and physical habitat of streams and other receiving waters have been found to occur



with as little as a 10% conversion from natural to impervious surfaces. The increased runoff characteristics from new development must be controlled to protect against increased erosion of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

9. Urban development creates new pollution sources as human population density increases and brings with it proportionately higher levels of car emissions, car maintenance wastes, municipal sewage, pesticides, household hazardous wastes, pet wastes, trash, etc. which can either be washed or directly dumped into the MS4. As a result, the runoff leaving the developed urban area is significantly greater in pollutant load than the pre-development runoff from the same area. These increased pollutant loads must be controlled to protect downstream receiving water quality.
10. Development and urbanization especially threaten environmentally sensitive areas (ESAs), such as water bodies designated as supporting a RARE beneficial use (supporting rare, threatened or endangered species) and CWA 303(d) impaired water bodies. Such areas have a much lower capacity to withstand pollutant shocks than might be acceptable in the general circumstance. In essence, development that is ordinarily insignificant in its impact on the environment may become significant in a particular sensitive environment. Therefore, additional control to reduce pollutants from new and existing development may be necessary for areas adjacent to or discharging directly to an ESA.
11. Although dependent on several factors, the risks typically associated with properly managed infiltration of runoff (especially from residential land use areas) are not significant. The risks associated with infiltration can be managed by many techniques, including (1) designing landscape drainage features that promote infiltration of runoff, but do not "inject" runoff (injection bypasses the natural processes of filtering and transformation that occur in the soil); (2) taking reasonable steps to prevent the illegal disposal of wastes; (3) protecting footings and foundations; and (4) ensuring that each drainage feature is adequately maintained in perpetuity.

#### **D. URBAN RUNOFF MANAGEMENT PROGRAMS**

##### **1. General**

- a. This Order specifies requirements necessary for the Copermittees to reduce the discharge of pollutants in urban runoff to the maximum extent practicable (MEP). However, since MEP is a dynamic performance standard which evolves over time as urban runoff management knowledge increases, the Copermittees' urban runoff management programs must continually be assessed and modified to incorporate improved programs, control measures, best management practices (BMPs), etc. in order to achieve the evolving MEP standard. Absent evidence to the contrary, this continual assessment, revision, and improvement of urban runoff management program implementation is expected to ultimately achieve compliance with water quality standards.
- b. Although the Copermittees have generally been implementing the jurisdictional urban runoff management programs required pursuant to Order No. 2001-01 since February 21, 2002, urban runoff discharges continue to cause or contribute to violations of water quality standards. This Order contains new or modified requirements that are necessary to improve Copermittees' efforts to reduce the discharge of pollutants in urban runoff to the MEP and achieve water quality

standards. Some of the new or modified requirements, such as the expanded Watershed Urban Runoff Management Program section, are designed to specifically address these high priority water quality problems. Other new or modified requirements address program deficiencies that have been noted during audits, report reviews, and other Regional Board compliance assessment activities.

- c. Updated Jurisdictional Urban Runoff Management Plans (JURMPs) and Watershed Urban Runoff Management Plans (WURMPs), and a new Regional Urban Runoff Management Plan (RURMP), which describe the Copermittees' urban runoff management programs in their entirety, are needed to guide the Copermittees' urban runoff management efforts and aid the Copermittees in tracking urban runoff management program implementation. It is practicable for the Copermittees to update the JURMPs and WURMPs, and create the RURMP, within one year, since significant efforts to develop these programs have already occurred.
- d. Pollutants can be effectively reduced in urban runoff by the application of a combination of pollution prevention, source control, and treatment control BMPs. Pollution prevention is the reduction or elimination of pollutant generation at its source and is the best "first line of defense". Source control BMPs (both structural and non-structural) minimize the contact between pollutants and flows (e.g., rerouting run-on around pollutant sources or keeping pollutants on-site and out of receiving waters). Treatment control BMPs remove pollutants from urban runoff.
- e. Urban runoff needs to be addressed during the three major phases of development (planning, construction, and use) in order to reduce the discharge of pollutants to the MEP and protect receiving waters. Development which is not guided by water quality planning policies and principles can unnecessarily result in increased pollutant load discharges, flow rates, and flow durations which can impact receiving water beneficial uses. Construction sites without adequate BMP implementation result in sediment runoff rates which greatly exceed natural erosion rates of undisturbed lands, causing siltation and impairment of receiving waters. Existing development generates substantial pollutant loads which are discharged in urban runoff to receiving waters.
- f. Annual reporting requirements included in this Order are necessary to meet federal requirements and to evaluate the effectiveness and compliance of the Copermittees' programs.

## **2. Development Planning**

- a. The Standard Urban Storm Water Mitigation Plan (SUSMP) requirements contained in this Order are consistent with Order WQ-2000-11 adopted by the SWRCB on October 5, 2000. In the precedential order, the SWRCB found that the design standards, which essentially require that urban runoff generated by 85 percent of storm events from specific development categories be infiltrated or treated, reflect the MEP standard. The order also found that the SUSMP requirements are appropriately applied to the majority of the Priority Development Project categories contained in Section D.1 of this Order. The SWRCB also gave Regional Water Quality Control Boards the discretion to include additional categories and locations, such as retail gasoline outlets (RGOs), in future SUSMPs.

- b. Controlling urban runoff pollution by using a combination of onsite source control and Low Impact Development (LID) BMPs augmented with treatment control BMPs before the runoff enters the MS4 is important for the following reasons: (1) Many end-of-pipe BMPs (such as diversion to the sanitary sewer) are typically ineffective during significant storm events. Whereas, onsite source control BMPs can be applied during all runoff conditions; (2) End-of-pipe BMPs are often incapable of capturing and treating the wide range of pollutants which can be generated on a sub-watershed scale; (3) End-of-pipe BMPs are more effective when used as polishing BMPs, rather than the sole BMP to be implemented; (4) End-of-pipe BMPs do not protect the quality or beneficial uses of receiving waters between the source and the BMP; and (5) Offsite end-of-pipe BMPs do not aid in the effort to educate the public regarding sources of pollution and their prevention.
- c. Use of LID BMPs at new development projects can be an effective means for minimizing the impact of urban runoff discharges from the development projects on receiving waters. LID BMPs help preserve and restore the natural hydrologic cycle of the site, allowing for filtration and infiltration which can greatly reduce the volume, peak flow rate, velocity, and pollutant loads of urban runoff.
- d. Retail Gasoline Outlets (RGOs) are significant sources of pollutants in urban runoff. RGOs are points of convergence for motor vehicles for automotive related services such as repair, refueling, tire inflation, and radiator fill-up and consequently produce significantly higher loadings of hydrocarbons and trace metals (including copper and zinc) than other urban areas. To meet MEP, LID, source control, and treatment control BMPs are needed at RGOs that meet the following criteria: (a) 5,000 square feet or more, or (b) a projected Average Daily Traffic (ADT) of 100 or more vehicles per day. These are appropriate thresholds since vehicular development size and volume of traffic are good indicators of potential impacts of urban runoff from RGOs on receiving waters.
- e. Sites of heavy industry are significant sources of pollutants in urban runoff. Pollutant concentrations and loads in runoff from industrial sites are similar or exceed pollutant concentrations and loads in runoff from other land uses, such as commercial or residential land uses. As with other land uses, LID, source control, and treatment control BMPs are needed at sites of heavy industry in order to meet the MEP standard. These BMPs are necessary where the site of heavy industry is larger than one acre. The one acre threshold is appropriate, since it is consistent with requirements in the Phase II NPDES storm water regulations.
- f. If not properly designed or maintained, certain BMPs implemented or required by municipalities for urban runoff management may create a habitat for vectors (e.g. mosquitoes and rodents). However, proper BMP design and maintenance can prevent the creation of vector habitat. Nuisances and public health impacts resulting from vector breeding can be prevented with close collaboration and cooperative effort between municipalities and local vector control agencies and the State Department of Health Services during the development and implementation of urban runoff management programs.

### 3. Construction and Existing Development

- a. In accordance with federal NPDES regulations and to ensure the most effective oversight of industrial and construction site discharges, discharges of runoff from

industrial and construction sites are subject to dual (state and local) storm water regulation. Under this dual system, the Regional Board is responsible for enforcing the General Construction Activities Storm Water Permit, SWRCB Order 99-08 DWQ, NPDES No. CAS000002 (General Construction Permit) and the General Industrial Activities Storm Water Permit, SWRCB Order 97-03 DWQ, NPDES No. CAS000001 (General Industrial Permit), and each municipal Copermittee is responsible for enforcing its local permits, plans, and ordinances, which may require the implementation of additional BMPs than required under the statewide general permits.

- b. Identification of sources of pollutants in urban runoff (such as municipal areas and activities, industrial and commercial sites/sources, construction sites, and residential areas), development and implementation of BMPs to address those sources, and updating ordinances and approval processes are necessary for the Copermittees to ensure that discharges of pollutants into and from its MS4 are reduced to the MEP. Inspections and other compliance verification methods are needed to ensure minimum BMPs are implemented. Inspections are especially important at high risk areas for pollutant discharges.
- c. Historic and current development makes use of natural drainage patterns and features as conveyances for urban runoff. Urban streams used in this manner are part of the municipalities MS4 regardless of whether they are natural, man-made, or partially modified features. In these cases, the urban stream is both an MS4 and a receiving water.
- d. As operators of the MS4s, the Copermittees cannot passively receive and discharge pollutants from third parties. By providing free and open access to an MS4 that conveys discharges to waters of the U.S., the operator essentially accepts responsibility for discharges into the MS4 that it does not prohibit or control. These discharges may cause or contribute to a condition of contamination or a violation of water quality standards.
- e. Waste and pollutants which are deposited and accumulate in MS4 drainage structures will be discharged from these structures to waters of the U.S. unless they are removed or treated. These discharges may cause or contribute to, or threaten to cause or contribute to, a condition of pollution in receiving waters. For this reason, pollutant discharges into MS4s must be reduced to the MEP unless treatment within the MS4 occurs.
- f. Enforcement of local urban runoff related ordinances, permits, and plans is an essential component of every urban runoff management program and is specifically required in the federal storm water regulations and this Order. Each Copermittee is individually responsible for adoption and enforcement of ordinances and/or policies, implementation of identified control measures/BMPs needed to prevent or reduce pollutants in storm water runoff, and for the allocation of funds for the capital, operation and maintenance, administrative, and enforcement expenditures necessary to implement and enforce such control measures/BMPs under its jurisdiction.
- g. Education is an important aspect of every effective urban runoff management program and the basis for changes in behavior at a societal level. Education of municipal planning, inspection, and maintenance department staffs is especially critical to ensure that in-house staffs understand how their activities impact water

quality, how to accomplish their jobs while protecting water quality, and their specific roles and responsibilities for compliance with this Order. Public education, designed to target various urban land users and other audiences, is also essential to inform the public of how individual actions impact receiving water quality and how these impacts can be minimized.

- h. Public participation during the development of urban runoff management programs is necessary to ensure that all stakeholder interests and a variety of creative solutions are considered.

#### **4. Watershed and Regional Urban Runoff Management**

- a. Since urban runoff does not recognize political boundaries, watershed-based urban runoff management can greatly enhance the protection of receiving waters within a watershed. Such management provides a means to focus on the most important water quality problems in each watershed. By focusing on the most important water quality problems, watershed efforts can maximize protection of beneficial use in an efficient manner. Effective watershed-based urban runoff management actively reduces pollutant discharges and abates pollutant sources causing or contributing to watershed water quality problems; watershed-based urban runoff management that does not actively reduce pollutant discharges and abate pollutant sources causing or contributing to watershed water quality problems can necessitate implementation of the iterative process outlined in section A.3 of the Order. Watershed management of urban runoff does not require Copermittees to expend resources outside of their jurisdictions. Watershed management requires the Copermittees within a watershed to develop a watershed-based management strategy, which can then be implemented on a jurisdictional basis.
- b. Some urban runoff issues, such as residential education, can be effectively addressed on a regional basis. Regional approaches to urban runoff management can improve program consistency and promote sharing of resources, which can result in implementation of more efficient programs.
- c. Both regionally and on a watershed basis, it is important for the Copermittees to coordinate their water quality protection and land use planning activities to achieve the greatest protection of receiving water bodies. Copermittee coordination with other watershed stakeholders, especially Caltrans, the Department of Defense, and Native American Tribes, is also important. Establishment of a management structure, within which the Copermittees subject to this Order will fund and coordinate those aspects of their joint obligations, will help promote implementation of urban runoff management programs on a watershed and regional basis in a most cost effective manner.

#### **E. STATUTE AND REGULATORY CONSIDERATIONS**

- 1. The Receiving Water Limitations (RWL) language specified in this Order is consistent with language recommended by the USEPA and established in SWRCB Water Quality Order 99-05, adopted by the SWRCB on June 17, 1999. The RWL in this Order require compliance with water quality standards, which is to be achieved through an iterative approach requiring the implementation of improved and better-tailored BMPs over time. Compliance with receiving water limits based on applicable water quality standards is necessary to ensure that MS4 discharges will not cause or contribute to violations of water quality standards and the

creation of conditions of pollution.

2. The Water Quality Control Plan for the San Diego Basin (Basin Plan), identifies the following beneficial uses for surface waters in San Diego County: Municipal and Domestic Supply (MUN), Agricultural Supply (AGR), Industrial Process Supply (PROC), Industrial Service Supply (IND), Ground Water Recharge (GWR), Contact Water Recreation (REC1) Non-contact Water Recreation (REC2), Warm Freshwater Habitat (WARM), Cold Freshwater Habitat (COLD), Wildlife Habitat (WILD), Rare, Threatened, or Endangered Species (RARE), Freshwater Replenishment (FRSH), Hydropower Generation (POW), and Preservation of Biological Habitats of Special Significance (BIOL). The following additional beneficial uses are identified for coastal waters of San Diego County: Navigation (NAV), Commercial and Sport Fishing (COMM), Estuarine Habitat (EST), Marine Habitat (MAR), Aquaculture (AQUA), Migration of Aquatic Organisms (MIGR), Spawning, Reproduction, and/or Early Development (SPWN), and Shellfish Harvesting (SHELL).
3. This Order is in conformance with SWRCB Resolution No. 68-16 and the federal Antidegradation Policy described in 40 CFR 131.12.
4. Section 6217(g) of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA) requires coastal states with approved coastal zone management programs to address non-point pollution impacting or threatening coastal water quality. CZARA addresses five sources of non-point pollution: agriculture, silviculture, urban, marinas, and hydromodification. This NPDES permit addresses the management measures required for the urban category, with the exception of septic systems. The adoption and implementation of this NPDES permit relieves the Permittee from developing a non-point source plan, for the urban category, under CZARA. The Regional Board addresses septic systems through the administration of other programs.
5. Section 303(d)(1)(A) of the CWA requires that "Each state shall identify those waters within its boundaries for which the effluent limitations... are not stringent enough to implement any water quality standard (WQS) applicable to such waters." The CWA also requires states to establish a priority ranking of impaired waterbodies known as Water Quality Limited Segments and to establish Total Maximum Daily Loads (TMDLs) for such waters. This priority list of impaired waterbodies is called the Section 303(d) List. The current Section 303(d) List was approved by the SWRCB on February 4, 2003 and on July 25, 2003 by USEPA.
6. This Order fulfills a component of the TMDL Implementation Plan adopted by this Regional Board on August 14, 2002 for diazinon in Chollas Creek by establishing Water Quality Based Effluent Limits (WQBELs) for the Cities of San Diego, Lemon Grove, and La Mesa, the County of San Diego, and the San Diego Unified Port District; and by requiring: 1) legal authority, 2) implementation of a diazinon toxicity control plan and a diazinon public outreach/ education program, 3) achievement of the Compliance Schedule, and 4) a monitoring program. The establishment of WQBELs expressed as iterative BMPs to achieve the Waste Load Allocation (WLA) compliance schedule is appropriate and is expected to be sufficient to achieve the WLAs specified in the TMDL.
7. This Order fulfills a component of the TMDL Implementation Plan adopted by this Regional Board on February 9, 2005 for dissolved copper in Shelter Island Yacht Basin (SIYB) by establishing WQBELs expressed as BMPs to achieve the WLA of 30 kg copper / year for the City of San Diego and the San Diego Unified Port District. The establishment of WQBELs expressed as BMPs is appropriate and is expected to be sufficient to achieve the WLA

specified in the TMDL.

8. This Order establishes WQBELs and conditions consistent with the requirements and assumptions of the WLAs in the TMDLs as required by 40 CFR 122.44(d)(1)(vii)(B).
9. Requirements in this Order that are more explicit than the federal storm water regulations in 40 CFR 122.26 are prescribed in accordance with the CWA section 402(p)(3)(B)(iii) and are necessary to meet the MEP standard.
10. Urban runoff treatment and/or mitigation must occur prior to the discharge of urban runoff into a receiving water. Federal regulations at 40 CFR 131.10(a) state that in no case shall a state adopt waste transport or waste assimilation as a designated use for any waters of the U.S. Authorizing the construction of an urban runoff treatment facility within a water of the U.S., or using the water body itself as a treatment system or for conveyance to a treatment system, would be tantamount to accepting waste assimilation as an appropriate use for that water body. Furthermore, the construction, operation, and maintenance of a pollution control facility in a water body can negatively impact the physical, chemical, and biological integrity, as well as the beneficial uses, of the water body. This is consistent with USEPA guidance to avoid locating structural controls in natural wetlands.
11. The issuance of waste discharge requirements and an NPDES permit for the discharge of urban runoff from MS4s to waters of the U.S. is exempt from the requirement for preparation of environmental documents under the California Environmental Quality Act (CEQA) (Public Resources Code, Division 13, Chapter 3, section 21000 et seq.) in accordance with the CWC section 13389.

#### **F. PUBLIC PROCESS**

1. The Regional Board has notified the Copermittees, all known interested parties, and the public of its intent to consider adoption of an Order prescribing waste discharge requirements that would serve to renew an NPDES permit for the existing discharge of urban runoff.
2. The Regional Board has, at public meetings on (date), held public hearings and heard and considered all comments pertaining to the terms and conditions of this Order.

**IT IS HEREBY ORDERED** that the Copermittees, in order to meet the provisions contained in Division 7 of the California Water Code (CWC) and regulations adopted thereunder, and the provisions of the Clean Water Act (CWA) and regulations adopted thereunder, shall each comply with the following:

#### **A. PROHIBITIONS AND RECEIVING WATER LIMITATIONS**

1. Discharges into and from municipal separate storm sewer systems (MS4s) in a manner causing, or threatening to cause, a condition of pollution, contamination, or nuisance (as defined in CWC section 13050), in waters of the state are prohibited.
2. Discharges from MS4s containing pollutants which have not been reduced to the maximum extent practicable (MEP) are prohibited.<sup>2</sup>

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<sup>2</sup> This prohibition does not apply to MS4 discharges which receive subsequent treatment to reduce pollutants to the MEP prior to entering receiving waters (e.g., low flow diversions to the sanitary sewer).

3. Discharges from MS4s that cause or contribute to the violation of water quality standards (designated beneficial uses and water quality objectives developed to protect beneficial uses) are prohibited.
  - a. Each Copermittee shall comply with section A.3 and section A.4 as it applies to Prohibition 5 in Attachment A of this Order through timely implementation of control measures and other actions to reduce pollutants in urban runoff discharges in accordance with the Jurisdictional Urban Runoff Management Program and other requirements of this Order including any modifications. The Jurisdictional Urban Runoff Management Program shall be designed to achieve compliance with section A.3 and section A.4 as it applies to Prohibition 5 in Attachment A of this Order. If exceedance(s) of water quality standards persist notwithstanding implementation of the Jurisdictional Urban Runoff Management Program and other requirements of this Order, the Copermittee shall assure compliance with section A.3 and section A.4 as it applies to Prohibition 5 in Attachment A of this Order by complying with the following procedure:
    - (1) Upon a determination by either the Copermittee or the Regional Board that MS4 discharges are causing or contributing to an exceedance of an applicable water quality standard, the Copermittee shall promptly notify and thereafter submit a report to the Regional Board that describes best management practices (BMPs) that are currently being implemented and additional BMPs that will be implemented to prevent or reduce any pollutants that are causing or contributing to the exceedance of water quality standards. The report may be incorporated in the annual update to the Jurisdictional Urban Runoff Management Program unless the Regional Board directs an earlier submittal. The report shall include an implementation schedule. The Regional Board may require modifications to the report;
    - (2) Submit any modifications to the report required by the Regional Board within 30 days of notification;
    - (3) Within 30 days following approval of the report described above by the Regional Board, the Copermittee shall revise its Jurisdictional Urban Runoff Management Program and monitoring program to incorporate the approved modified BMPs that have been and will be implemented, the implementation schedule, and any additional monitoring required;
    - (4) Implement the revised Jurisdictional Urban Runoff Management Program and monitoring program in accordance with the approved schedule.
  - b. So long as the Copermittee has complied with the procedures set forth above and is implementing the revised Jurisdictional Urban Runoff Management Program, the Copermittee does not have to repeat the same procedure for continuing or recurring exceedances of the same receiving water limitations unless directed by the Regional Board to do so.
  - c. Nothing in section A.3 shall prevent the Regional Board from enforcing any provision of this Order while the Copermittee prepares and implements the above report.



4. In addition to the above prohibitions, discharges from MS4s are subject to all Basin Plan prohibitions cited in Attachment A to this Order.

## B. NON-STORM WATER DISCHARGES

1. Each Copermittee shall effectively prohibit all types of non-storm water discharges into its MS4 unless such discharges are either authorized by a separate National Pollutant Discharge Elimination System (NPDES) permit; or not prohibited in accordance with sections B.2 and B.3 below.
2. The following categories of non-storm water discharges are not prohibited unless a Copermittee or the Regional Board identifies the discharge category as a significant source of pollutants to waters of the U.S. For such a discharge category, the Copermittee shall either prohibit the discharge category or develop and implement appropriate control measures to reduce the discharge of pollutants to the MEP and report to the Regional Board pursuant to section J.
  - a. Diverted stream flows;
  - b. Rising ground waters;
  - c. Uncontaminated ground water infiltration [as defined at 40 CFR 35.2005(20)] to MS4s;
  - d. Uncontaminated pumped ground water;
  - e. Foundation drains;
  - f. Springs;
  - g. Water from crawl space pumps;
  - h. Footing drains;
  - i. Air conditioning condensation;
  - j. Flows from riparian habitats and wetlands;
  - k. Water line flushing;
  - l. Landscape irrigation;
  - m. Discharges from potable water sources not subject to NPDES Permit No. CAG679001, other than water main breaks;
  - n. Irrigation water;
  - o. Lawn watering;
  - p. Individual residential car washing; and
  - q. Dechlorinated swimming pool discharges.
3. Emergency fire fighting flows (i.e., flows necessary for the protection of life or property) do not require BMPs and need not be prohibited. As part of the Jurisdictional Urban Runoff Management Plan (JURMP), each Copermittee shall develop and implement a program to reduce pollutants from non-emergency fire fighting flows (i.e., flows from controlled or practice blazes and maintenance activities) identified by the Copermittee to be significant sources of pollutants to waters of the United States.
4. Each Copermittee shall examine all dry weather field screening and analytical monitoring results collected in accordance with section D.4 of this Order and Receiving Waters Monitoring and Reporting Program No. R9-2007-0001 to identify water quality problems which may be the result of any non-prohibited discharge category(ies) identified above in section B.2. Follow-up investigations shall be conducted as necessary to identify and control any non-prohibited discharge category(ies) listed above.

**C. LEGAL AUTHORITY**

1. Each Copermittee shall establish, maintain, and enforce adequate legal authority to control pollutant discharges into and from its MS4 through ordinance, statute, permit, contract or similar means. This legal authority must, at a minimum, authorize the Copermittee to:
  - a. Control the contribution of pollutants in discharges of runoff associated with industrial and construction activity to its MS4 and control the quality of runoff from industrial and construction sites. This requirement applies both to industrial and construction sites which have coverage under the statewide general industrial or construction storm water permits, as well as to those sites which do not. Grading ordinances shall be upgraded and enforced as necessary to comply with this Order.
  - b. Prohibit all identified illicit discharges not otherwise allowed pursuant to section B.2 including but not limited to:
    - (1) Sewage;
    - (2) Discharges of wash water resulting from the hosing or cleaning of gas stations, auto repair garages, or other types of automotive services facilities;
    - (3) Discharges resulting from the cleaning, repair, or maintenance of any type of equipment, machinery, or facility including motor vehicles, cement-related equipment, and port-a-potty servicing, etc.;
    - (4) Discharges of wash water from mobile operations such as mobile automobile washing, steam cleaning, power washing, and carpet cleaning, etc.;
    - (5) Discharges of wash water from the cleaning or hosing of impervious surfaces in municipal, industrial, commercial, and residential areas including parking lots, streets, sidewalks, driveways, patios, plazas, work yards and outdoor eating or drinking areas, etc.;
    - (6) Discharges of runoff from material storage areas containing chemicals, fuels, grease, oil, or other hazardous materials;
    - (7) Discharges of pool or fountain water containing chlorine, biocides, or other chemicals; discharges of pool or fountain filter backwash water;
    - (8) Discharges of sediment, pet waste, vegetation clippings, or other landscape or construction-related wastes; and
    - (9) Discharges of food-related wastes (e.g., grease, fish processing, and restaurant kitchen mat and trash bin wash water, etc.).
  - c. Prohibit and eliminate illicit connections to the MS4;
  - d. Control the discharge of spills, dumping, or disposal of materials other than storm water to its MS4;
  - e. Require compliance with conditions in Copermittee ordinances, permits, contracts or orders (i.e., hold dischargers to its MS4 accountable for their contributions of pollutants and flows);
  - f. Utilize enforcement mechanisms to require compliance with Copermittee storm water ordinances, permits, contracts, or orders;
  - g. Control the contribution of pollutants from one portion of the shared MS4 to another portion of the MS4 through interagency agreements among Copermittees. Control of

the contribution of pollutants from one portion of the shared MS4 to another portion of the MS4 through interagency agreements with other owners of the MS4 such as Caltrans, the Department of Defense, or Native American Tribes is encouraged;

- h. Carry out all inspections, surveillance, and monitoring necessary to determine compliance and noncompliance with local ordinances and permits and with this Order, including the prohibition on illicit discharges to the MS4. This means the Copermittee must have authority to enter, monitor, inspect, take measurements, review and copy records, and require regular reports from industrial facilities discharging into its MS4, including construction sites;
  - i. Require the use of BMPs to prevent or reduce the discharge of pollutants into MS4s to the MEP; and
  - j. Require documentation on the effectiveness of BMPs implemented to reduce the discharge of pollutants to the MS4 to the MEP.
2. Each Permittee shall include as part of its JURMP a statement certified by its chief legal counsel that the Copermittee has taken the necessary steps to obtain and maintain full legal authority to implement and enforce each of the requirements contained in 40 CFR 122.26(d)(2)(i)(A-F) and this Order. This statement shall include:
- a. Identification of all departments within the jurisdiction that conduct urban runoff related activities, and their roles and responsibilities under this Order. Include an up to date organizational chart specifying these departments and key personnel.
  - b. Citation of urban runoff related ordinances and the reasons they are enforceable;
  - c. Identification of the local administrative and legal procedures available to mandate compliance with urban runoff related ordinances and therefore with the conditions of this Order;
  - d. A description of how urban runoff related ordinances are implemented and appealed; and
  - e. Description of whether the municipality can issue administrative orders and injunctions or if it must go through the court system for enforcement actions.

#### **D. JURISDICTIONAL URBAN RUNOFF MANAGEMENT PROGRAM**

Each Copermittee shall implement all requirements of section D of this Order no later than 365 days after adoption of the Order, unless otherwise specified in this Order. Prior to 365 days after adoption of the Order, each Copermittee shall at a minimum implement its Jurisdictional URMP document, as the document was developed and amended to comply with the requirements of Order No. 2001-01.

Each Copermittee shall develop and implement an updated Jurisdictional Urban Runoff Management Program for its jurisdiction. Each updated Jurisdictional Urban Runoff Management Program shall meet the requirements of section D of this Order, reduce the discharge of pollutants from the MS4 to the MEP, and prevent urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards.

**Attachment P**

**Excerpts from the Deposition of California Regional Water Quality  
Control Board Cleanup Team Member, Craig Carlisle, dated  
February 9, 2011**



1 A. That order of magnitude rings a bell.

2 Q. How much was the total cost of the CEQA  
3 document, do you know?

4 A. The contract right now has been funded. I  
5 believe their contract is approximately \$450,000. But  
6 that's not the entire CEQA complete document.

7 Q. Do you know what portion of the CEQA, on a  
8 percentage basis, the Port was asked to fund?

9 A. No.

10 Q. Do you have an estimate?

11 A. No.

12 Q. Was it in the neighborhood of 40 percent?

13 A. I don't know.

14 Q. Do you know if the Port objected on the grounds  
15 that the amount that was asked was too high?

16 A. No.

17 MR. CARRIGAN: Asked and answered. Calls for  
18 speculation.

19 BY MR. BROWN:

20 Q. All right. What other grounds other than  
21 failing to pay for the CEQA document and withdrawing  
22 technical support did the Port withdraw its assistance?

23 A. Withdrawing from the mediation.

24 Q. And did any other parties withdraw from the  
25 mediation?

1 A. I don't know for certain. I assume they did.

2 Q. Were you ever made aware of what the Port's role  
3 was in cleaning up the Campbell Shipyard case?

4 A. Yes.

5 Q. And what was it?

6 A. I heard they took ownership of that.

7 Q. Do you know what they funded?

8 A. I have no idea. I didn't know, you know, where  
9 the money came from at all.

10 Q. Do you know who instigated the mediation in this  
11 case, the current case?

12 A. I thought it was the Regional Board, David King.

13 Q. Do you know whether the Port went to the  
14 Regional Board and requested that mediation be  
15 instigated?

16 A. No.

17 Q. Do you know if the Port provided funding for the  
18 mediation?

19 A. No.

20 Q. Do you know if the Port provided insurance money  
21 to make the mediations go forward?

22 A. No.

23 Q. Do you know if the Port contributed to technical  
24 data that was used during the mediation?

25 MR. CARRIGAN: I'm going to stop and instruct

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I, ANNE M. ZARKOS, Certified Shorthand  
Reporter for the State of California, do hereby certify:

That the witness in the foregoing deposition was by me  
first duly sworn to testify to the truth, the whole  
truth and nothing but the truth in the foregoing cause;  
that the deposition was taken by me in machine shorthand  
and later transcribed into typewriting, under my  
direction, and that the foregoing contains a true record  
of the testimony of the witness.

Dated: This 22<sup>nd</sup> day of February, 2011  
at San Diego, California.

  
\_\_\_\_\_  
Anne M. Zarkos RPR, CRR  
CSR No. 13095



**EXHIBIT NO. "1"**

Excerpts from the Deposition of California Regional Water Quality  
Control Board Cleanup Team Member, David Gibson, dated March 11,  
2011



EXAMINATION

1

2 BY MR. BROWN:

3 Q Good morning, Mr. Gibson.

4 My name is Bill Brown. I represent the Port of  
5 San Diego in this matter, and we have a few short  
6 questions for you today. One of the allegations against  
7 the Port in some Interrogatory Answers is that the Port  
8 has not been cooperative as a landlord at this site. I  
9 wanted to ask you about this site as well as a few  
10 others and talk about cooperation.

11 I'm going to start out talking about some of  
12 the other sites that you may have knowledge of. Were  
13 you involved in the Campbell Shipyard site? Not the  
14 Campbell site here, but the other Campbell site where  
15 the new Hilton Hotel is?

16 A No, I was not.

17 Q Okay. Did you have any knowledge as to whether  
18 the Port was cooperative at that site?

19 A I believe that they were cooperative. And I do  
20 want to revise that answer. I think I was involved with  
21 the revision of the waste discharge requirements after  
22 they were initially adopted for the purposes of that  
23 site. I was the supervisor of Datquach. And I think it  
24 was the comparable sites that we presented to the board.

25 Q Do you know how much money the Port of

1 discussions in the hallway with staff working on that.

2 Q Have you worked with anybody at the Port of  
3 San Diego on that matter?

4 A I have not.

5 Q Do you know if the Port of San Diego  
6 contributed to the payment for that remediation?

7 A I don't know.

8 Q Okay. Do you know if the Port of San Diego  
9 assisted in bringing parties to the table to pay for  
10 that remediation?

11 A I don't know.

12 Q Do you know if the Port of San Diego initiated  
13 mediation to resolve that site?

14 A I don't know.

15 Q Do you know whether they located insurance for  
16 other parties for that site?

17 A I don't know that.

18 Q Are you involved in South Bay power plant?

19 A I've been involved in that, yes.

20 Q And what's your role in that?

21 A As Executive Officer, I oversaw the staff  
22 presentations and the development of those presentations  
23 in the several items that the Board had on that in 2009  
24 and 2010.

25 Q Have you worked with anybody at the Port of

1 San Diego on that matter?

2 A I have not.

3 Q Do you know whether the Port of San Diego has  
4 been cooperative in that matter?

5 A It's my sense from the briefing I've received  
6 from staff that the Port has been cooperative, and I  
7 look forward to more of that cooperation in the next  
8 year ahead.

9 Q I think we're all going to need it.

10 Did you ever work on the site known as Goodrich  
11 or the site in Chula Vista also known as Rohr  
12 Industries?

13 A I did not work on it. I've been briefed on it.

14 Q Have you ever worked with anybody at the Port  
15 of San Diego on that matter?

16 A I've not.

17 Q Do you know whether the Port of San Diego has  
18 spent money on remediating that site?

19 A I don't believe I've been briefed on that, no.

20 Q Have you worked on the Shelter Island Yacht  
21 Basin?

22 A I have worked on that, yes.

23 Q And have you worked with representatives of the  
24 Port on that matter?

25 A Yes, I have.

1 Q And who did you work with?

2 A I have worked primarily with David Merk and  
3 Karen Holman on that subject.

4 Q And what have they been doing?

5 A In short, they have been implementing the TMDL  
6 with the yacht owners in that basin vis-a-vis seeking  
7 grant funds which the Regional Board supported from the  
8 319(h) Federal Clean Water Act Nonpoint Source grant  
9 program to switch over boats from copper-based  
10 antifouling coatings to non-copper-based and preferably  
11 a nontoxic alternative.

12 We supported their grant application. They  
13 have been facilitating communications with the yacht  
14 owners and the marinas in that yacht basin, and we  
15 appreciate that help.

16 Q Do you know whether the Port has also, aside  
17 from the grant, contributed financially to that program?

18 A I believe that they have. There's a matching  
19 requirement for that grant. And, even in advance of  
20 that, the Port's commitment to applying for the grant  
21 and working with the yacht owners and marina owners  
22 there include that. And I believe that there was also  
23 monitoring associated that the Port has done.

24 Q Have you worked with the Port on any other  
25 matters involving sediment in San Diego Bay?

1 A No, I've not.

2 Q In regard to the NASSCO matter, have you had  
3 interaction with Port representatives on that site or  
4 what we'll call the shipyard site?

5 A In mediation, yes.

6 Q Outside of mediation, have you had dealings  
7 with Port representatives?

8 A No.

9 Q Can you characterize the -- do you have any  
10 knowledge as to whether the Port has been uncooperative  
11 in that matter?

12 A Yes.

13 Q And what knowledge do you have?

14 A As I recall, and as I've been briefed,  
15 beginning in January of 2010 the Port's perspective  
16 seemed to change on that. The Port had the opportunity  
17 in midyear to identify witnesses, to designate witnesses  
18 to support the cleanup order. And the Port allowed that  
19 opportunity to pass.

20 The Regional Board's staff's access to the Port  
21 experts was withdrawn, and the Port's position seemed to  
22 be one of adversarial.

23 Q How did you learn that the Port had withdrawn  
24 its expert witnesses?

25 A I was --

1           Q    If you learned this from your attorney, you  
2    shouldn't repeat it to me. If you learned it from  
3    anybody else, you're free to let me know.

4           MR. CARRIGAN: Or if it's a matter of public  
5    record. For example, documents that may have been filed  
6    or not filed. Go ahead.

7           THE WITNESS: There's a document in the  
8    Administrative Record, a letter dated February, 2010,  
9    from the Port to Timothy Gallaher, withdrawing from the  
10   mediation.

11   BY MR. BROWN:

12           Q    Is that the same as saying that you couldn't  
13    have access to their experts?

14           A    No. But, subsequent to that, access to their  
15    experts was denied the Regional Board.

16           Q    And who denied that access?

17           A    I don't know specifically who on the Port  
18    denied that access. This is what I was informed by the  
19    staff.

20           Q    Okay. Do you recall who at the staff informed  
21    you of that?

22           A    Mr. Barker and Mr. Carlisle.

23           Q    Okay. Do you know if the Port has designated  
24    any experts in this proceeding subsequently?

25           A    I believe that they have. Yes.