

1 JILL A. TRACY (State Bar No. 182136)
2 SAN DIEGO GAS & ELECTRIC COMPANY
3 OFFICE OF THE GENERAL COUNSEL
4 101 Ash Street, 12th Floor
5 San Diego, CA 92101
6 Telephone: (619) 699-5112
7 Facsimile: (619) 696-4488
8 jtracy@semprautilities.com

6 WARD L. BENSHOOF (State Bar No. 054987)
7 PETER A. NYQUIST (State Bar No. 180953)
8 CATHERINE M. WIEMAN (State Bar No. 222384)
9 ALSTON & BIRD LLP
10 333 South Hope Street, Sixteenth Floor
11 Los Angeles, California 90071
12 Telephone: (213) 576-1000
13 Facsimile: (213) 576-1100
14 pete.nyquist@alston.com

11 Attorneys for Designated Party
12 SAN DIEGO GAS & ELECTRIC COMPANY

14 **CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD**
15 **SAN DIEGO REGION**

17 IN THE MATTER OF:
18 TENTATIVE CLEANUP AND
19 ABATEMENT ORDER NO. R9-2011-0001

**SAN DIEGO GAS & ELECTRIC
COMPANY'S REQUEST FOR
RESCINDMENT OF DISCHARGER
DESIGNATION AND COMMENTS ON
TENTATIVE CLEANUP AND
ABATEMENT ORDER NO. R9-2011-0001
AND DRAFT TECHNICAL REPORT**

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

I.	INTRODUCTION	1
II.	LEGAL ARGUMENT	5
	A. Cleanup and Abatement Orders Must be Based on Substantial, Reasonable and Credible Evidence	5
	B. The DTR’s Allegations Against SDG&E Wholly Fail to Meet the “Substantial Evidence” Standard.....	7
	1. Allegations in DTR Sections 9.6 and 9.7 are Entirely Speculative and Not Based on Substantial Evidence	8
	2. Allegations in DTR Section 9.8 are Entirely Speculative and Not Based on Substantial Evidence	11
	3. Allegations in DTR Section 9.9 are Entirely Speculative and Not Based on Substantial Evidence	15
	4. Allegations in DTR Section 9.10 are Entirely Speculative and Not Based on Substantial Evidence	18
	C. Regional Board Staff Failed to Reasonably Weigh and Consider Extensive Evidence of Southwest Marine/BAE System’s Probable Role as Sole Cause of Impacts in the Northern Area of the Shipyard Site.....	26
	1. Extensive Evidence in the Administrative Record Demonstrating the Magnitude of Southwest Marine/BAE’s Impacts, and Role as Sole Cause, Were Entirely Ignored by the Cleanup Team in Designating SDG&E as a “Person Responsible”	27
	2. Regional Board Staff’s Indefensible Failures to Reasonably Investigate Shipyard Impacts Facilitated Improper Acquiescence in BAE Systems’ Self-Serving Demand to Name SDG&E as an Additional Discharger.....	31
III.	CONCLUSION.....	32

TABLE OF AUTHORITIES

Page(s)

CASES

Aetna Cas. & Surety Co. v. Ind. Acc. Com.

(1947) 30 Cal.2d 3889

As You Sow v. Conbraco Industries

(2005) 135 Cal. App. 4th 4319

Bank of America v. State Water Resources Control Board

(1974) 42 Cal.App.3d 1986

Evangelatos v. Superior Court

(1988) 44 Cal.3d 11889

In the Matter of the Petition of Exxon Company, USA, et al.,

WQO No. 85-7 at 12..... 6

In the Matter of the Petition of Stinnes-Western Chemical Corporation,

WQO No. 86-16.....6

Russell v. Superior Court

(1986) 185 Cal. App. 3d 8109

Tapia v. Superior Court

(1991) 53 Cal.3d 2829

TWC Storage, LLC v. State Water Resources Control Board

(2010) 185 Cal.App.4th 2916

United States v. State Water Resources Control Board

(1986) 182 Cal.App.3d 826

STATUTES

California Water Code section 13304.....4, 5, 6

Code Civ. Proc. § 1094.5(c).....6

Title 40 of the Code8

Wat. Code § 13050(l)(1).....7

Wat. Code § 13304(a).....5, 7

Wat. Code § 13330(d).....6

TABLE OF AUTHORITIES

(continued)

Page

Water Code section 133206

OTHER AUTHORITIES

(65 Fed.Reg. 31682-31719)8

“Effects Range Low” (“ERL”)15

“Effects Range Medium” (“ERM”)5

Order No. 85-078

Order Nos. 76-9 and 85-078

OSHA Fact Sheet, “Shipbreaking” (2001)4

SAR 06962532

U.S. EPA 315-BO-00-0014

1 On behalf of San Diego Gas & Electric Company (“SDG&E”), we respectfully submit the
2 following comments in connection with San Diego Shipyard Sediment Site (“Site”) Tentative
3 Cleanup and Abatement Order No. R9-2011-0001 (“TCAO”) and Draft Technical Report (“DTR”),
4 prepared by the California Regional Water Quality Control Board, San Diego Region’s (“Regional
5 Board”) Cleanup Team.

6 **I. INTRODUCTION**

7 Beginning in 1991 – and for the next 14 years – the Regional Board directed BAE¹ and
8 NASSCO² to address sediment contamination directly adjacent to and beneath more than 75 years of
9 active, ongoing shipyard operations at their facilities. These operations included known, substantial,
10 and direct discharges of all contaminants of concern referenced in the DTR (“COCs”) to the Site. In
11 2005, for the first time, the Cleanup Team identified SDG&E as a “Discharger” and person respon-
12 sible, not based upon any newly-discovered evidence implicating SDG&E’s former Silver Gate
13 Power Plant, but instead, based upon the self-serving and unsupported theories of other responsible
14 parties – primarily, BAE. Rather than taking any independent steps to assess the theories of
15 responsible parties who wanted to get “more people on board,” the Cleanup Team simply adopted
16 those theories as its own and incorporated them into the TCAO. In doing so, the Cleanup Team
17 failed to identify any evidence of discharges from SDG&E’s former Silver Gate Power Plant that
18 caused or contributed to a condition of nuisance or pollution at the Site, much less evidence that is
19 credible, reasonable, and substantial.

20 This alone is a sufficient basis to grant SDG&E’s Request for Rescindment. However, the
21 Cleanup Team compounded its own failures in the fact finding process by repeatedly ignoring the
22 obvious. When preparing the TCAO, by its own admissions, the Cleanup Team: (i) failed even to
23

24
25 ¹ “BAE” collectively refers to BAE Systems San Diego Ship Repair, Inc., and its predecessor, Southwest
26 Marine, Inc. (“SWM”). Beginning in or about 1914, entities that have engaged in operations at this leasehold
include: San Diego Marine Construction Company; Campbell Industries, Inc. Star & Crescent Investment
Co.; Southwest Marine, Inc.; and BAE Systems San Diego Ship Repair, Inc.

27 ² “NASSCO” refers to the National Steel and Shipbuilding Company, the present operator of the shipyard
28 located in the southern portion of the Site. Extensive PCB contamination has been found at the NASSCO
shipyard as well as the BAE shipyard (Exponent, 2003) despite the fact that there are no SDG&E facilities
near the NASSCO shipyard.

1 consider mountains of readily available evidence that BAE and predecessor shipyards are primarily,
2 if not exclusively, responsible for sediment contamination in the Northern Area of the Site; and (ii)
3 acted upon material and undisputed factual mistakes. For example, the Cleanup Team never
4 reviewed or accounted for any findings or evidence from a trial against BAE in federal court, which
5 established that the shipyard regularly and systematically engaged in unlawful pollutant discharges
6 into San Diego Bay. Also, for example, the Cleanup Team cited to sampling results in a City of San
7 Diego stormwater catch basin as purported evidence of a discharge from SDG&E's former Silver-
8 gate substation without considering what the most rudimentary investigation would have shown: the
9 substation did not drain to that catch basin. As a final example, when preparing the TCAO, the
10 Cleanup Team did not know that BAE and its shipyard predecessors had subleased from SDG&E a
11 San Diego Unified Port District ("SDUPD") tidelands leasehold parcel of land between SDG&E's
12 former power plant and the Bay and conducted shipyard operations on that parcel directly adjacent
13 to the Bay for the last 58 years – information BAE apparently failed to share with the Cleanup Team
14 while pressing to have SDG&E named as a Discharger. Many more examples are discussed below,
15 but in short, the Cleanup Team's recommendation to name SDG&E as a Discharger and person
16 responsible in the TCAO is an arbitrary and capricious, unreasonable and inappropriate abuse of dis-
17 cretion that should be rejected by the Regional Board.

18 For almost a century, active shipyard operations have been continuously ongoing along tidel-
19 ands property on the eastern waterfront of central San Diego Bay. This includes the roughly 40-acre
20 parcel BAE Shipyard adjacent to, overlying portions of, and fronting SDG&E's former Silver Gate
21 Power Plant facilities and the San Diego Bay. Industrial activities at the BAE Shipyard leasehold
22 have included abrasive/sand blasting, painting, tank and equipment cleaning, mechanical and struc-
23 tural assembly, repair and maintenance, engine and hydraulic repair and installation, tank emptying,
24 fueling, boiler cleaning, and sheet metal fabrication.³ Notably, these activities involved countless
25

26
27 ³ See "Findings of Fact and Conclusions of Law," Natural Resources Defense Council, et al. v. Southwest
28 Marine, Inc., USDC Case No. 96-CV-1492-B, at 3:10-24 (Sept. 7, 1999) ("testing performed by Defendant
revealed that substantial quantities of pollutants – metals and toxics – have entered the Bay in Defendant's
stormwater discharges and because of blasting operations." *Id.* at 9:21-23.).

1 features containing polychlorinated biphenyls ("PCBs"), metals and other COCs in immediate
2 proximity to and, in some instances, over the San Diego Bay, including electrical transformers and
3 infrastructure, winches, cranes, marine railcars, sandblasting and painting equipment, electrical and
4 machine shops (with PCBs in dielectric fluids, cutting oils, hydraulic fluids, and other functional
5 fluids), creosote piers and other in-water infrastructure containing High molecular weight Polycyclic
6 Aromatic Hydrocarbons ("HPAHs"), miscellaneous solid wastes associated with shipbuilding (metal
7 components, caulks, insulation, gaskets, cables, etc.), and ships painted with copper, tributyltin
8 ("TBT," a contaminant used exclusively by the shipyard industry as an anti-fouling agent), and PCB-
9 impregnated paints (resulting in passive leaching of PCBs in water).

10 Not surprisingly, the highest concentrations of these contaminants are found within the same
11 general location at the base of the Pier 1 marine railways, with all COCs strongly co-located with
12 TBT, a COC solely attributed to shipyard discharges.⁴ Massive quantities of chemicals were used by
13 the shipyards and released over the course of multiple decades, resulting in numerous, substantial
14 releases and discharges to the San Diego Bay of each of the COCs referenced in the DTR, including
15 PCBs, TBT and metals. Many of these facts are undisputed, with a prior judicial determination
16 establishing liability under the Clean Water Act against SWM addressing these very issues.
17 Likewise, there has been, and remains, no dispute whatsoever that these shipyard activities and
18 resulting waste discharges directly and adversely impacted San Diego Bay marine sediment and
19 water quality resulting in "Beneficial Use Impairment."

20 PCBs have long been recognized as a major problem within the ship building, repair and
21 demolition industry, and in older marine vessels PCBs are widely encountered in various materials.⁵
22 Likewise, the Sediment Site shipyards extensively utilized equipment containing PCBs (including
23

24 _____
25 ⁴ See "NASSCO and Southwest Marine Detailed Sediment Investigation," Exponent 2003; Deposition of
26 Craig Carlisle ("Carlisle Depo."), Vol. II at 323:2-326:12; Carlisle Depo. Exh. 1261.

27 ⁵ Such materials include "rubber products such as hoses, plastic foam insulation, cables, silver paint,
28 habitability paint, felt under septum plates, plates on top of the hull bottom, and primary paint on hull steel."
OSHA Fact Sheet, "Shipbreaking" (2001). Similarly, "PCBs are found throughout older vessels and it is
likely your ship scrapping facility will be faced with managing large quantities of PCBs." U.S. EPA 315-BO-
00-001, "Guide for Ship Scrappers."

1 equipment containing dielectric fluids), along with a hazardous materials storage area, in immediate
2 proximity to the San Diego Bay shoreline and multiple areas of identified sediment impacts. Con-
3 versely, PCBs were never used in quantities, or in a manner, at the Silver Gate Power Plant facilities
4 likely to result in their release or transport to San Diego Bay, and certainly not in quantities suffi-
5 cient to result in a condition of nuisance or pollution of the Bay. The only identified uses of PCBs
6 by SDG&E were in closed systems (unlike open and partially-open systems such as equipment con-
7 taining hydraulic oils used by shipyards), such as in transformers, capacitors and fluorescent light
8 ballasts typically found in commercial buildings.

9 As detailed herein, the Cleanup Team's recommendation to name SDG&E as a "person
10 responsible" and Discharger under the TCAO is based on wholly unsubstantiated and speculative
11 allegations, and entirely devoid of reasonable, substantial or credible evidence as required under
12 California Water Code section 13304. SDG&E owned and operated the Silver Gate Power Plant
13 adjacent to the north side of the present-day BAE Shipyard beginning in the early 1940s. The
14 SDG&E power plant facility operated continuously through 1974, and intermittently thereafter with
15 minimal operations (and associated cooling water circulation) after 1983. The adjacent substation
16 facility operated until 2005. Decommissioning of the power plant facility began in 1994, with power
17 plant and substation closure and demolition thereafter completed by 2007. The Regional Board
18 generally alleges that SDG&E caused or permitted waste discharges from the Silver Gate Power
19 Plant facilities into San Diego Bay and "created, or threatened to create, a condition of pollution or
20 nuisance." (DTR § 9, at 9-1.) Based on these allegations, which SDG&E denies in their entirety,
21 the Regional Board has designated SDG&E as a "Discharger" in the TCAO. *Id.*

22 There is no evidence that discharges from the Silver Gate Power Plant facilities contributed
23 to the accumulation of pollutants in marine sediments at the Site to levels which create, or threaten to
24 create, conditions of pollution or nuisance.⁶ Consequently, in so naming SDG&E, Regional Board
25 staff has abused its discretion and acted unreasonably, inappropriately and erroneously by: (i)
26

27
28 ⁶ Cf. , §§ 7-8 of TCAO, finding "there is insufficient evidence to find that discharges from [the ARCO and Chevron Terminals] contributed to the accumulation of pollutants in the marine sediments at the Shipyard Sediment Site to levels, which create, or threaten to create, conditions of pollution or nuisance."

1 basing its findings and conclusions in Sections 9 of the TCAO and DTR on pure speculation and
2 conjecture; (ii) failing to engage in any meaningful evaluation of extensive exculpatory evidence
3 submitted by SDG&E; (iii) failing to engage in any meaningful evaluation of the most likely (and
4 readily-identifiable) sources of sediment impacts among the alleged Dischargers, and (iv) relying on
5 biased, unsubstantiated information provided by other responsible parties seeking to implicate
6 SDG&E as an additional Discharger.

7 For the foregoing reasons, and those set forth below, SDG&E requests that the Regional
8 Board rescind its status as a “person responsible” and “Discharger” under the final Cleanup and
9 Abatement Order for the Site.

10 **II. LEGAL ARGUMENT**

11 The Regional Board’s findings of alleged pollutant discharges by SDG&E fall into three
12 basic categories: (1) alleged discharges of pollutants in Silver Gate Plant process water to San Diego
13 Bay in violation of SDG&E’s applicable National Pollutant Discharge Elimination System
14 (“NPDES”) permit requirements; (2) alleged unauthorized discharges of pollutants to land and to
15 Catch Basin-1 (“CB-1,” located immediately to the east of the BAE Systems’ parking lot and Silver
16 Gate Power Plant), which, in turn, impacted San Diego Bay via discharges from the municipal storm
17 drain system into the BAE Systems leasehold at the Site from Storm Drain SW-4, between Piers 3
18 and 4; and (3) alleged unauthorized discharges of pollutants from former wastewater ponds located
19 on the SDG&E tidelands leasehold directly to San Diego Bay.

20 As demonstrated below, none of these findings is supported by evidence sufficient to support
21 the naming of SDG&E as a responsible party under a cleanup and abatement order.

22 **A. Cleanup and Abatement Orders Must be Based on Substantial, Reasonable and** 23 **Credible Evidence**⁷

24 California Water Code section 13304 prescribes the circumstances in which regional boards
25 may issue cleanup and abatement orders, and states in relevant part: “[A]ny person who has
26 discharged...or who has caused or permitted, causes or permits, or threatens to cause or permit any
27

28 _____
⁷ See generally, TCAO § 9 and DTR § 9.

1 waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the
2 state and creates, or threatens to create, a condition of pollution or nuisance may be required to
3 cleanup the discharge and abate the effects thereof. . . .” Cal. Water Code § 13304(a). State Water
4 Resources Control Board (“State Board”) Resolution No. 92-49, which sets forth procedures
5 applicable to cleanup and abatement orders, directs regional boards to use “any relevant evidence” in
6 determining who shall be “held accountable” as a responsible person.

7 While Resolution 92-49 confers discretion to regional boards to rely on broad categories of
8 “relevant” evidence, the State Board has made clear that any decision to name a party responsible
9 under a cleanup and abatement order must be based on substantial evidence, meaning “credible and
10 reasonable evidence which indicates the named party has responsibility.” *In the Matter of the Peti-*
11 *tion of Exxon Company, USA. et al.*, WQO No. 85-7 at 12 (holding liability determination must be
12 “founded upon substantial evidence”) (emphasis added). The State Board reiterated this standard
13 when presented the virtually identical question in *In the Matter of the Petition of Stinnes-Western*
14 *Chemical Corporation*, WQO No. 86-16. Citing its decision in *Exxon*, the State Board concluded
15 that “while we can independently review the Regional Board record, in order to uphold a Regional
16 Board action, we must be able to find that the action was based on substantial evidence. . . .” *Id.* at
17 11. The State Board further clarified the appropriate standard for determining a party’s liability
18 under a cleanup and abatement order issued under Water Code section 13304 as follows:

19 Generally speaking it is appropriate and responsible for a Regional Board to
20 name all parties for which there is reasonable evidence of responsibility, even
21 in cases of disputed responsibility. However there must be a reasonable basis
22 on which to name each party. There must be substantial evidence to support a
23 finding of responsibility for each party named. This means credible and rea-
24 sonable evidence which indicates the named party has responsibility.

25 *Id.* at 12 (emphasis added).

26 Along similar lines, in reviewing any decision by the State Board under Water Code
27 section 13320 (or an improper or inappropriate decision or order of a regional board for which the
28 State Board denies review), courts exercise “independent judgment on the evidence.” Cal. Water

1 Code § 13330(d). In such instances, a court's inquiry will extend to whether there was a prejudicial
2 abuse of discretion, which is established if the court determines that the findings are not supported
3 by the "weight of the evidence." Code Civ. Proc. § 1094.5(c); see *United States v. State Water*
4 *Resources Control Board* (1986) 182 Cal.App.3d 82 (in reviewing State Board's actions court
5 examined record for "reasonable factual basis"); *TWC Storage, LLC v. State Water Resources*
6 *Control Board* (2010) 185 Cal.App.4th 291, 296 (same); *Bank of America v. State Water Resources*
7 *Control Board* (1974) 42 Cal.App.3d 198, 208 (same).

8 Therefore, the Regional Board's decision to designate SDG&E as a responsible party
9 and Discharger under the TCAO must be based on substantial, credible and reasonable evidence.

10 **B. The DTR's Allegations Against SDG&E Wholly Fail to Meet the "Substantial**
11 **Evidence" Standard**⁸

12 Section 9 of the DTR sets forth the Regional Board's findings with respect to SDG&E's
13 alleged liability, and rests on purely speculative assertions and conclusions. Although the DTR
14 includes reference to some data collected at the former substation adjacent to the former Silver Gate
15 Power Plant that indicate limited historic contaminant releases to sub-surface soils (soils beneath
16 approximately 6-12 inches of rock blotter within secondary containment), the Regional Board pro-
17 vides no evidence – or any plausible explanation – causally linking via a transport pathway or oth-
18 erwise any such releases to "an alteration of the quality of the waters of the state by waste to a
19 degree which creates a hazard to the public health . . ." or to sediment impacts in San Diego Bay.
20 Wat. Code § 13050(l)(1) (defining "pollution"). Rather, the Cleanup Team simply, and without any
21 apparent consideration of the evidence, incorporates by reference "information" regarding historical
22 activities at the Silver Gate Power Plant "provided in Sections 9.3, 9.7, 9.8, 9.9 and 9.10" to deter-
23 mine "that SDG&E is responsible for discharging pollutants including metals . . . PCBs, PAHs,
24 TPH-d, and TPH-h to San Diego Bay at the Site as a result of their operations. . . ." ⁹ DTR § 9.5 at 9-

25
26 ⁸ See generally, TCAO § 9 and DTR § 9.

27 ⁹ Note that DTR Section 9.3, entitled "Historical Activities," provides a general overview of the history of
28 operations and certain key features at the Silver Gate Power Plant. Specific allegations in support of
SDG&E's status as a "Discharger" are set forth in Sections 9.7 – 9.10 and are specifically addressed herein in
Sections II.B.1-4.

1 3. However, with the exception of metals regulated under waste discharge permits (discussed, infra,
2 in section II.B.1), which at all relevant times SDG&E fully complied with, there is simply no evi-
3 dence that SDG&E's operations caused or contributed to discharges of the referenced pollutants into
4 "waters of the state." Wat. Code § 13304(a).

5 1. Allegations in DTR Sections 9.6 and 9.7 are Entirely Speculative and Not
6 Based on Reasonable, Credible or Substantial Evidence

7 Sections 9.6 and 9.7 of the DTR generally describe the manner by which process water dis-
8 charges from the Silver Gate Power Plant were historically regulated under National Pollutant Dis-
9 charge Elimination System ("NPDES") requirements. DTR § 9.6 at 9-5; DTR § 9.7 at 9-8. These
10 process water discharges were regulated by Regional Board Order Nos. 76-9 and 85-07 (NPDES No.
11 CA00011376) beginning on May 10, 1976 through April 13, 1995, and included monitoring
12 requirements, numerical waste discharge limitations, and narrative waste discharge limitations. DTR
13 § 9-7 at 9-8.

14 As the Regional Board concedes, at all times "during the permit cycle" SDG&E was in full
15 compliance with permit requirements, including numeric discharge limits for copper, zinc and
16 nickel. Id. The Silver Gate Power Plant was out of service by the time Order No. 85-07 expired on
17 April 13, 1995. More than five years later, on May 18, 2000, the U.S. EPA promulgated the Cali-
18 fornia Toxics Rule.¹⁰ None of the numerical values established in the CTR were included, or
19 enforceable, "in any of the NPDES Permits issued to SDG&E." DTR § 9.7 at 9-9. Nevertheless, the
20 Regional Board states that non-contact cooling water monitoring data collected between 1990 and
21 1994 (a period of very limited operations at the Silver Gate Power Plant) show exceedances of post-
22 permit CTR values for copper, zinc and nickel. DTR Table 9-3 at 9-9 – 9-11. As a result, the
23 Regional Board contends these exceedances "may have" violated "narrative" limits of Order No. 85-
24 07.¹¹ Id., § 9.7 at 9-9. This position, as a matter of law, is simply incorrect. Under well-established
25

26 ¹⁰ The California Toxics Rule ("CTR") was finalized by the U.S. EPA in the Federal Register (65 Fed.Reg.
27 31682-31719(May 18, 2000)), adding Section 131.38 to Title 40 of the Code of Federal Regulations. DTR §
28 9-7 at 9-9 fn. 66.

¹¹ DTR Section 9.7 exemplifies the speculative and conclusory nature of the Regional Board's findings,
stating in relevant part: "By comparing CTR values with historical discharges, the San Diego Water Board is

1 authority, the Regional Board may not use the CTR as a basis to impose retroactive liability against
2 SDG&E for alleged NPDES permit violations.¹²

3 Otherwise, the Regional Board has cited no evidence that non-contact cooling water dis-
4 charges from the Silver Gate Power Plant contributed pollutants that adversely impacted marine
5 sediments. In fact, the patterns of contaminant distribution in sediment in the Pier 1 area do not sup-
6 port a conclusion that SDG&E cooling water discharges were a source of sediment contamination.
7 Although copper was found at detectable concentrations in cooling water discharges, sediment sam-
8 ples in the Silver Gate Power Plant intake and discharge tunnels indicate virtually identical concen-
9 trations, indicates no appreciable accumulation of copper from cooling water; therefore, no contri-
10 bution to a condition of nuisance or pollution to the Site can be shown. (See, e.g., “Summary of
11 Sampling and Analysis of Soil and Cooling Water Tunnels, BAE Subleasehold Area, San Diego
12 Bay,” San Diego, CA – Environ, 2011; “Subsurface Investigation, San Diego Gas & Electric
13 Tidelands Area, Belt Street and San Diego Bay,” San Diego, California – Ninyo & Moore, 2011.)

14 By contrast, trends in concentrations of copper in sediment in this same area clearly indicate
15 that former BAE Pier 1 marine railways were the source of highly elevated concentrations of copper
16 to impacted Shipyard Site sediments.¹³ Additionally, detected concentrations of chemicals of con-

17
18 able to determine which discharges may have contributed to toxic chemical concentrations in marine water,
19 marine life, and sediment at the shipyard sediment site in the past. Also, where there are historical discharges
20 elevated above CTR values, there exists an elevated probability that those same discharges contributed to the
21 present condition of pollution.” DTR § 9.7 at 9-9 (emphasis in original).

22 ¹² A retroactive statute is one that changes the legal effects of past events. *Russell v. Superior Court* (1986)
23 185 Cal. App. 3d 810, 814, *citing Aetna Cas. & Surety Co. v. Ind. Acc. Com.* (1947) 30 Cal.2d 388, 391.
24 “Retroactive laws are generally disfavored because the parties affected have no notice of the new law
25 affecting past conduct.” *Russell, supra*, 185 Cal. App. 3d at 814. Consequently, newly enacted statutes are
26 presumed to apply prospectively only unless a clear intent to the contrary is expressed by the Legislature.
27 *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1207 (“established canon of interpretation that statutes
28 are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative
intent”); *Aetna Cas. & Surety Co. v. Ind. Acc. Com.* (1947) 30 Cal.2d 388, 391; *Tapia v. Superior Court*
(1991) 53 Cal.3d 282, 288-289; *Russell v. Superior Court* (1986) 185 Cal. App. 3d 810, 814; *As You Sow v.*
Conbraco Industries (2005) 135 Cal. App. 4th 431, 459-460. The CTR contains no express retroactivity
provisions, and nothing in its wording suggests an intent for retroactive application. See *Russell, supra*, 185
Cal. App. 3d at 814.

¹³ See, e.g., Exponent, 2003; ENV America, 2004b, 2005. Marine railways are a known source material
containing copper that was directly deposited to Site sediment. For example, Shawn Halifax testified at trial
that SWM used an average of 2,000 tons (4 million pounds) of sandblast grit annually, with the majority of
sandblast grit comprised of copper slag. (*Natural Resources Defense Council, et al. v. Southwest Marine,*

1 cern in the SDG&E cooling water tunnel solids do not indicate process water as a source of chemi-
2 cals to sediment. Average concentrations of total PCB Aroclors and HPAHs in cooling water solids
3 were approximately 20 to 30 times lower than average concentrations measured in San Diego Bay,
4 and average concentrations of mercury and copper in cooling water solids were approximately 2 to 4
5 times lower than the average concentrations measured in San Diego Bay sediment and clearly did
6 not cause or contribute to a condition of nuisance or pollution. (Environ, 2011; Ninyo & Moore,
7 2011).

8 Were cooling water a source of contamination to San Diego Bay sediment, the concentrations
9 in tunnel solids would by necessity be greater than those in sediment since the tunnels would be
10 maximally exposed to undiluted process water. Quite simply, there is no sound technical or eviden-
11 tiary basis to reach or even infer any such conclusion. Furthermore, there is simply no correlation
12 between discharges of copper in cooling water, at extremely low concentrations, and Beneficial Use
13 Impairment due to the presence of elevated concentrations of copper in sediment. As noted in DTR
14 Appendix 15, at A15-1, CTR values are based on toxic effects of planktonic (water column-dwel-
15 ling) organisms exposed to water. CTR values do not ascribe to predict the ability of chemicals in
16 effluents to accumulate in sediments below effluent discharge locations, and they cannot be used to
17 predict the likelihood that chemicals that may accumulate in such sediments impact benthic
18 (sediment-dwelling) animals or result in bioaccumulation of chemicals in fish and other organisms to
19 levels that may harm human or aquatic-dependent wildlife that may consume them.¹⁴ Indeed, during
20 his deposition, with consumption of organisms that are exposed to PCBs originating from sediment.

21
22 Inc., USDC Case No. 96-CV-1492-B, Trial Transcript, Vol. 7, 18:20-20:15 (Nov. 24, 1999).)

23 ¹⁴ For example, the CTR value for copper has no relation to the cleanup levels identified for human
24 health and aquatic dependent wildlife risk (159 mg/kg, DTR Table 32-3) or the Site-specific
25 concentration of copper equated with potential toxic effects to benthic invertebrates (275 mg/kg,
26 DTR Table 32-20). The range of the values (159 to 275 mg/kg) reinforces the fact that the
27 likelihood of a condition of nuisance or pollution must be evaluated on the basis of the receptor or
28 beneficial use to be protected. CTR values are unsuitable for this evaluation because they are
derived to address contamination in effluent and/or surface water. The same argument also applies
to PCBs, as the CTR value for PCBs (0.00017µg/L) represents an upper safe limit protective of
cancer risks associated with consumption of organisms exposed to PCB-contaminated surface water
or effluent. This value has no relationship to the upper limit for the concentration of PCBs in
sediment (194 µg/kg, DTR Table 32-3) protective of Site-specific human health risks associated

1 Craig Carlisle, the Regional Board's designated "person most knowledgeable" on these issues,
2 admitted:

- 3 • that equating toxicity in water based on established CTR values with toxicity in sedi-
4 ment "might be" wrong. (Carlisle Depo., Vol. II (Feb. 11, 2011) at 277:3-20.)
- 5 • there were "several other factors" not considered in the DTR that would require
6 evaluation before the Regional Board could reasonably conclude that concentrations
7 of COCs exceeding CTR values would constitute a condition of pollution or nuisance
8 in Shipyard Site sediments. (Carlisle Depo., Vol. II at 277:3-278:14.)

9 No such other factors were considered in connection with the Regional Board's statements
10 and findings in DTR Section 9.7, which are entirely devoid of substantial, credible and reasonable
11 evidence.

12 2. Allegations in DTR Section 9.8 are Entirely Speculative and Not Based on
13 Reasonable, Credible or Substantial Evidence

14 DTR Section 9.8 addresses allegations by the Regional Board stemming from limited surface
15 samples collected at the Silvergate substation, located to the northeast of the former Silver Gate
16 Power Plant, in connection with closure of three underground storage tanks ("USTs") in 2006. Spe-
17 cifically, the Regional Board cites a 2006 soil investigation report documenting 18 samples collected
18 in the vicinity of the USTs. DTR § 9.8 at 9-11, citing TN & Associates, 2006. The samples, col-
19 lected over an area approximately 440 feet long by 80 feet wide, were taken approximately 0.2 miles
20 from San Diego Bay. The Regional Board notes that 11 of 18 samples revealed PCB concentrations
21 greater than 1,000 µg/kg (an arbitrary value given that the median concentration of PCBs in sedi-
22 ment near SW-4 is 1.5 times this value), with the single highest PCB concentration reported at
23 125,000 µg/kg. DTR § 9.8 at 9-11. PCB detections were limited to sub-surface soil (e.g., top 0.5 to
24 1 feet below ground surface taken beneath approximately six to twelve inches of rock blotter within
25 a secondary containment system).

26 Based on the above data, the Regional Board speculates that stormwater runoff from the for-
27 mer Silvergate substation may have resulted in the migration of PCBs in soils beneath several inches
28 of rock blotter and within a secondary containment system, to a catch basin above a gutter storm

1 drain which discharges to San Diego Bay through a 30-inch pipe that runs along Sampson Street. As
2 detailed in section II.B.3, infra, there is simply no technical or evidentiary foundation for any such
3 fate and transport allegation.¹⁵

4 Furthermore, in a subsequent soil investigation conducted in 2006, over 100 additional soil
5 samples were collected at the substation adjacent to the Silver Gate Power Plant, including in the
6 vicinity of the former USTs, and analyzed for PCBs. (See “Former Silver Gate Substation - Surface
7 Soil Sampling and Removal” – TN & Associates, 2007.) The median sub-surface soil PCB concen-
8 tration was 600 µg/kg. Notably, this is approximately three times lower than the median PCB con-
9 centration in sediments near the SW-4 outfall (1,700 µg/kg), as characterized in the Exponent inves-
10 tigation (Exponent, 2003). Simply put, it is without any evidentiary merit to conclude that PCBs in
11 sub-surface soils in the substation found in concentrations that were many times less than those
12 found in sediments in San Diego Bay would be a source of PCBs.

13 But once again, the Cleanup Team ignored the obvious: the presence of multiple transfor-
14 mers and other electrical infrastructure containing PCB-containing dielectric fluids at the BAE
15 Shipyard (an industry with significant electrical demands¹⁶) in direct proximity to the Bay represent
16 the likely source of PCBs in sediments. For example, a 1990s Sanborn¹⁷ SWM facility map (Booth,
17 et al., 2004 - SAR163351) shows four electrical transformer stations located on piers above water
18 and adjacent to water. Sanborn shipyard facility maps in 1954-1959 (Booth, 2004 - SAR163118,
19 SAR163121, SAR163129) indicate the presence of a shipyard electric transformer approximately 20
20 feet from San Diego Bay and approximately 250 feet from the SW-4 stormwater outfall. PCB
21 information on these transformers is not available, although as late as June of 1997, at least one
22

23 ¹⁵ SDG&E incorporates by reference, as if set forth fully herein, evidence, information and testimony by
24 Regional Board staff as presented section II.B.3 in connection with its denial of the allegations, and each of
25 them, in Section 9.8.

26 ¹⁶ Electrical needs of shipyards include many machining uses, welding, electrical shops, and supplying
27 docked ships with electricity (BAE Systems. 2008. Detailed Description of Operational Processes for
28 Northwest Marine and its Successors at the Portland Harbor Shipyard. November 5.)

¹⁷ Sanborn maps were widely used by the United States fire insurance industry prior to the 1970s to document
the existence of buildings, structures, and other assets. Review of Sanborn maps enable a richly-detailed
historical review of facilities and are widely used in environmental investigations of historical activities that
may give rise to releases of contaminants into the environment.

1 SWM transformer in the Pier 4/SW-4 area was noted as having PCBs present in dielectric fluid (See
2 Halvax, S., 1997. Environmental Projects Update. Email to Lloyd A. Schwartz, Esq.). The pres-
3 ence of PCBs in leaking transformers on piers directly over San Diego Bay represents a direct
4 Shipyard source for the contamination of Site sediments with PCBs in the Pier 4/SW-4 area. This
5 information was, of course, entirely ignored in Section 9 of the DTR, and notably, equally ignored in
6 Sections 3, 5 and 6 of the DTR of the allegations of liability against the present and former BAE
7 Systems shipyard operators at the Site. During his deposition, David Barker acknowledged:

- 8 • additional sampling data collected by SDG&E would be relevant to Regional Board
9 staff in determining whether the soil data referenced in Section 9.8 of the DTR was
10 representative of site conditions, or merely a statistical “outlier.” (Deposition of
11 David Barker (“Barker Depo.”) Vol. IV (March 10, 2011) at 860:15-861:23; Barker
12 Depo. Exh. 1276.)

13 In any event, the substation soil data in no way provides evidence of a discharge to San Diego Bay,
14 and is entirely inconsistent with any allegation that the Silver Gate Power Plant facilities are the
15 source of PCBs detected in sediments near SW-4.

16 In addition, while not expressly referenced in Section 9 of the DTR, and as noted above, at
17 the Silver Gate substation, a sophisticated, multifaceted containment structure existed as a perimeter
18 around transformers and identified locations of PCB releases in sub-surface soil. (SAR193281.).
19 Additionally, all soils were underneath several inches of rock blotter (gravel) and within secondary
20 containment of the original substation infrastructure that would have limited the erosion of soils to
21 stormwater pathways as well as the lateral flow of stormwater runoff across the substation to down-
22 gradient City of San Diego stormwater infrastructure. At deposition, Mr. Carlisle admitted:

- 23 • “it might be useful to know” whether or not releases from the SDG&E facility were
24 contained “at the time the release occurred.” (Carlisle Depo., Vol. II at 351:17-23.)
- 25 • Regional Board staff never evaluated the effectiveness of the Silver Gate substation
26 containment structures, or whether they would have prevented the migration of any
27 contaminant releases in that area of the facility. (Carlisle Depo., Vol. II at 348:16-
28 25.)

1 Since Regional Board staff ignored and did not evaluate the effectiveness of the Silver Gate substa-
2 tion containment structures and other relevant physical considerations of the substation, it is purely
3 speculative to assert that any releases to the soil at the facility “were, or would probably be, dis-
4 charged into San Diego Bay via storm water runoff . . .” DTR § 9.8 at 9-12. The Cleanup Team has
5 proffered no evidence whatsoever to support such a pathway; rather, the existence of a comprehen-
6 sive containment structure at the facility directly refutes this notion.

7 Significantly, even if such a PCB transport pathway could be demonstrated, the available
8 evidence does not support transport of PCBs from substation stormwater runoff to San Diego Bay.
9 The only evidence cited in the DTR in support of a transport pathway from the SDG&E substation to
10 the Bay is the detections of PCBs in CB-1 by the City of San Diego (“City”). No further investiga-
11 tion was conducted by the City, much less Regional Board staff, to demonstrate a transport pathway
12 from the SDG&E substation to CB-1 existed. (Deposition of Lisa Honma, Oct. 5, 2010, at 83:6 –
13 89:17.). What is equally problematic from a transport pathway perspective is the design of CB-1.
14 The design of CB-1 is such that substation runoff would not have flowed through CB-1 en route to
15 San Diego Bay. CB-1 is actually upgradient to the gutter storm drain, which is the only potential
16 transport pathway from the substation to the City stormdrain system. Although Section 9.9 of the
17 DTR presents PCB data from solid samples collected from CB-1, this catch basin is not within the
18 pathway for stormwater runoff from the substation. Any stormwater runoff from the Silver Gate
19 substation would have flowed from the substation to the gutter on the northwest side of Sampson
20 Street, entering the subsurface stormwater infrastructure at a gutter vault that is downgradient of CB-
21 1. Thus, stormwater runoff from the Silver Gate substation could not flow through CB-1. Accord-
22 ingly, any samples collected from CB-1 are irrelevant with regard to characterizing the PCB con-
23 tent of substation stormwater runoff. Moreover, two solid samples collected from the northwest
24 gutter of Sampson Street in 2005 between the substation and upgradient from the gutter stormdrain
25 revealed only trace levels of PCBs (143-214 µg/kg) typical of urban soils (“SDG&E Response to
26 Silver Gate Silver Gate Power Plant Storm Water Discharge NOV No. 5408” – TN & Associates,
27 2006; see also “Development of Advisory Levels for Polychlorinated Biphenyls (PCBs) Cleanup” –
28 USEPA/600/6-86/002, 1986). These gutter samples are the only representative samples within a

1 potential transport pathway from the substation to the gutter storm drain for characterizing the undi-
2 luted, alleged substation stormwater PCB runoff. Therefore, it is completely without evidentiary
3 merit to conclude that this material, even if transported to San Diego Bay, would somehow increase
4 in concentration by an order of magnitude to levels found in sediment at the SW4 outfall (median
5 concentration 1,700 µg/kg, ranging from 560 to 7,500 µg/kg). It is equally improbable that suffi-
6 cient material containing elevated concentrations of PCBs could also be transported from the substa-
7 tion secondary containment to contaminate a 1-acre area of sediment to a depth of three feet or more
8 (Exponent, 2003).

9 The Regional Board's statements and findings in DTR Section 9.8 are not based on substan-
10 tial, credible and reasonable evidence.

11 3. Allegations in DTR Section 9.9 are Entirely Speculative and Not Based on
12 Reasonable, Credible or Substantial Evidence

13 Section 9.9 of the DTR refers to an investigation conducted by the City on October 3, 2005 at
14 Catch Basin-1 ("CB-1"), located immediately to the east of the BAE Systems' parking lot and the
15 Silver Gate Power Plant. DTR § 9.9 at 9-13. During the City's investigation, three sediment sam-
16 ples were collected and analyzed for PCBs and polynuclear aromatic hydrocarbons ("PAHs"). The
17 first sample was allegedly collected from inside and at the base of a six-inch lateral pipe; the second
18 sample was allegedly collected from inside and at the base of a 12-inch lateral pipe; the third sample
19 was allegedly collected from an 18-inch pipe exiting CB-1 and conveying stormwater runoff to San
20 Diego Bay at the Site at SW-4. *Id.* The results of these samples, presented in Table 9-5, indicated
21 the presence of both PCBs and PAHs in levels that exceed the "Effects Range Low" ("ERL") and
22 "Effects Range Medium" ("ERM") of 22.7 µg/kg and 180 µg/kg, respectively, as well as proposed
23 Alternative Sediment Cleanup Levels established by the Regional Board for the Site. *Id.*, 9-15. The
24 City, a named Discharger and plaintiff in City of San Diego v. NASSCO, et al., issued a Notice of
25 Violation ("NOV") to SDG&E. In fact, the City first issued the NOV to BAE, but subsequently
26 withdrew it and reissued it to SDG&E at the direction of BAE Systems (SAR285339).

27 Based on these findings, the Regional Board alleges that sediment PCB and PAH levels
28 reported in Bay sediment near SW-4, as summarized in Tables 9-5 and 9-6, provides "evidence that

1 discharges from the SDG&E facility have contributed to the pollution in the Site.” DTR § 9.9 at 9-
2 16. Once again, the Regional Board’s findings are entirely speculative and conclusory, and fail to
3 refer to any evidence that contaminants detected in CB-1 are the result of releases from the Silver
4 Gate Power Plant substation. Most obviously, in connection with contaminants detected in the
5 City’s stormwater conveyance system, the Regional Board fails to acknowledge a crucial fact: there
6 are multiple potential sources of the PCBs and PAHs detected by the City in CB-1 and MS4, partic-
7 ularly given the multiple direct shipyard stormwater discharges to MS4. Additionally, the fact that
8 the City issued a NOV to SDG&E is of no evidentiary value. The City, of course, had (and main-
9 tains) a strong interest in seeking to shift responsibility for COCs identified in City facilities to
10 another party, rendering the NOV entirely self-serving. Likewise, Regional Board staff has
11 acknowledged that BAE Systems also aggressively lobbied staff to attribute sole responsibility for
12 the CB-1 concerns to SDG&E. Perhaps most importantly, neither the City nor the Regional Board
13 has ever identified a viable pathway for any discharges of PCBs or PAHs from the Silver Gate
14 substation or Power Plant to CB-1, which captured stormwater from the roof of the powerhouse. As
15 mentioned previously, alleged stormwater runoff from the substation did not flow through CB-1.

16 There are countless fatal deficiencies in the Regional Board’s findings in Section 9.9. First
17 and foremost is the fact that staff accepted, without independent evaluation, the veracity of the City’s
18 and BAE Systems’ allegations that SDG&E was the source of contaminants detected by the City at
19 CB-1 in 2005. For example:

- 20 • Lisa Honma, who drafted the text of Section 9.9 and compiled Tables 9-5 and 9-6,
21 testified that no one at the Regional Board ever engaged in any independent verifica-
22 tion of information provided by the City that SDG&E was the source of the contami-
23 nants in CB-1, relying exclusively on reports provided by the City. (Deposition of
24 Lisa Honma, Oct. 5, 2010, at 83:6 – 89:17.)
- 25 • Mr. Barker likewise admitted that the allegations made against SDG&E in DTR Sec-
26 tion 9.9 relied solely on sampling of CB-1 performed by the City in 2005. (Barker
27 Depo., Vol. IV at 756:5-757:5.)
- 28 • Mr. Barker further admitted that Regional Board staff did nothing to independently

1 verify where the contaminants in CB-1 originated from, and that while the Regional
2 Board was given information that lines entering CB-1 drained from the Silver Gate
3 Power Plant, Regional Board staff did no investigation to ever verify this assertion.
4 (Id. at 757:17-23; 761:2-16.)

- 5 • Benjamin Tobler further confirmed that the City's allegations were accepted "at face
6 value" with no independent inquiry. (Tobler Depo., at 57:7-59:10.)
- 7 • Craig Carlisle admitted he was never told that the six-inch line entering CB-1 drained
8 from the Silver Gate Power Plant roof (despite the City of San Diego being provided
9 such information by SDG&E in 2005), and acknowledged "that would have been use-
10 ful information to have," notwithstanding the fact the City was provided such
11 information by SDG&E in 2005. (Carlisle Depo., Vol. II at 309:4-18.)
- 12 • Mr. Carlisle acknowledged that, prior to making the allegations in Section 9.9, it
13 would have been useful for him to know that the source of the 12-inch line had been
14 investigated, and that the assertion that it "drained from the [Silver Gate] facility was
15 untrue." (Id. at 310:22-311:6.)
- 16 • Likewise, Mr. Barker admitted that in assessing the allegations of Section 9.9, he was
17 unaware that the six-inch line drained from the Silver Gate Power Plant roof. He also
18 conceded, that in assessing whether any PCBs could have potentially been on the roof
19 of the Silver Gate Power Plant, it would be important to know whether SWM's
20 abrasive blasting operations could have been the source of any contaminants
21 deposited thereon. (Barker Depo., Vol. IV at 766:12-768:3.)
- 22 • Mr. Barker further admitted that there were approximately 30 different storm drains
23 on BAE Systems' leasehold, and that no one from Regional Board staff ever did a
24 comparison between sediments in CB-1 and sediments in the catch basins or storm-
25 water drains on BAE Systems' property. (Id. at 705:13-706:16.)
- 26 • Likewise, Mr. Carlisle admitted he made no effort to do such a comparison between
27 sediments in CB-1 and sediments in the catch basins or stormwater drains on BAE
28 Systems' property, and agreed it "may" have been important to him. (Carlisle Depo.,

1 Vol. II at 310:13-312:3.)

2 In light of the foregoing, while members of the Cleanup Team appear to have been misled by
3 the City and BAE Systems into concluding that stormwater lines entering CB-1 captured surface
4 runoff from the Silver Gate substation, and that SDG&E was the source of identified PCBs and
5 PAHs detected therein, there is no evidence to support statements to this effect in the DTR. They are
6 simply untrue. Likewise, the conclusions presented in Section 9.9 of the DTR – that contaminants in
7 CB-1 are evidence of PCB discharges by SDG&E to San Diego Bay – have no basis in fact.
8 Attempts by the Regional Board to link contaminants in CB-1 and sampling points in the vicinity of
9 the SW-4 outfall (see Table 9-6) to purported discharges from the Silver Gate Power Plant facilities
10 lack technical or other evidentiary foundation, and are wholly unsubstantiated.

11 In conclusion, Section 9.9 fails to present any evidence whatsoever in support of a conclusion
12 that “discharges from the SDG&E facility have contributed to the pollution” at the Site, which find-
13 ing is not based on substantial, credible and reasonable evidence. DTR § 9.9 at 9-16.

14 4. Allegations in DTR Section 9.10 are Entirely Speculative and Not Based on
15 Reasonable, Credible or Substantial Evidence

16 In Section 9.10 of the DTR, the Regional Board makes reference to two historic wastewater
17 ponds allegedly utilized at the Silver Gate Power Plant until 1974, which, the Regional Board
18 alleges, may have discharged pollutants to the San Diego Bay causing a condition of nuisance or
19 pollution. DTR § 9.10 at 9-16. The ponds, referred to as “Pond A” and “Pond B” were used to settle
20 solids and separate oil and grease from Silver Gate Power Plant bilge water, prior to the installation
21 of systems to treat wastes prior to offsite disposal. As the Regional Board acknowledges, soil sam-
22 ples from Pond A were non-detect for PCBs, metals and volatile organic compounds (“VOCs”). Id.
23 Soil data from Pond B showed detectable concentrations of PCBs, metals and PAHs in concentra-
24 tions significantly below concentrations of each COC found in sediment in the northern portion of
25 the BAE shipyard. Based on these results, the Regional Board asserts that a “comparison of Pond B
26 soil boring results with sediment clean-up levels identifies several constituents at levels that would
27 be a concern, especially if any of this waste stream was discharged to San Diego Bay.” Id. at 9-17.
28 However, a recent, much more comprehensive investigation by the SDUPD (split samples of the

1 SDUPD sampling program as reported in ENVIRON (2011) and Ninyo & Moore (2011)) indicates
2 that the concentrations of PCBs shown in DTR Table 9-7 (as well as other COCs) are not at all
3 representative of the SDG&E leasehold concentrations of COCs and the DTR grossly overestimates
4 the levels of PCBs and other COCs associated with the leasehold soils. For example, the average
5 concentration of PCBs in 185 samples collected from the leasehold in 2011 was 35 µg/kg (ENVI-
6 RON, 2011)¹⁸. The average concentration of the 108 samples analyzed by Ninyo & Moore (2011)
7 was similar (43 µg/kg), reflecting concurrence between the analyses. These average concentrations
8 are approximately 10 to 100 times lower than the two sample values shown in Table 9-7. The
9 maximum concentrations found by Ninyo & Moore (2011) and ENVIRON (2011), found at sample
10 station SB-40 at a depth of 2-3 feet below ground surface, (670-810 µg/kg) was approximately 6
11 times lower than the maximum concentration of total PCBs in tidelands soil noted by CRWQCB
12 (2010) and approximately 50 times lower than the maximum concentration of total PCBs in the Pier
13 1 area sediment of 36,000 ug/kg at SW04 (Exponent, 2003). Thus, when all 299 samples are
14 examined, it is evident that the SDG&E tidelands leasehold did not, and cannot represent a source of
15 PCBs to San Diego Bay, much less a cause or contribution of a condition of pollution or nuisance.
16 Simply put, PCBs are relatively immobile in terrestrial environments such that they tend to remain
17 near the point (source) from which they are released (Silberhorn, E.M. 1995. PCBs. In: *Encyclope-*
18 *dia of Energy Technology and the Environment*. John Wiley & Sons, Inc., New York, NY, USA.).
19 Thus, concentrations of PCBs in soil would decrease with distance from the source along a concen-
20 tration gradient. In order for the Regional Board to reasonably consider the wastewater ponds and/or
21 tidelands leasehold soils as potential sources of PCBs detected in the San Diego Bay, one would see
22 higher, if not the highest, PCB concentrations in or around the former wastewater ponds. It is with-
23 out evidentiary merit to assume that historical features or activities associated with the leasehold
24 could contaminate surface sediment to average concentrations of 1,900 µg/kg (Exponent, 2003)
25 over 50 times the average soil concentrations, when such features or activities could only cause con-
26 centrations of PCBs in underlying soils to reach an average concentration of 35 µg/kg. This analysis
27

28 ¹⁸ Value assumes one-half the detection limit where Aroclors were not detected.

1 also applies when the highest concentrations are considered. It is illogical to assume that features
2 and activities could contaminate soils in the immediate vicinity to a maximum concentration of
3 4,400 µg/kg, yet would also contaminate sediment to concentrations as high as 36,000 µg/kg (Sta-
4 tion SW4, depth 2-4 feet, Exponent (2003)). Additionally, it is difficult to explain how sources on
5 the tidelands area could contaminate an area of sediment (BAE leasehold) to this degree considering
6 that the “inside BAE” area is approximately 20 times the size of the tidelands area exhibiting detect-
7 able concentrations of PCBs in soil. After careful consideration of the record, the allegations by the
8 Regional Board that the mass of PCBs contained within the soils on the tidelands leasehold caused
9 beneficial use impairment in the adjacent sediment is without merit.

10 The Regional Board also erroneously concludes that SDG&E operational history and site
11 assessment data from the former wastewater ponds indicate that either ponds discharged PCBs or
12 other pollutants to San Diego Bay. In this regard, the Cleanup Team relies on a statement by
13 SDG&E’s former consultant in July 14, 2004 that “[s]ome water from the pond was discharged to
14 the Bay.” *Id.* at 9-16, citing ENV America (2004b). While the Regional Board correctly notes that
15 SDG&E operations, at one time, included discharges of bilge water from the powerhouse to these
16 holding ponds, staff has no evidentiary basis to conclude these features impacted San Diego Bay.
17 The referenced statement that “some water from the pond was discharged to the Bay” was entirely
18 misplaced, and in no way based on or supported by any factual information or extensive sampling
19 data.¹⁹ Rather, multiple lines of evidence conclusively indicate that PCBs detected in San Diego
20 Bay sediment (in particular, near Pier 1 and SW4) are associated with decades of shipyard operations
21 at the BAE Shipyard. The 2010 analysis of 299 samples clearly confirms that the former location of
22 the wastewater ponds is not a PCB or other COC source area.

23 In addition to the lack of a concentration gradient between tidelands soils and San Diego Bay
24 sediment, the PCB Aroclor signature found in the tidelands soils is substantially different than that of
25 the adjacent sediment. Pier 1 sediment exhibits a substantially lighter Aroclor signature (e.g., Aroc-
26

27
28 ¹⁹ Thomas J. Mulder of ENV America, Inc., explained the erroneous nature of this prior statement in a June 15, 2005 letter to the Regional Board submitting comments to TCAO R9-2005-0126, which the Cleanup Team ignored.

1 lers 1242 and 1248) that averages approximately 25% of the total PCB Aroclors. Approximately
2 70% of Pier 1 sediment samples exhibit detectable concentrations of the lighter Aroclors. In con-
3 trast, lighter Aroclors were detected in only 1% (two of the 191) of tidelands soil samples, at
4 concentrations ranging from 41 to 170 µg/kg (ENV America, 2004; ENVIRON, 2011). The differ-
5 ence in Aroclor signatures indicates sources other than SDG&E tidelands leasehold soils are respon-
6 sible for increased PCB concentrations found in San Diego Bay Pier 1 area sediments. Additionally,
7 affected soil beneath the former wastewater ponds does not currently pose a threat to the San Diego
8 Bay. The area of the former wastewater ponds is buried beneath pavement, and groundwater sam-
9 ples collected from beneath the wastewater ponds were non-detect for PCBs. (Id.; Ninyo & Moore
10 2011)

11 Concentration trends in sediment data strongly indicate that the primary source of PCBs and
12 other COCs in the Northern Area of the Site (and Exponent study area) was in the immediate vicin-
13 ity of the shipyard marine railways at the landward end of Pier 1. (See Figure 5, ENV America
14 2005.).

- 15 • In addition to the analytical measurements of the highest concentrations of lighter
16 Aroclor PCBs in the BAE Shipyards noted below, empirical observations confirm
17 that the marine railways contained potential PCB-laden wastes such as oils, paint, and
18 sandblasting grit.²⁰ During a 1998 inspection of the marine railways area, the
19 executive director of San Diego Baykeeper, Kenneth Moser noted that “the railway
20 was made up predominantly of coarse black spent sandblasting grit which was
21 flecked with reddish brown paint chips and large flakes of metal” and that he “was
22 struck again by the amount of spent sand blasting grit, paint chips, metal flakes, and
23 oil and grease left in the railways” (Moser, K. 1998. Ken Moser 3-25-98 Inspection
24 at SWM). SWM employee Charles Von Fange (Von Fange, C. 1997. Deposition of
25

26 ²⁰ Ogden. 1998a. Final Report Site Remediation, Marine Railway Removal Project, Southwest Marine
27 Shipyard. December. SAR198846; Anchor. 2005. Site Investigation and Characterization Report For 401
28 Water Quality Certification, BAE Systems, Inc. (Formerly Southwest Marine, Inc.) Bulkhead Extension and
Yard Improvement Phase 2 Activities. Revised August 2005; Anchor. 2006. Construction Completion
Report Bulkhead Extension and Yard Improvement Project, BAE Systems San Diego Ship Repair, Inc.
December 2006.

1 Charles Von Fange. October 7.) also noted that sandblasting operations were poorly
2 contained at SWM and resulted in emission of sandblast wastes. In addition, Von
3 Fange (1997) noted that stormwater that ponded on shipyard property was pumped
4 directly to San Diego Bay (without treatment). This activity would have carried
5 sandblast material (and associated chemicals) and other wastes containing COCs
6 (spills of fluids, fuels, etc.) to San Diego Bay.

- 7 • Because PCBs were used in marine paints at concentrations as high as 30%²¹, and
8 hydraulic oils in marine railways, the erosion and resuspension of PCB-oil saturated
9 materials, sandblast and paint material represented a continuous source of PCBs to
10 the Site until remediation in 2006 (Anchor, 2005. Anchor. 2006).
- 11 • During BAE's partial removal of contaminated soils and sediments within the marine
12 railways in 1998, Ogden (Ogden. 1998a.) noted the presence of oils and hydrocarbon
13 sheens that were likely due to a variety of fluids discharged in the marine railways.
14 Fluids used in the marine railways would include lubricants and heat transfer fluids
15 used as hydraulic, machine, and cutting oils associated with the wide variety of
16 machinery or those associated with winches used to haul ships up the railways (as
17 noted in facility maps in Booth (2004), SAR163118, SAR163121, and SAR163129).
18 Pease (Pease, S. 1998. Deposition testimony, NRDC vs. SWM.) stated that
19 machinery in the marine railways contained hydraulic fluid, and that these
20 represented potential discharge points to San Diego Bay. Concentrations of PCBs in
21 these types of fluids were often found in the percentage levels, ranging from 5 to 10%
22 as estimated by OECD (OECD. 1973. Polychlorinated Biphenyls, Their Use and
23 Control), although industry documents for Monsanto's "Pydraul" functional fluids
24

25
26 ²¹ Jensen, S. 1972. *The PCB Story*. *Ambio* 1:123-131.; Young, D.R., Heesen, T.C., McDermott, D.J.,
27 Smokler, P.E. 1974. *Marine Inputs of Polychlorinated Biphenyls and Copper from Vessel Antifouling Paints*.
28 Southern California Water Research Project (SCWRP-TM212-74).; Larcom, B.J., Cline, J.M., Merrill, E.A.,
Jederberg, W.W. 1996. *Risk Assessment of Polychlorinated Biphenyls (Pcbs) On-Board Navy Ships*. US Air
Force AL/OE-TR-1996-0153.; USEPA. 1999. Use Authorization for, and Distribution in Commerce of, Non-
liquid Polychlorinated Biphenyls; Notice of Availability; Partial Reopening of Comment Period; Proposed.
Rule 40 CFR Part 761.)

1 contained as much as 50% PCBs. Aroclors used in functional fluids included lighter
2 Aroclors such as Aroclor 1242 and 1248, but also Aroclor 1254 and 1260²².

- 3 • Shipbuilding and repair activities in marine railways were also a direct source of
4 PCBs. Regulatory agencies have long recognized PCBs are ubiquitous in ships and
5 have been found at high concentrations (to percentage levels) in ship materials,
6 including insulation, plastics, small foam rubber and rubber parts, adhesive tape,
7 insulating materials, gaskets used in heating, ventilation and air conditioning (HVAC)
8 and other duct systems, caulking and grout, felt and cork, adhesives and tapes, elec-
9 tronic equipment, voltage regulators, switches, reclosers, bushings, electromagnets,
10 caulking, waterproofing compounds, plastics, antifouling compounds, and fire
11 retardant coatings²³ PCB-contaminated gaskets, materials generated during
12 shipyard activities, were noted as being handled by BAE in 1998 (SWM. 1998. Uni-
13 form Hazardous Waste Manifest, Waste PCB Gaskets. November 24). Releases of
14 ship solid materials containing PCBs occurring as a result of direct disposal of ship
15 wastes during shipyard ship maintenance and shipbuilding, stormwater runoff of solid
16 wastes from shipyard ship maintenance and ship building, and ship discharges of
17 bilge water and solid wastes that occurred in or directly adjacent to the Pier 1 marine
18 railways for approximately 100 years is the only proper conclusion after a careful
19 consideration of the evidence. It is not merely a foregone conclusion.
- 20 • Most importantly, analytical measurements of PCBs in soils by BAE after top layers
21 of the Pier 1 marine railways area were removed documented the presence of PCBs to
22 concentrations as high as 155,400 µg/kg (Ogden, 1998a), the highest concentration of
23

24
25 ²² Erickson, M.D. 1997. *Analytical Chemistry of PCBs*. Lewis Publishers, Boca Raton, FL, USA.; Johnson,
26 G.W., Chiarenzelli, J., Quensen, J.F., III, Hamilton, M.C. 2006. Chapter 10: Polychlorinated Biphenyls. In:
27 *Environmental Forensics: A Contaminant Specific Guide* (R. Morrison and B. Murphy, eds.). Elsevier.
28 Amsterdam. pp. 187-225.)

²³ Larcom et al., 1996; USEPA, 1999; George, R.D., In, C.R., Johnston, R.K., Seligman, P.F., Gauthier, R.D.,
Wild, W.J. 2005. *Seawater Leaching Investigation of Polychlorinated Biphenyls from Solid Matrices*.
OCEANS, 2005, Proceedings of MTS/IEEE, 1492- 1500, Vol. 2.; USEPA. 2006. *National Guidance: Best
Management Practices for Preparing Vessels Intended to Create Artificial Reefs: Polychlorinated Biphenyls
(PCBs)*. EPA 842-B-06-002.).

1 PCBs found in sediments or soils at the Site. Additionally, these samples indicated
2 the presence of Aroclor 1248, a lighter Aroclor that is consistent with marine paint
3 and oil/fluid uses. For example, 55% of the sample from this area indicating a con-
4 centration of 155,400 µg/kg was comprised of Aroclor 1248. More recent monitoring
5 by Anchor (Anchor, 2005; Anchor, 2006) confirmed Aroclor 1248 presence in
6 groundwater and sediment porewater (concentrations as high as 2.7 µg/L), reflecting
7 the flux of PCBs from the marine railways to San Diego Bay at Pier 1. Sediment data
8 also indicate the marine railways as a dominant source of PCBs to Site sediment in
9 the northern portion of the BAE Shipyard. The two highest concentrations of PCBs
10 in sediment noted by Exponent (2003) are located in the subtidal area of the BAE Pier
11 1 marine railways (36,000 µg/kg at SW04 and 34,000 µg/kg at SW08). Both samples
12 bear a strong Aroclor 1248 signature (44% of total Aroclors), corresponding to the
13 Aroclor 1248 signature in the source soils located within the marine railways (Ogden,
14 1998a; Anchor, 2005; Anchor 2006). This evidence strongly supports the BAE Pier 1
15 marine railways, not the SDG&E tidelands soils or former ponds, as the source of
16 elevated PCBs in Site sediments.

17 In addition, engineering drawings, lease records, and aerial photographs show extensive
18 shipyard maintenance, retrofitting, sandblasting and other activity in the vicinity of the wastewater
19 ponds as early as 1958. Corresponding to the preparation of the area for shipyards use and the rede-
20 sign of the SDG&E oil-water separator in 1956, photos repeatedly identify the absence of an
21 observable potential transport pathway from the wastewater ponds to the San Diego Bay after 1956.
22 Notably, multiple shipyard operators, including San Diego Marine Construction Company, San
23 Diego Marine Construction Corporation, and BAE, subleased the SDG&E parcel from the 1950s up
24 to and including the present where the former wastewater ponds were located many decades ago. By
25 the late 1960's and early 1970's, aerial photos indicate shipyard operations encompassed the area of
26 Pond B, as well as all areas with the highest concentrations of PCBs in soil (Ninyo & Moore, 2011;
27 ENVIRON, 2011). The BAE Shipyard, where multiple shipyard operators operated for almost 100
28 years, is the source of contamination at and around Pier 1, including PCB sediment impacts. In this

1 regard, in deposition testimony by Cleanup Team members:

- 2 • Messrs. Barker and Carlisle each admitted that, in preparing the allegations in Section
3 9.10 against SDG&E, they were unaware that SWM had subleased property adjacent
4 to the wastewater ponds for its operations. (Barker Depo., Vol. IV at 715:6-719:12;
5 Carlisle Depo., Vol. II at 335:8-336:23.)
- 6 • Mr. Barker also was unaware of a series of aerial photographs depicting shipyard
7 operations, which Mr. Barker agreed showed suspicious features that might be incon-
8 sistent with the allegations against SDG&E and warranted further investigation.
9 (Barker Depo., Vol. IV at 715:6-742:9; Barker Depo. Exhs. 1249-1257.)
- 10 • Mr. Barker admitted that the allegations in DTR Section 9-10 are based exclusively
11 on the soil sampling data reflected in DTR Table 9-7, and the Regional Board
12 assumed that contaminants reflected therein originated from SDG&E's wastewater
13 ponds. (Barker Depo., Vol. IV at 707:11-709:14; 711:22-715:4.)
- 14 • Mr. Carlisle likewise admitted that DTR Table 9-7 attributes the listed soil contami-
15 nants to former operations of SDG&E, and that he was unaware of SWM's operations
16 on the parcel where the wastewater ponds were located. (Carlisle Depo., Vol. II at
17 334:1-336:23.)
- 18 • Mr. Barker agreed the lack of PCBs in borings surrounding the wastewater ponds, as
19 reflected by the 2011 Environ Report (Barker Exhs. 1272-1273), is something the
20 Regional Board would want to consider in re-evaluating the allegations of DTR Sec-
21 tion 9.10. (Barker Depo., Vol. IV at 843:11-846:13; Barker Exhs. 1272-1273.)
- 22 • Mr. Barker testified he would also want to consider that one of the higher PCB results
23 reflected in the 2011 Environ Report was in the vicinity of a ship shown in a 1958
24 aerial photograph. (Id. at 847:1-849:21.)
- 25 • Mr. Carlisle admitted that he never asked any member of Regional Board staff to
26 investigate the extent to which the area, in which soil samples listed in Table 9-7 were
27 collected, was in fact utilized by SWM after 1953 or 1954. (Carlisle Depo., Vol. II at
28 336:19-23.)

- 1 • Mr. Barker testified that having been made aware of SWM's use of the SDG&E
2 leasehold area where the former wastewater ponds were located, he would want to
3 investigate SWM operations on the parcel to determine whether they are responsible
4 for the findings described in Section 9.10 of the DTR. (Barker Depo., Vol. IV at
5 849:13-21.)

6 The Regional Board's statements and findings in DTR Section 9.10 are in no way based on
7 substantial, credible and reasonable evidence.

8 **C. Regional Board Staff Failed to Reasonably Weigh and Consider Extensive**
9 **Evidence of BAE's Role as The Cause of COC Impacts in the Northern Area of**
10 **the Shipyard Site**²⁴

11 As noted above, for almost a century, active shipyard operations have been continuously
12 ongoing on and in the vicinity of the BAE Shipyard, which fronts SDG&E's former Silver Gate
13 Power Plant facilities and immediately adjacent to, and within, waters of the San Diego Bay. Since
14 the inception of the Regional Board's Site investigation there has never been, and remains, no dis-
15 pute whatsoever that shipyard activities were a major pollutant source that directly and adversely
16 impacted San Diego Bay marine sediment and water quality. Evidence in support of this conclusion
17 is overwhelmingly conclusive.

18 Despite the fact – as reflected in extensive technical and facility information produced to the
19 Regional Board by SDG&E showing – that PCBs were never used in open systems in any apprecia-
20 ble quantities at the Silver Gate Power Plant facilities, the Regional Board has embarked on a tor-
21 tured effort to implicate SDG&E as a significant contributor to a condition of nuisance or trespass in
22 sediment at the San Diego Bay. In doing so, Regional Board staff has failed to meaningfully con-
23 sider the magnitude of impacts from shipyard operations, or to adequately address the threshold
24 question of whether shipyard operations are responsible for the entirety of impacts observed in the
25 Northern Area of the Site, and not SDG&E.

26
27
28

²⁴ See generally, TCAO § 9 and DTR § 9.

1 operations, he conceded he never asked any Regional Board staff member to review
2 the reports to determine whether and to what degree the presence of these waste
3 materials would indicate SWM as the sole source of PCBs and other metals
4 contamination at the Shipyard Site. (Id. at 660:8-19.)

- 5 • Regional Board staff did not review these reports in considering the source of PCBs
6 near the SW-4 outfall, despite the fact that the Regional Board assigned great weight
7 on the presence of PCBs from one sampling event by the City of San Diego in that
8 area in naming SDG&E as a responsible party. (Id. 626:7-628:10.)

9 In addition, Regional Board staff ignored sediment investigations, conducted by Ogden for
10 BAE (1998a & 1998b), in San Diego Bay between Piers 1 through 4 at the BAE Shipyard (see, e.g.,
11 Barker Depo. Exhs. 1243, 1247, and 1261) which reported:

- 12 • multiple PCB detections, including a maximum concentration of 155,400 µg/kg – the
13 highest concentration anywhere at the Site, which Mr. Barker conceded would have
14 been “relevant” to the investigation of likely sources and responsible parties. (Barker
15 Depo., Vol. III at 632:24-633:8; 640:13-641:2.)
- 16 • frequent detections of metals, including copper – data which Mr. Barker agreed that
17 he would want to review in order to assess the extent of SWM’s impacts to the San
18 Diego Bay. (Id. at 669:1-670:23.)
- 19 • observations of oily impacts to sediments that Mr. Barker agreed would be relevant to
20 assessing shipyard impacts. (Id. at 642:19-644:7.)
- 21 • observations of creosote-soaked debris that Barker agreed would be relevant to deter-
22 mining the source of PAH impacts to the sediment. (Id. at 648:1-650:24.)
- 23 • data establishing the co-occurrence or co-location of contaminant impacts that the
24 shipyards are known to be the sole source of – such as tributyltin (“TBT”) – with
25 other COCs. (Depo. of Carlisle, Vol. II at 323:2-326:12; Carlisle Depo. Exh. 1261).

26 Mr. Carlisle agreed Regional Board staff had never assessed this data, and recognized this is a useful
27 technique for determining the likely sources of contamination. (Id.) Mr. Barker agreed this data was
28 not considered in drafting the allegations in DTR Section 9 against SDG&E. (Barker Depo., Vol. IV

1 at 779:19-784:1.)

2 Regional Board staff also failed to consider the contaminating effects of fugitive dust from
3 sand and abrasive blasting operations at the BAE Shipyard to adjacent areas, such as the Bay and the
4 Silver Gate Power Plant. Staff did so despite the fact the Shipyard administrative record, as supple-
5 mented over many years, contains evidence of sand blasting activities "causing a nuisance" beyond
6 the boundaries of shipyard property to areas as far away as the Chevron terminal. (Barker Depo.,
7 Vol. III at 659:23-676:24; Barker Depo. Exh. 1246.) Regional Board staff likewise failed to review
8 any of the numerous available historic Sanborn Maps which illustrate BAE Shipyard facilities
9 located directly over San Diego Bay, which Mr. Barker agreed were likely sources of COC
10 discharges to sediment. (Barker Depo., Vol. IV at 793:14-799:21; Barker Depo. Exhs. 1263-1267.)

11 Such maps (see, e.g., Barker Depo. Exh. 1268) showed facilities such as transformers located
12 directly adjacent to, and over, the San Diego Bay. Mr. Barker admitted this information was not
13 considered in drafting Section 9 of the DTR. (Barker Depo., Vol. IV at 799:23-802:13.) Nor did
14 Regional Board staff consider a 1993 Bechtel report on the BAE Shpyard, prepared at the request of
15 the U.S. EPA, which illustrates a variety of facilities of concern that Mr. Barker agreed the Regional
16 Board would wish to consider in relation to allegations in DTR Section 9 against SDG&E. (Id. at
17 802:14-805:23; Barker Depo. Exh. 1269.)

18 In this regard, and as noted above, Regional Board staff never engaged in or requested an
19 investigation of the storm drains on the BAE Shipyard that directly discharged to SW4, and whether
20 pollutants in or from said facilities might be the source of impacts to sediments in the vicinity of out-
21 fall SW-4. (Barker Depo., Vol. IV at 699:8-702:8.) Mr. Barker also admitted that, in determining
22 the source of contamination near SW-4, a relevant consideration would be whether BAE had
23 historically maintained a hazardous materials storage area immediately adjacent to SW-4. (Id. at
24 701:4-22.) In fact, a hazardous materials storage area was located in that area. (See Barker Depo.
25 Exh. 1248.)

26 Regional Board staff likewise failed to account for the numerous shipyard activities that dis-
27 rupt Site sediments, including propeller wash (prop wash) from shipyard vessels, maintenance
28 dredging and pier construction activities. For example, numerous construction and dredging main-

1 tenance projects (e.g., Southwest Marine. 1992. Southwest Marine Pier One Dredging Project
2 Water Quality Monitoring Report, SAR 165446; Anchor, 2005, Anchor 2006; Ogden 1998a) that
3 have occurred at Pier 1 have resulted in the lateral dispersion of chemicals at the Site to adjacent
4 areas, including the vicinity of the SDG&E cooling water outfall. During his deposition, Craig
5 Carlisle acknowledged:

- 6 • dredging activities would affect fate and transport of materials (Depo. of Carlisle,
7 Vol. 2 at 356:9-20; Exh. 1261)
- 8 • factors such as shipyard prop wash have disturbed sediments near the SDG&E cool-
9 ing water outfall Depo. of Carlisle, Vol. 2 at 355:8-356:7; Exh. 1261)

10 Intensive shipyard disturbance activity in the Pier 1 vicinity, including the Pier 1 marine railways, is
11 a major fate mechanism for the dispersion of the most PCB-contaminated sediments present at the
12 Pier 1 marine railways (e.g., 36,000 µg/kg at SW04 (Exponent, 2003)) to other areas of the Site.
13 Additionally, such activity, especially propeller wash, vertically mixes sediment layers²⁷ such that
14 prevents natural recovery processes from isolating chemical contamination. The Regional Board
15 has not accounted for this additional factor regarding shipyard liability for chemicals in surface
16 sediments, which pose the most potential for Beneficial Use Impairment.

17 Finally, the Cleanup Team acknowledged the Regional Board staff never reviewed or
18 accounted for any findings or evidence from the preliminary proceedings and trial in *Natural*
19 *Resources Defense Council, et al. v. Southwest Marine, Inc.*, United States District Court Case No.
20 96-CV-1492-B. (Barker Depo., Vol. IV at 823:7-825:9; Barker Depo. Exhs. 112-113.) In this
21 action, NRDC prevailed in a citizen's suit against SWM under the Clean Water Act, on the grounds
22 that SWM had regularly and systemically engaged in unlawful pollutant discharges to San Diego
23 Bay. Over the course of many years, SDG&E communicated to Cleanup Team members regarding
24 the abundance of relevant information to be discerned from this proceeding. As Mr. Barker
25 acknowledged, the Regional Board never sought to engage in interviews of any persons with
26 knowledge or witnesses to SWM's activities that caused extensive pollutant discharges to San Diego

27
28 ²⁷ Blake, A.C., Chadwick, D.B., White, P.J., Jones, C.A. 2007. User's Guide for Assessing Sediment
Transport at Navy Facilities. Technical Report 1960. September.

1 Bay. (Barker Depo., Vol IV at 823:7-16.)

2 2. Regional Board Staff's Indefensible Failures to Reasonably Investigate
3 Shipyards Impacts Facilitated Improper Acquiescence in BAE's Self-Serving
4 Demand to Name SDG&E as an Additional Discharger²⁸

5 As explained above, Regional Board staff long ago determined that shipyard operators are
6 major sources of all COCs identified at the Site. (Barker Depo., Vol. III 573:21-574:4; 576:2-577:3;
7 591:14-20; 600:21-602:20; 603:6-11; 607:2-608:5; see also Carlisle Depo., Vol. II at 323:2-326:12.)
8 Beginning in or about 1994, and continuing for many years, the Regional Board focused its investi-
9 gation of pollutant sources and impacts at the Site investigation exclusively on major shipyard oper-
10 ators. Indeed, at the time the Regional Board commenced formal administrative proceedings in this
11 matter, the only parties initially considered for designation as "Dischargers" were NASSCO and
12 SWM/BAE Systems. As the nature and extent of sediment impacts and potential remedy became
13 clearer, this circumstance dramatically changed. As acknowledged by staff in deposition testimony,
14 BAE, in particular, applied enormous pressure on the Regional Board to name additional
15 dischargers, including SDG&E. For example, a survey of the administrative record shows at least
16 658 separate written communications between SWM and Regional Board staff during the
17 development of the DTR, between 1996 to 2005. (Barker Depo., Vol. IV at 577:24-581:19; Barker
18 Depo. Exh. 1240.) Many of these communications specifically reference the naming of SDG&E as a
19 Discharger, and reflect direct pressure being applied upon staff. (See, e.g. Barker Depo. Exh. 1241
20 (SAR 069625); Barker Depo., Vol. IV at 581:20-589-12.)

21 Perhaps the most illustrative example of the force and effect of this pressure was recounted
22 through the testimony of Mr. Tobler. At deposition, Mr. Tobler recounted that when he joined the
23 Cleanup Team he asked Mr. Carlisle why SDG&E had been named a Discharger. He went on to
24 explain that Mr. Carlisle responded that SDG&E was named as a responsible party because the
25 shipyards wanted "more people on board."²⁹ (Tobler Depo. at 129:9-14.) Consequently, despite
26

27
28 ²⁸ See generally, TCAO § 9 and DTR § 9.

²⁹ At his subsequent deposition, Mr. Carlisle claimed he could not recall this comment, but did not deny making a statement to this effect. (Carlisle Depo., Vol. II at 215:17-216:17.)

1 overwhelming and conclusive evidence that shipyard activities – in particular, at the BAE Shipyard
2 – were the source of decades of pollutant discharges to the Northern Area of the Shipyard Site and
3 resulting impacts to Bay sediments, the Regional Board eventually acquiesced and named SDG&E
4 in the TCAO.

5 This decision, in the absence of any independent, reasonable evidentiary basis for naming
6 SDG&E as a responsible party, can be construed as arbitrary and capricious and, by any measure,
7 was unreasonable and inappropriate.

8 **III. CONCLUSION**

9 Following years of investigations, along with an enormous array of technical, legal, financial
10 and political considerations associated with the San Diego Shipyard Sediment Site (“Site”), a simple
11 yet inescapable conclusion emerges: SDG&E should never have been, and cannot justifiably be,
12 named as a “Discharger” under the TCAO. Accordingly, SDG&E seeks rescission of its status as
13 both a “person responsible” and Discharger under the final Cleanup and Abatement Order for this
14 Site.

15 The Cleanup Team’s recommendation to name SDG&E as a “person responsible” and “Dis-
16 charger” under the TCAO is based on unsubstantiated, purely speculative allegations. In preparing
17 the allegations set forth Section 9 of the DTR and TCAO, respectively, Regional Board staff failed
18 to base its findings on the requisite level of substantial, reasonable or credible evidence that dis-
19 charges from the Silver Gate Power Plant facilities contributed in any way to the accumulation of
20 pollutants in marine sediments at the Site to levels which create, or threaten to create, conditions of
21 pollution or nuisance. In doing so, Regional Board staff abused its discretion and acted
22 unreasonably, inappropriately and erroneously by: (i) basing its findings and conclusions in Section
23 9 of the TCAO and DTR on pure speculation and conjecture; (ii) failing to engage in any meaningful
24 evaluation of extensive exculpatory evidence submitted by SDG&E; (iii) failing to engage in any
25 meaningful evaluation of the most likely (and readily-identifiable) sources of sediment impacts
26 among the alleged Dischargers, and (iv) relying on biased, unsubstantiated information provided by
27 other responsible parties seeking to implicate SDG&E as an additional Discharger.

1 For the reasons set forth herein, SDG&E therefore requests that the Regional Board rescind
2 its designation as a "person responsible" and "Discharger" under the final Cleanup and Abatement
3 Order for the San Diego Shipyard Sediment Site.

4
5 Respectfully submitted,

6 DATED: May 26, 2011

OFFICE OF THE GENERAL COUNSEL

7
8 By: 

Jill A. Tracy

9 Attorneys for Designated Party
10 SAN DIEGO GAS & ELECTRIC COMPANY
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28