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13
14 CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
15
16 SAN DIEGO REGION

17 In re Tentative Cleanup and Abatement Order) SAN DIEGO UNIFIED PORT DISTRICT'S
No. R9-2011-0001 (formerly No. R9-2010-) OPPOSITION TO MOTIONS SUBMITTED
18 0002) (Shipyard Sediment Site)) BY BAE SAN DIEGO SYSTEMS SHIP
19) REPAIR, INC./SOUTHWEST MARINE,
20) INC., SAN DIEGO GAS & ELECTRIC
21) COMPANY, AND NATIONAL STEEL AND
22) SHIPBUILDING COMPANY TO EXCLUDE
23) SAN DIEGO UNIFIED PORT DISTRICT'S
24) EXPERT DECLARATIONS

25)
26)
27)
28)
Presiding Officer: Grant Destache

1 The San Diego Unified Port District (“Port District”) submits the following response to
2 BAE Systems San Diego Ship Repair, Inc.’s (“BAE”), San Diego Gas & Electric Company’s
3 (“SDG&E”) and National Steel and Shipbuilding Company’s¹ (“NASSCO”); and collectively
4 with BAE and SDG&E, the “Dischargers”) motions to exclude the San Diego Unified Port
5 District’s expert declarations that were submitted as part of the Port District’s May 26, 2011
6 Submission of Comments, Evidence and Legal Argument (“Port Brief”) in the matter of
7 Tentative Cleanup and Abatement Order No. R9-2011-0001 (“Administrative Proceeding”). The
8 Port District timely designated its expert witnesses, and has otherwise fully complied with all of
9 the discovery rules governing this Administrative Proceeding. For this reason, and those set
10 forth in detail below, the Port Experts’ testimony, submitted as declarations attached to the Port
11 District Brief, should not be excluded.

12 **I. INTRODUCTION AND FACTUAL BACKGROUND**

13 The California Regional Water Quality Control Board – San Diego Region (“Water
14 Board”) released the latest Tentative Cleanup and Abatement Order (“TCAO”) and related Draft
15 Technical Report (“DTR”) on September 15, 2010. The Water Board subsequently issued an
16 order reopening discovery in these proceedings on October 27, 2010 (“Discovery Order”), which
17 incorporated a prior Discovery Plan, dated February 18, 2010 (“Discovery Plan”). The
18 Discovery Order provided that the Port District was to designate its expert and non-expert
19 witnesses on January 18, 2011. On January 18, 2011, the Port District timely submitted its
20 Designation of Expert and Non-Expert witnesses, identifying Dr. Michael Johns, Dr. Ying Poon
21 and Robert Collacott (collectively, the “Port Experts”) as its expert witnesses (See Exhibit 1).

22 The Discovery Order further provided that March 11, 2011 was to be both the discovery
23 cutoff date, and the last date to submit expert reports. The Dischargers had the opportunity
24 during the two month period between January 18, 2011, when the Port District timely designated
25 its experts, and the discovery cutoff date to depose the Port Experts. None of the Dischargers
26 elected to do so. The Dischargers now argue that the Code of Civil Procedure (“CCP”) dictates
27 that the Port Experts’ testimony be excluded. The Dischargers incorrectly interpret the

28 ¹ NASSCO submitted a Joinder in Support of BAE’s and SDG&E’s motions to exclude the Port’s expert
declarations.

1 applicable provisions of the CCP. The Port Experts' testimony, submitted as part of the Port
2 District Brief, should not be excluded under the CCP. More importantly, the Dischargers
3 incorrectly assume that the Water Board is bound to strictly adhere to the CCP. Rather, the
4 Water Board is expressly bound to admit all relevant evidence, including the Port Experts'
5 declarations.

6 **II. LEGAL STANDARD**

7
8 **A. RESOLUTION 79-42 AND CALIFORNIA GOVERNMENT CODE SECTION 11513**

9
10 State Water Resources Control Board Resolution 79-42 provides, in pertinent part:

11 "It is the policy of the State Board that when a Regional Board hearing is held, all
12 relevant, non-duplicative evidence be considered by the Regional Board in the
13 first instance." (See Exhibit 2.)

14 Consistent with this policy, California Code of Regulations section 648(b) dictates that
15 California Government Code section 11513 governs this Administrative Proceeding. Section
16 11513(c) states:

17 The hearing need not be conducted according to technical rules relating to
18 evidence and witnesses, except as hereinafter provided. *Any relevant evidence*
19 *shall be admitted* if it is the sort of evidence on which responsible persons are
20 accustomed to rely in the conduct of serious affairs, regardless of the existence of
21 any common law or statutory rule which might make improper the admission of
22 the evidence over objection in civil actions. (Emphasis added.)

23 By its plain language, California Government Code section 11513(c) *requires* the Water Board
24 to consider all relevant evidence.

25 While the CCP *generally* governs certain discovery issues in the Administrative
26 Proceeding², the application of the CCP is not mandated. Discovery issues in administrative

27
28 ² The Discovery Plan provides that the "Procedures for written discovery and expert witness disclosures shall
generally be governed by applicable Code of Civil Procedure ("CCP") sections." (See Discovery Plan, at p. 3;
emphasis added.)

1 hearings are governed by statute³ and the agency's discretion. (*See Cimarusti v. Superior Court*
2 (2000) 79 Cal. App. 4th 799, 808-809; citing *Mohilef v. Janovici* (1996) 51 Cal. App. 4th 267,
3 302, "Generally, there is no due process right to prehearing discovery in administrative hearing
4 cases, and particularly no constitutional right to take depositions. The scope of discovery in
5 administrative hearings is governed by statute and the agency's discretion.") Adjudicative
6 proceedings conducted by the Water Board must be in accordance with California Government
7 Code section 11513, which governs these proceedings with respect to the admissibility of
8 evidence. Section 11513 supersedes any general application of the CCP with respect to
9 discovery and evidentiary issues in this Administrative Proceeding.

10 **B. CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 2034.270 AND**
11 **DISCOVERY PLAN**

12 Even if the Water Board was required to strictly adhere to the CCP in resolving this issue,
13 the CCP makes the production of an expert report discretionary in the absence of a written
14 demand submitted by an opposing party. CCP section 2034.270 provides:

15 *If a demand for an exchange of information concerning expert trial witnesses*
16 *includes a demand for production of reports and writings as described in*
17 *subdivision (c) of Section 2034.210, all parties shall produce and exchange, at the*
18 *place and on the date specified in the demand, all discoverable reports and*
19 *writings, if any, made by any designated expert described in subdivision (b) of*
20 *Section 2034.210. (Emphasis added.)*

21 Therefore, under the CCP, a party may obtain expert reports by making a demand for exchange
22 of information concerning expert trial witnesses pursuant to CCP Section 2034.270, and
23 additionally demanding the production of reports and writings as described in CCP section
24 2034.210(c). Only the party who makes a demand for exchange of expert witness information
25 and the party upon whom the demand is made are required to comply with the statutory
26 procedures for exchanging expert witness information. (*West Hills Hospital v. Superior Court*
27 (1979) 98 Cal. App. 3d 656, 659.) From this, it reasonably follows that, where no demand is
28 made by any party, no party is required to comply with the statutory exchange requirements.
(*Hirano v. Hirano* (2007) 158 Cal. App. 4th 1, 6.)

³ The Administrative Proceeding is expressly governed by Ch. 4.5 of the APA (Gov't Code sec. 11400, et seq.), sections 801-805 of the California Evidence Code and section 11513 of the Government Code (C.C.R. sec. 648(b).)

1 Alternatively, the Discovery Plan, citing California Government Code section
2 11450.10(a), expressly permitted the parties to conduct depositions pursuant to the California
3 Administrative Procedures Act. The Discovery Plan provides:

4 “Depositions and subpoenas duces tecum to be governed by Chapter 4.5, Article
5 11 (Subpoenas), of the California Administrative Procedures Act, which
6 authorizes the use of subpoenas and subpoenas duces tecum (for production of
7 documents) in administrative adjudications. Gov. Code § 11450.10(a).”
(Discovery Plan, at p. 3.)

8 The Discovery Plan further provides that “Deposition notices shall be sufficient for designated
9 party witnesses.” (Discovery Plan, at p. 4.) A deposition notice pursuant to this Article would
10 have mandated that the expert deponent produce, at the time of deposition, any expert reports
11 that had been prepared. (Cal. Gov. Code sec. 11450.05, *et seq.*) Overall, unless a CCP demand
12 has been made for the exchange of expert reports, or a deposition has been noticed, an opposing
13 party has no right to receive the expert reports of opposing party’s designated experts.

14 **III. ANALYSIS**

15 **A. THE SUBSTANCE OF THE PORT EXPERTS’ DECLARATIONS IS 16 CLEARLY RELEVANT TO THE ADMINISTRATIVE PROCEEDING AND 17 MUST THEREFORE BE ADMITTED PURSUANT TO CALIFORNIA GOVERNMENT CODE SECTION 11513(c).**

18 Each of the Port Experts testified under penalty of perjury regarding issues that are
19 indisputably relevant to the Administrative Proceeding. Each of the Port Experts is clearly
20 qualified to render expert opinions on the topics discussed in their respective declarations⁴. To
21 remain consistent with the policy set forth in State Water Resources Control Board Resolution
22 79-42, and to comply with the mandate of Government Code Section 11513(c) that requires the
23 Water Board to admit all relevant evidence, such testimony *must* be admitted into the
24 Administrative Proceeding.

25 **1. DR. MICHAEL JOHNS**

26 Dr. Johns testified that: (i) the TCAO and DTR are correct that concentrations of
27 chemicals of concern (“COCs”) in sediment in the Shipyard Sediment Site exceed what could be

28 ⁴ The Port Experts’ declarations each included a copy of the respective expert’s curriculum vitae.

1 considered background concentrations for San Diego Bay; (ii) the COCs are sufficient both in
2 terms of their concentrations and distribution to impair the beneficial uses of the site; and (iii) the
3 remedial action footprint and alternative cleanup proposed by the Water Board are consistent
4 with California Water Code section 13304 and State Water Board Resolution No. 92-49. (See
5 Declaration of Dr. Michael Johns, Exhibit 3 to Port District's May 26, 2010 Comments, at p. 3-
6 4.) The Dischargers contest the Water Board's allegations that COCs in the Shipyard Sediment
7 Site exceed background levels, and that the size and scope of the remedial action footprint
8 proposed in the DTR are excessive, making Dr. Johns testimony germane to some of the most
9 fundamental issues posed in the Administrative Proceeding.

10 **2. DR. YING POON**

11 Dr. Poon testified that: (i) the 2003 Exponent report entitled "NASSCO and Southwest
12 Marine Detailed Sediment Investigation" (hereinafter, the "2003 Exponent Report")
13 overestimates Chollas Creek as a source of toxics to the Shipyard Sediment Site; and (ii) it is
14 unlikely that Chollas Creek would be a major source of contaminants that bind with fine
15 sediments to the NASSCO and BAE shipyards. (See Declaration of Dr. Ying Poon, Exhibit 4 to
16 Port District's May 26, 2011 Comments, at p. 5.) Dr. Poon's testimony directly rebuts
17 NASSCO's and BAE's allegations, which are based primarily on the 2003 Exponent Report, that
18 Chollas Creek contributes significant amounts of contaminated sediment into the Shipyard
19 Sediment Site, and therefore any remedial efforts are premature until Chollas Creek has been
20 fully resolved. Dr. Poon's testimony is clearly relevant to the determination of whether it is
21 premature to initiate remedial efforts at the Shipyard Sediment Site.

22 **3. ROBERT COLLACOTT, M.S., MBA**

23 Mr. Collacott testified that: (i) the City of San Diego maintains easements over, and owns
24 and operates the MS4 facilities and the associated outfalls SW4 and SW9; (ii) the Port District
25 Environmental Services Department has prepared a Jurisdictional Urban Runoff Management
26 Program ("JURMP") document in accordance with the requirements of the MS4 Permit, and
27 operates its MS4 facilities in accordance with its JURMP; and (iii) the Port District's compliance
28 program is being implemented to the Maximum Extent Practicable standard prescribed by the

1 MS4 permit. (See Declaration of Mr. Robert Collacott, Exhibit 20 to Port District's May 26,
2 2011 Comments, at p. 3-5.) Mr. Collacott's testimony rebuts allegations in the TCAO and DTR
3 that Port District's MS4 facilities contribute to contamination in the Shipyard Sediment Site, and
4 is therefore directly relevant to the Port District's defense.

5 **B. IF THE WATER BOARD IS BOUND TO STRICTLY ADHERE TO THE**
6 **CCP, THE PORT EXPERTS' DECLARATIONS ARE ADMISSIBLE.**

7 The Port District maintains that Government Code section 11513 governs this
8 Administrative Proceeding, and supersedes any general applicability of the CCP. However, even
9 if the CCP does govern this issue, the Port Experts' declarations must be admitted.

10 **1. THE PORT COMPLIED WITH THE FEBRUARY 18, 2010 DISCOVERY**
11 **PLAN AND THE OCTOBER 27, 2010 DISCOVERY ORDER**

12 The Port District complied with the Discovery Plan when it timely designated the Port
13 Experts as expert witnesses by January 18, 2011. (See Exhibit 1.) Upon disclosure of the Port
14 Experts, it is incumbent upon the opposing parties to either (a) make a CCP section 2034.210(c)
15 demand for the production of the Port Experts' reports, or (b) notice the depositions of the Port
16 Experts. No party has made an expert report demand. Perhaps most notably, no party noticed a
17 deposition for any of the Port Experts, despite having nearly two months to do so between
18 receiving the Port's Expert Designation on January 18, 2011 and the close of discovery on March
19 11, 2011. If they had done so, the Dischargers' deposition notices could have mandated the
20 production of any expert reports the Port Experts had prepared at that time.

21 SDG&E alleges in its Motion in Limine to Exclude San Diego Unified Port District's
22 Expert Declarations, that the "Designated Parties"⁵ had an "agreement to forego expert
23 depositions" during the period between January 18, 2011 and March 11, 2011. (See SDG&E
24 Motion In Limine, at 3.) The Port District was not a party to any alleged agreement to forego
25 expert depositions, and was unaware that such an agreement existed. It is also notable that BAE
26 failed to mention this alleged agreement in its motion to exclude the Port Experts' declarations.

27 ⁵ Paragraph 5 of the Declaration of SDG&E counsel, Jill Tracy, in support of SDG&E's Motion in Limine states,
28 "In connection with discovery in this proceeding, SDG&E, together with *other Designated Parties*, made the
decision to forego expert depositions as a means to expediting discovery in this proceeding." (Emphasis added.)
SDG&E does not allege that the Port District was included among the "*Other Designated Parties*" who were
party to the alleged agreement. The Port District was, in fact, not a party to the alleged agreement.

1 The Dischargers only rely upon the Discovery Order's March 11, 2011 deadline for
2 submittal of expert reports as their rationale for excluding the Port Experts' declarations. The
3 Dischargers' reliance on the March 11, 2011 deadline is misplaced for two reasons. First, the
4 Port Experts' declarations are not expert reports at all.⁶ The declarations are testimony, offered
5 under penalty of perjury, to support portions of the Port Brief. Second, the Discovery Plan does
6 not require the parties to prepare or submit an expert report.

7 **2. THE DISCHARGERS ARE NOT PREJUDICED BY THE ADMISSION OF** 8 **PORT EXPERT WITNESS TESTIMONY**

9 The Dischargers' claim that they will be prejudiced if the Water Board considers the Port
10 Experts' testimony is unfounded. In its motion in limine, SDG&E quotes 23 CCR section
11 648.4(a), which states, "[i]t is the policy of the State and Regional Boards to discourage the
12 introduction of surprise testimony and exhibits." (SDG&E Motion in Limine, at 8.) 23 CCR
13 section 648.4(a), taken in context with the remainder of the regulation, CCR sections 648.4(b)-
14 (f), is intended to guard against surprise testimony and exhibits at the administrative hearing, and
15 not during the pre-hearing stage⁷. For example, SDG&E cites to CCR section 648.4(b) and
16 648.4(c) as support for its position regarding the exchange of evidence. However, both
17 provisions solely govern the contents of the hearing notice. (See footnote 7.)

18 The Port District's submission of expert witness declarations with the Port Brief did not
19 constitute "surprise testimony." To the contrary, the Dischargers had the opportunity one month

20 ⁶ Excluding each experts' curriculum vitae, Dr. Johns', Dr. Poon's and Mr. Collacott's declarations are 8 pages, 6
21 pages and 5 pages, respectively. To compare, BAE's expert reports were 28 pages, 17 pages and 131 pages;
22 SDG&E's expert reports were 65 pages, 25 pages and 163 pages; NASSCO's expert reports were 59 pages, 77
23 pages, and 132 pages.

24 ⁷ 23 CCR section 648.4(b)-(d) provides:

25 (b) The hearing notice may require that all parties intending to present evidence at a hearing shall submit
26 the following information to the Board prior to the hearing: the name of each witness whom the party
27 intends to call at the hearing, the subject of each witness' proposed testimony, the estimated time required
28 by the witness to present direct testimony, and the qualifications of each expert witness. The required
information shall be submitted in accordance with the procedure specified in the hearing notice.

(c) The hearing notice may require that direct testimony be submitted in writing prior to the hearing. Copies
of written testimony and exhibits shall be submitted to the Board and to other parties designated by the
Board in accordance with provisions of the hearing notice or other written instructions provided by the
Board. The hearing notice may require multiple copies of written testimony and other exhibits for use by
the Board and Board staff. Copies of general vicinity maps or large, nontechnical photographs generally
will not be required to be submitted prior to the hearing.

(d) Any witness providing written testimony shall appear at the hearing and affirm that the written
testimony is true and correct. Written testimony shall not be read into the record unless allowed by the
presiding officer.

1 after the submission of the Port Brief to attempt to rebut the Port Experts' brief declarations.
2 (See footnote 6.) SDG&E's contention that the Port Experts' declarations are too "conclusory"
3 to allow its experts to adequately rebut them and therefore must be excluded is without merit.
4 First, SDG&E mischaracterizes the Port Experts' testimony. Second, SDG&E's remedy is not to
5 exclude the evidence, but rather to allege in its Reply Comments to the Water Board that the Port
6 Experts' testimony is somehow entitled to less weight. (See *Mora v. Big Lots Stores, Inc.* (2011)
7 194 Cal. App. 4th 496, 511.) Exclusion is not the remedy for this reason.

8 Moreover, there are nearly six months until the Administrative Proceeding hearing, at
9 which point the Dischargers will have the right, as set forth in Government Code section
10 11513(b), "to call and examine witnesses, to introduce exhibits; to cross-examine opposing
11 witnesses on any matter relevant to the issues even though that matter was not covered in the
12 direct examination; to impeach any witness regardless of which party first called him or her to
13 testify; and to rebut the evidence against him or her."

14 Finally, March 11, 2011 was both the last date for submission of expert reports and the
15 discovery cutoff date. Had the Port produced expert reports on March 11, 2011, the Dischargers
16 would not have been able to take the Port Experts' depositions within the discovery period.
17 Rather, the time for noticing and taking depositions of the Port Experts was during the discovery
18 period between January 18, 2011 and March 11, 2011.

19 In sum, the Dischargers have already had the opportunity, both via depositions (which
20 they elected to forego) and through their respective Reply Comments submitted on June 23,
21 2011, to rebut the Port Experts' testimony. They will have another chance to do the same at the
22 hearing.

23 **3. EXCLUSION OF THE PORT DISTRICT'S EXPERT TESTIMONY 24 WOULD SUBSTANTIALLY PREJUDICE THE PORT DISTRICT**

25 While the Dischargers are not prejudiced by the admission of the Port Experts'
26 declarations, the exclusion of the declarations would undermine the Port District's ability to
27 defend itself in the Administrative Proceeding. The TCAO and DTR allege that the Port District
28 is liable for discharges of COCs through its MS4 facilities into the Shipyard Sediment Site. Mr.
Collacott's declaration testifies that the Port District's MS4 facilities are not impacting the

1 Shipyard Sediment Site, and that the Port District operates its facilities consistent with applicable
2 law.

3 The exclusion of Dr. Johns' and Dr. Poon's testimony would undercut the Port District's
4 right to submit substantive comments regarding the size and scope of the current proposed
5 cleanup, as well as the need for the cleanup.

6 **4. SDG&E SUBMITTED NEW EXPERT EVIDENCE TO THE WATER**
7 **BOARD AFTER MARCH 11, 2011**

8 SDG&E submitted a new expert report after March 11, 2011, and is not in a position to
9 challenge the Port District's submission of the Port Experts' declarations. "The behavior of the
10 party seeking to exclude the expert testimony is relevant to the reasonableness inquiry." (*Boston*
11 *v. Penny Lane Centers, Inc.* (2009) 170 Cal. App. 4th 936, 954.)

12 Along with its May 26, 2011 Request for Rescindment of Discharger Designation and
13 Comments to the Water Board, SDG&E submitted a technical report produced by Dr. Jason
14 Conder, SDG&E's designated expert witness. Dr. Conder's newest report contains technical
15 comments pertaining to the DTR and to documents obtained from the Administrative Record of
16 these proceedings. NASSCO's June 23, 2011 Reply Comments to the Water Board allege that
17 Dr. Conder's most recently submitted report materially alters the findings contained in his expert
18 reports submitted on March 18, 2011.⁸

19 **5. EXCLUSION OF THE PORT EXPERTS' TESTIMONY WOULD**
20 **REQUIRE THE EXCLUSION OF EVIDENCE SUBMITTED BY THE**
21 **UNITED STATES NAVY AND SDG&E IN CONTRAVENTION OF**
22 **RESOLUTION 79-42 AND CALIFORNIA GOVERNMENT CODE**
23 **SECTION 11513**

24 A Water Board ruling that expert testimony submitted after March 11, 2001 is
25 inadmissible would require the Water Board to exclude certain expert testimony introduced by
26 the Port District, the United States Navy and SDG&E in the March 26, 2011 Comments and June
27 23, 2011 Reply Comments. The Water Board is required to give the same treatment to each of
28 the parties. The exclusion of evidence from three of the seven parties contravenes the intent of

⁸ NASSCO's June 23, 2011 Reply Comments state "Moreover, in Dr. Conder's analysis submitted on March 11, 2011, he concludes that 'the Site remedy footprint should be restricted to the areas with TU values greater than one,' which produced a footprint requiring remediation only of NA19 and NA22. However, in his untimely expert submission on May 26, he reaches an entirely different conclusion, and recommends a footprint containing six additional NASSCO polygons." (NASSCO Reply Comments, at p. 60.)

1 State Water Board Resolution 79-42, and violates the mandate of Government Code section
2 11513(c).

3
4 **6. EXCLUSION OF THE EXPERT TESTIMONY IS AN IMPROPER
REMEDY**

5 If the Water Board was to decide both that the CCP supersedes the application of
6 Government Code section 11513(c), and that the Port District's failure to submit expert reports
7 into the administrative record on March 11, 2011 violates the CCP and therefore the Discovery
8 Order, exclusion is not the correct remedy. Even in the civil court setting, case law is clear that
9 exclusion of testimony is a last resort reserved for parties who have engaged in a long history of
10 abusing the discovery process. (*West Hills Hospital v. Superior Court* (1979) 98 Cal.App.3d
11 656; *McGinty v. Superior Court* (1994) 26 Cal. App. 4th 204, 211; also see *Plunkett v. Spaulding*
12 (1997) 52 Cal. App. 4th 114, overruled on other grounds by *Schreiber v. Estate of Kiser* (1999)
13 22 Cal. 4th 31, holding that it was an abuse of the trial court's discretion to have based an
14 exclusionary sanction on just one isolated factor such as timing of a motion.) As discussed in
15 detail above, administrative proceedings are subject to far less restrictive evidentiary rules than
16 are civil court proceedings. Any alleged lack of support for the statements contained in the Port
17 Experts' declarations goes to the weight the Water Board may give to that expert evidence and
18 not to its admissibility. (See *Mora v. Big Lots Stores, Inc.* (2011) 194 Cal. App. 4th 496, 511;
19 *People v. Cooper* (1991) 53 Cal. 3d 771, 814.) Therefore, the proper remedy is to permit the
20 Water Board to consider the Port Experts' declarations so that the Water Board may weigh them
21 appropriately in their decision-making process.

22 **IV. CONCLUSION**

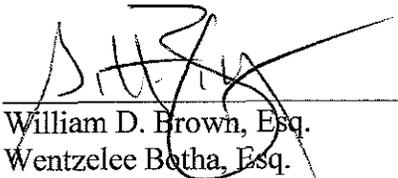
23 The Water Board is required by State Water Resources Control Board Resolution 79-42
24 and California Government Code section 11513(c) to admit the Port Experts' declarations. Even
25 if the Water Board determines that the CCP supersedes Government Code section 11513(c)
26 regarding evidentiary issues, the Port Experts' declarations must be admitted. As detailed above,
27 the Port timely identified its expert witnesses. The Dischargers suffer no prejudice as a result of
28 the declarations' admission. Any prejudice the Dischargers claim to incur is self-imposed by
virtue of their failure to demand expert reports, or depose the Port Experts. On the other hand,

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exclusion of the Port Experts' testimony would greatly damage its defense, and undermine the Port District's right, as a party to the TCAO, to comment on the merits of the TCAO and DTR.

Dated: July 11, 2011

BROWN & WINTERS, LLP

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Wentzelee Botha, Esq.
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DISTRICT

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14 CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
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16 SAN DIEGO REGION

17 In re Tentative Cleanup and Abatement Order) **DECLARATION OF SCOTT E.**
No. R9-2011-0001 (formerly No. R9-2010-) **PATTERSON IN SUPPORT OF SAN**
18 0002) (Shipyard Sediment Site)) **DIEGO UNIFIED PORT DISTRICT'S**
19) **OPPOSITION TO MOTIONS**
20) **SUBMITTED BY BAE SAN DIEGO**
21) **SYSTEMS SHIP REPAIR, INC. /**
22) **SOUTHWEST MARINE, INC., SAN**
23) **DIEGO GAS & ELECTRIC COMPANY,**
24) **AND NATIONAL STEEL AND**
25) **SHIPBUILDING COMPANY TO**
26) **EXCLUDE SAN DIEGO UNIFIED PORT**
27) **DISTRICT'S EXPERT DECLARATIONS**

28) Presiding Officer: Grant Destache

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I, Scott E. Patterson, declare:

1. I am an attorney at law, duly admitted to practice before the courts of this state, and am a partner with the law firm of Brown & Winters, attorneys of record for the SAN DIEGO UNIFIED PORT DISTRICT in the above-referenced matter.

2. I have personal knowledge of all the matters stated herein and, if called as a witness, I could competently testify thereto, except as to those matters stated upon information and belief, and as to those matters, I believe them to be true.

3. Attached as "Exhibit 1" is a true and correct copy of an excerpt from the San Diego Unified Port District's Designation of Expert and Non-Expert Witnesses, dated January 18, 2011.

4. Attached as Exhibit "2" is a true and correct copy of State Water Resources Control Board Resolution 79-42.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed this 11th day of July 2011, at Cardiff-by-the-Sea, California.

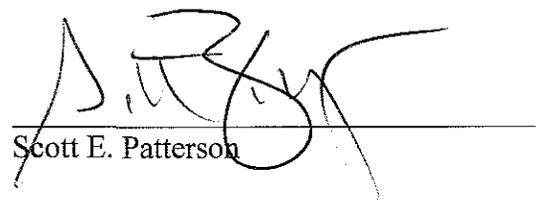

Scott E. Patterson

EXHIBIT NO. "1"

Excerpt from the San Diego Unified Port District's Designation of
Expert and Non-Expert Witnesses, dated January 18, 2011

1 BROWN & WINTERS
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11 Duane E. Bennett, Esq., Port Attorney (SBN 110202)
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12 SAN DIEGO UNIFIED PORT DISTRICT
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14 Telephone: (619) 686-6219
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16 Attorneys for Designated Party
17 SAN DIEGO UNIFIED PORT DISTRICT

18 **CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD**
19 **SAN DIEGO REGION**

21)
22 IN THE MATTER OF TENTATIVE) **SAN DIEGO UNIFIED PORT**
CLEANUP AND ABATEMENT ORDER) **DISTRICT'S DESIGNATION OF**
23 NO. R9-2011-0001 (formerly R9-2010-0002)) **EXPERT AND NON-EXPERT**
(SHIPYARD SEDIMENT CLEANUP)) **WITNESSES**
24)
25)
26)

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1 **I. Expert Witnesses**

2 San Diego Unified Port District (“PORT”) hereby designates the following expert
3 witnesses pursuant to the Order Issuing Final Discovery Plan for Tentative Cleanup and
4 Abatement Order No. R9-2011-0001, the Tentative Cleanup and Abatement Order No. R9-
5 2011-0001 (“TCAO”) and Associated Draft Technical Report (“DTR”), and California Code
6 of Civil Procedure section 2034.010 *et seq.*:

- 7
- 8 1. Ying Poon, D. Sc., P.E.
9 Everest International Consultants, Inc.
10 444 West Ocean Blvd., Suite 1104
11 Long Beach, CA 90802
 - 12 2. Robert Collacott, MBA, M.S.
13 URS Corporation
14 2020 East First Street, Suite 400
15 Santa Ana, CA 92705
 - 16 3. Michael D. Johns, MBA, M.S., PhD
17 Windward Environmental
18 200 West Mercer Street, Suite 401
19 Seattle, WA 98119-3958

20 The qualifications and brief narrative statements of the general substance of the
21 testimony these experts are expected to give are contained in the following Declaration of
22 Wentzelee Botha.

23 PORT hereby expressly reserves the right to add, modify, or delete any expert from
24 this list of expert witnesses, and to submit supplemental lists of expert witnesses as provided
25 by the California Code of Civil Procedure. PORT reserves the right to consult with and
26 retain any other expert witness in the capacity of an impeaching or rebuttal witness pursuant
27 to California Code of Civil Procedure section 2034.310(b).

28 PORT reserves the right to call any expert witness either presently or later identified
by any other party to this proceeding, although not specifically retained by PORT.
In the event that any additional analyses are obtained by any other party prior to the hearing,
PORT reserves the right to call as an expert witness the professional performing any such

1 analyses. PORT further reserves the right to call any expert witness regarding any issues
2 arising in this matter relating to the California Environmental Quality Act ("CEQA").

3 If any of the witnesses discussed or listed above are not available at the time of trial,
4 PORT hereby advises all parties that it will seek the introduction of competent testimony,
5 including deposition testimony of such witnesses, in lieu of their live testimony.

6 **II. Non-Expert Witnesses**

7 PORT, by this pleading, also designates the following non-expert witnesses in this
8 matter, who may offer percipient testimony on PORT's behalf at the hearing on this matter:

- 9
- 10 1. Jeff Gabriel, Assistant Director of Maritime Properties
11 San Diego Unified Port District
12 P.O. Box 120488
San Diego, CA 92112-0488
 - 13 2. Bill Hays, Senior Environmental Specialist
14 San Diego Unified Port District
15 P.O. Box 120488
San Diego, CA 92112-0488

16 PORT hereby expressly reserves its right to name or call any additional percipient
17 witnesses as the need may arise. PORT further reserves the right to withdraw any non-
18 expert witness designated expressly or by reference herein.

19 PORT expressly reserves its right to call any percipient witness either presently or
20 later identified by any other Dischargers named in the tentative or final Cleanup and
21 Abatement Order(s) in this matter, although not specifically named as a witness herein by
22 PORT, regardless of whether such other Dischargers remain as such at the time of hearing.

23 Dated: January 18, 2011

BROWN & WINTERS, LLP

24
25 By: Wentzelee Botha
26 William D. Brown, Esq.
27 Wentzelee Botha, Esq.
28 Attorneys for Designated Party
SAN DIEGO UNIFIED PORT
DISTRICT

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DECLARATION OF WENTZELEE BOTHA

I, Wentzelee Botha, declare as follows:

1. I am an attorney licensed to practice in the State of California and a partner with Brown & Winters, LLP, the law firm of record for Designated Party San Diego Unified Port District (“Port”) in this matter. I make this declaration based on personal knowledge and, if called as a witness, I could competently testify thereto.

2. The following expert witnesses have been retained by the Port:

3. Ying Poon

a. Qualifications: Dr. Poon is responsible for managing and directing coastal and hydraulic engineering projects and has over 20 years of professional experience with coastal and hydraulic engineering studies and design projects. Dr. Poon is an expert in the application of numerical and physical models in solving complex water resources planning, coastal processes, and harbor engineering projects. Dr. Poon has developed and applied the most up-to-date numerical models on various wetland, coastal, and port development projects. He has also developed and used a wide range of hydrodynamic and water quality models, analyzed tidal inlet stability, and modeled wave transformation and wave-structure interactions. In addition, Dr. Poon is experienced in statistical modeling, spectral analysis, physical model design and interpretation of model results, as well as field investigation. He has directed numerous two- and three-dimensional physical model tests and has also directed several extensive wind, wave, current, and ship motion field data collection programs in California and China. A copy of Dr. Poon’s resume is attached as Exhibit A.

b. Substance of Testimony: Dr. Poon will testify regarding the hydrodynamic and sediment transport conditions for the Shipyard Sediment Site, including but not limited to Chollas Creek.

- 1 c. Readiness: Dr. Poon has agreed to testify in this matter, and will be
2 sufficiently familiar with the pending action to submit to a meaningful
3 oral deposition concerning his expected testimony.
4 d. Fees for Testimony: Dr. Poon's fee for testimony is \$300 per hour.

5 **4. Robert Collacott**

- 6 a. Qualifications: Mr. Collacott is a Principal Scientist with URS
7 Corporation and has 31 years experience covering a broad range of
8 environmental programs related to permitting stormwater and wastewater
9 discharges. As Manager of Water Resources Management and Permitting
10 for the Santa Ana office, Mr. Collacott is responsible for directing
11 projects involving stormwater and wastewater discharge permitting,
12 surface water quality management and planning, and regulatory
13 compliance plan development and implementation. His experience
14 includes stormwater discharger permitting, stormwater quality planning
15 and monitoring, hydrologic monitoring, water resources management,
16 solid waste management, and regulatory compliance. A copy of Mr.
17 Collacott's resume is attached as Exhibit B.
18 b. Substance of Testimony: Mr. Collacott will be providing his evaluation of
19 the discharges from the municipal separate storm sewer system (MS4) to
20 the Shipyard Sediment Site. This evaluation will include an assessment
21 of the Port's compliance with the requirements of the San Diego County
22 Phase I National Pollutant Discharge Elimination System (NPDES) MS4
23 permit. In addition, he will identify other sources that may discharge
24 Chemicals of Concern (COCs) in stormwater runoff to the Shipyard
25 Sediment Site and whether evidence exists that discharges directly from
26 the Port contributed to the contamination of the sediments at the Site.
27
28

1 c. Readiness: Mr. Collacott has agreed to testify in this matter, and will be
2 sufficiently familiar with the pending action to submit to a meaningful
3 oral deposition concerning his expected testimony.

4 d. Fees for Testimony: Mr. Collacott's fee for testimony is \$220 per hour.

5 **5. Michael D. Johns**

6 a. Qualifications: Dr. Johns is a Partner at Windward Environmental, LLC,
7 and an aquatic scientist specializing in aquatic ecological and human
8 health risk assessments, and natural resource damage assessments
9 (NRDA), particularly those associated with contaminated sediment.
10 Experience gained during his 30 years of professional experience at sites
11 located throughout the United States has provided Dr. Johns with a broad
12 knowledge base on issues pertaining to the effects of toxic pollutants on
13 aquatic organisms. In addition to serving as a project manager and
14 program manager on a number of large multi-task, multi-disciplinary
15 environmental investigations, he has served in an advisory and advocacy
16 capacity for a number of clients in support of regulatory review and
17 reform, review and comment on pending legislation, liability
18 management, negotiations with state and federal environmental
19 regulatory agencies, and as a testifying expert in litigation in both state
20 and federal courts. A copy of Dr. Johns' resume is attached as Exhibit C.
21 b. Substance of Testimony: Dr. Johns will testify in regard to methods used
22 in the TCAO and DTR by the San Diego Regional Water Quality Control
23 Board (SDRWQCB) to define impacts to aquatic biota and human health
24 associated with exposure to contaminants detected at the Shipyard
25 Sediment Site. Dr. Johns may additionally testify regarding impacts to
26 beneficial uses associated with current environmental conditions at the
27 Shipyard Sediment Site, and improvements in the protection of beneficial
28 uses associated with proposed cleanup actions presented in the current

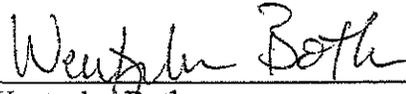
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version of the TCAO. Further testimony may include approaches for translating information on impacts to aquatic biota and human health into remedial actions, including developing of a cleanup footprint and utility of remedial technologies. Dr. Johns may also opine regarding design and implementation of post-remediation and long-term monitoring programs.

c. Readiness: Dr. Johns has agreed to testify in this matter, and will be sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning his expected testimony.

d. Fees for Testimony: Dr. Johns' fee for testimony is \$200 per hour.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on January 18, 2011.



Wentzelee Botha
Attorney for Designated Party
SAN DIEGO UNIFIED PORT
DISTRICT

EXHIBIT NO. "2"

SWRCB Resolution No. 79-42, dated May 17, 1979

STATE WATER RESOURCES CONTROL BOARD
RESOLUTION NO. 79-42

POLICY OF THE BOARD TO ENSURE
CONSIDERATION OF ALL RELEVANT EVIDENCE

WHEREAS:

1. It is the intent of the State Board that no person be prevented from presenting relevant evidence to a Regional Board.
2. It is also the intent of the State Board that Regional Boards, to the greatest extent possible, initially hear evidence related to matters within the Regional Boards' jurisdiction.
3. The State Board recognizes that Regional Boards may use appropriate mechanisms such as requiring the submittal of testimony or expert witnesses' qualifications in writing prior to commencement of a hearing and limiting the time for witnesses to present oral summaries of written testimony to shorten the time actually required for the hearing. It is also appropriate for Regional Boards to refuse to accept irrelevant or duplicative evidence.
4. On rare occasions an interested person may wish to present extensive evidence requiring a lengthy hearing beyond the ability of the Regional Board to accommodate in terms of time.
5. Dischargers and other interested persons have the right to petition the State Board to review failure of a Regional Board to hold a hearing or to consider relevant evidence pursuant to Water Code Section 13320(a) but the State Board has not previously had a mechanism for Regional Boards to request that the State Board assume jurisdiction prior to consideration of the evidence on its merits by the Regional Board where the extent of the relevant evidence precludes a Regional Board hearing of the length necessary to adequately consider it.

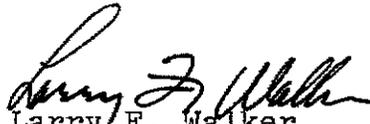
THEREFORE, BE IT RESOLVED:

That it is the policy of the State Board that when a Regional Board hearing is held all relevant, non-duplicative evidence be considered by the Regional Board in the first instance. However, in those unusual cases where a Regional Board finds: (1) that a hearing is necessary, and (2) based upon offers of proof or

some other reasonable preliminary showing by interested persons, that the quantity of relevant, non-duplicative evidence is such that the Regional Board cannot set aside sufficient time to hold the hearing, the Regional Board can request the State Board to assume jurisdiction and conduct the hearing.

CERTIFICATION

The undersigned, Executive Director of the State Water Resources Control Board, does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on May 17, 1979.


Larry F. Walker
Executive Director