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19 CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

20 SAN DIEGO REGION

21 IN THE MATTER OF TENTATIVE
CLEANUP AND ABATEMENT ORDER NO.
22 R9-2011-0001 (formerly R9-2010-0002)
(SHIPYARD SEDIMENT CLEANUP)
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**SAN DIEGO UNIFIED PORT DISTRICT'S
NOTICE OF MOTION AND MOTION TO
RE-OPEN AND EXTEND DISCOVERY
DEADLINES; MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT**

1 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN:

2 PLEASE TAKE NOTICE that on October 19, 2010, or as soon thereafter as the matter
3 may be heard, Designated Party SAN DIEGO UNIFIED PORT DISTRICT ("Port District"), will
4 and hereby does move for an order re-opening and extending certain discovery deadlines
5 previously established in this proceeding by Presiding Officer for Prehearing Proceedings Mr.
6 David King's February 18, 2010, "Order Issuing Final Discovery Plan for Tentative Cleanup and
7 Abatement Order No. R9-2010-0002 And Associated Draft Technical Report (the "Final
8 Discovery Order"), as modified by the Stipulation Regarding Discovery Extension ("Stipulation"),
9 dated August 9, 2010, and, specifically, to re-open and extend the discovery schedule as follows:

10 (1) **November 1, 2010:** Regional Water Quality Control Board ("RWQCB") Cleanup
11 Team to produce to the Designated Parties the Addendum to the Administrative Record and a
12 redlined version of the DTR (on a hard-disk drive or CD-ROM). The Cleanup Team shall also
13 produce to the Port District for inspection and copying all non-privileged documents that relate to
14 the allegations in Finding 11 of the TCAO/DTR. The Cleanup Team will do the same with
15 respect to Finding 5 if Star & Crescent so requests;

16 (2) **December 3, 2010:** Last day for all Designated Parties to serve written discovery
17 on any other Designated Party pertaining to the revisions made to the TCAO/DTR relative to the
18 December 2009 version of the TCAO/DTR (including, without limitation, discovery relating to
19 Finding 11 and Finding 5);

20 (3) **January 24, 2011:** Last day for the hearing of any motions to compel discovery by
21 the Discovery Referee, subject to any subsequent appeal to the Presiding Officer;

22 (4) **February 4, 2011:** Last day to designate expert and non-expert witnesses on
23 revisions made to the TCAO/DTR relative to the December 2009 version of the TCAO/DTR;

24 (5) **February 25, 2011:** Last day to submit expert counter-designations on revisions
25 made to the TCAO/DTR relative to the December 2009 version of the TCAO/DTR; and

26 (6) **March 31, 2011:** Last day to complete all other discovery, including depositions
27 and expert reports,

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1 but as to all such discovery, only that discovery pertaining to revisions made to the
2 TCAO/DTR relative to the prior version of the TCAO/DTR released publicly on December 22,
3 2009 (including, without limitation, discovery relating to the financial resources and insurance
4 assets of the "Dischargers" who are current or former tenants of the Port District), EXCEPT that
5 expert reports and depositions of the Cleanup Team will be for all purposes, and not limited to
6 changes to the TCAO/DTR.

7 This motion is made to the Presiding Officer pursuant to Paragraph 5 of the Stipulation,
8 and under the California Administrative Procedure Act (Gov't Code §§ 11370 et seq.), and, in
9 particular, Government Code section 11445.40, on the grounds that: (a) the Port District was—for
10 the first time in the almost 20 years since the RWQCB has been requiring the investigation and
11 remediation of the Shipyard Sediment Site—named in the September 15, 2010, TCAO/DTR as an
12 alleged "Discharger;" (b) the RWQCB Cleanup Team has not yet issued a redline of the multi-
13 volume TCAO/DTR and related Appendices or released an updated Administrative Record so as
14 to permit the Port District to undertake a meaningful inquiry and analysis into the changes made to
15 the TCAO/DTR since the issuance of the December 22, 2009, TCAO/DTR, including, without
16 limitation, each of the alleged grounds for the Port District's now being identified as a
17 "Discharger" in the proposed Order and the basis for the proposed cleanup levels and remedial
18 actions; and (c) because of the unprecedented approach taken in the new TCAO/DTR regarding
19 the findings required for the Port District to establish its secondary liability (at most) for the
20 cleanup of the Site, the Port District must now be provided the opportunity to address, through
21 written and deposition discovery, the financial resources, including insurance assets, of its current
22 and former Discharger-tenants.

23 This motion is based on this notice, the attached memorandum of points and authorities,
24 the Declarations of Sandi L. Nichols and Leslie FitzGerald submitted concurrently herewith, such
25 other evidence, argument and authorities submitted prior to or in connection with any hearing
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1 held on this motion, and the complete record of proceedings in this matter.

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DATED: October 19, 2010

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP

By: *Sandi L. Nichols*
SANDI L. NICHOLS
Attorneys for Designated Party
SAN DIEGO UNIFIED PORT DISTRICT

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 For close to 20 years, the Regional Water Quality Control Board, San Diego Region
4 ("RWQCB"), has maintained the position, consistent with long-established State Water Board
5 policy and precedent, that the San Diego Unified Port District ("Port District"), the non-operating
6 trustee/landlord of the public trust tidelands and submerged lands within the Shipyard Sediment
7 Site, should not be named as a "Discharger" in a Cleanup and Abatement Order for the Site.¹
8 Until now.

9 On September 15, 2010, the RWQCB's designated prosecutorial "Cleanup Team," without
10 any prior notice, legitimate explanation or factual basis, altered that long-held position and now
11 names the Port District as a "Discharger" in its draft Tentative Cleanup and Abatement Order R9-
12 2011-0001 ("TCAO") and related Draft Technical Report ("DTR"). The Cleanup Team's recent,
13 abrupt change of course came about only after the Port District elected to withdraw from the
14 mediation following the issuance of the last TCAO/DTR in December 2009, in favor of allowing
15 further discussions to proceed in the public domain, and declined the Cleanup Team's request,
16 shortly before the new TCAO/DTR was issued, to participate in the funding of the anticipated EIR
17 for the cleanup project—a cost that should rightfully be borne by the real "Dischargers," not the
18 Port District.

19 The Cleanup Team's about-face turns long established State Water Board policy and
20 precedent on its head. In stark contrast to the position it has long maintained, the Cleanup Team
21 now states:

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23 ¹ Indeed, in the June 30, 2005, Executive Officer's Memorandum re Separation of Functions,
24 and the July 14, 2005, "Proposed Procedures for Issuance of Cleanup and Abatement Order
25 No. R9-2005-0126," the Port District was not even identified by the RWQCB as a "Designated
26 Party." And none of the prior draft TCAOs and related DTRs issued by the Cleanup Team
27 named the Port District as a "Discharger," based upon established policy and precedent that
28 support not naming a non-operating public entity landlord unless and until it is shown that its
Discharger tenants either do not have the financial resources to comply with the CAO or
otherwise do not comply with the CAO. *See, e.g.,* Draft TCAO R9-2005-0126, dated April 29,
2005; Revised Draft TCAO R9-2005-0126, dated August 24, 2007, and related DTR, pages 1-
8 to 1-11; Revised Draft TCAO R9-2005-0126, dated April 4, 2008, and related DTR, pages 1-
9 to 1-12; and Draft TCAO R9-2010-002, dated December 22, 2009, and related DTR, pages
1-9, 10-1 to 10-4. There has been no such showing made here.

1 Although the Port District is a public government entity, *and there is*
2 *no evidence in the record that the Port District initiated or*
3 *contributed to the actual discharge of waste to the Shipyard*
4 *Sediment Site, it is nevertheless appropriate to name the Port District*
5 *as a discharger in the CAO to the extent the Port's tenants, past and*
6 *present, have insufficient financial resources to clean up the*
7 *Shipyard Sediment Site and/or fail to comply with the order.*
8 *(Citations.) In the event the Port District's tenants, past and*
9 *present, have sufficient financial resources to clean up the*
10 *Shipyard Sediment Site and comply with the Order, then the San*
11 *Diego Water Board may modify its status to secondarily*
12 *responsible party in the future.*

13 September 15, 2010 DTR, page 11-4 (footnote and citations omitted).

14 Thus, the Cleanup Team has now made the adequacy of the current and historical Port
15 Discharger-tenants' financial resources a pre-condition to granting the Port District "secondary
16 liability" status. Consequently, in order to fully respond to the new draft TCAO/DTR, the Port
17 District must now undertake discovery on those issues, including, without limitation, inquiry into
18 the tenants' monetary and insurance assets.

19 Additionally, the TCAO/DTR now curiously names the Port District as a "Discharger" on
20 the ground that the Port District is allegedly an "operator" of the two municipal separate storm
21 sewer system ("MS4") outfalls on the BAE Systems and NASSCO leaseholds, and of other
22 unidentified drains on other unidentified tidelands property over which the Port District is
23 allegedly the trustee. *See* 9/15/2010 DTR, at 11-5 to 11-15. All prior drafts of the TCAO/DTR
24 since 2005 placed responsibility for the MS4 discharges exclusively on the City of San Diego,
25 which owns and operates that storm drain system.² Consequently, to enable the Port District to
26 fully respond to the new draft TCAO/DTR, the Port District must also be permitted adequate
27 opportunity, through written and deposition discovery, to inquire into the Cleanup Team's factual
28 and technical basis for now seeking to pin responsibility on the Port District for these storm water
discharges. No Designated Party, including the Cleanup Team, disagrees.

² *See, e.g.,* Draft TCAO R9-2005-0126, dated April 29, 2005; Revised Draft TCAO R9-2005-0126, dated August 24, 2007, and related DTR, pages 4-1 to 4-22; Revised Draft TCAO R9-2005-0126, dated April 4, 2008, and related DTR, pages 4-1 to 4-22; and Draft TCAO R9-2010-002, dated December 22, 2009, and related DTR, pages 4-1 to 4-22.

1 The Designated Parties also agree that discovery should be re-opened and the deadlines
2 extended in order to allow the parties sufficient time to analyze the technical revisions made to the
3 TCAO/DTR since it was last published in December 2009, to undertake discovery on those issues,
4 and to identify and designate expert witnesses who will testify about those changes. The Port
5 District has not yet been able to undertake a meaningful analysis of all of the revisions made in the
6 TCAO/DTR (which is now three volumes totaling some 661 pages) or the 14 Appendices to the
7 DTR (totaling some 1,378 pages), because the Cleanup Team has not yet provided a redline to
8 identify those changes and has not yet produced its update to the Administrative Record. From
9 what we can gather so far, there appear to be proposed changes to the extent of the remedial
10 footprint, certain cleanup levels and remedial actions, as well as technical and factual issues
11 relating to the MS4 system, to which the Port District now must respond. The Port District
12 therefore requires sufficient additional time to undertake a meaningful evaluation of the technical
13 and legal issues arising from these changes. To do this, the Port District will require expert
14 assistance. It therefore needs a reasonable time to identify and engage the appropriate experts to
15 have them review the documentation relating to these issues once it is produced by the Cleanup
16 Team, and to identify those experts and have them submit reports as the Port District deems
17 necessary for it to meaningfully participate in the RWQCB's hearing on the proposed
18 TCAO/DTR.³

19 The deadline for the designation of experts and non-expert witnesses expired on June 22,
20 2010, and the deadline for the counter-designation of experts expired on July 7, 2010. The
21 Designated Parties therefore agree that these deadlines must be re-opened to permit them to
22 identify expert and other witnesses whom they may wish to testify on their behalf regarding
23 changes in the TCAO/DTR, and to allow the parties to propound written discovery and notice
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26 ³ The Port District did not previously see the need to, and did not, identify any experts or other
27 witnesses in connection with the December 2009 TCAO/DTR, but it reserved its right to do so
28 in the future. *See* July 19, 2010, letter from Leslie FitzGerald, Esq., Deputy Port Attorney, to
Presiding Officer David King, attached as **Exhibit A** to Declaration of Leslie FitzGerald in
support of this motion ("FitzGerald Declaration" or "FitzGerald Decl.") submitted concurrently
herewith.

1 depositions with respect to these changes, once they have had a full and fair opportunity to review
2 and analyze them.

3 Consequently, the Port District submits that the Presiding Officer should grant the Port
4 District's motion to re-open and extend the discovery deadlines in accordance with the following
5 schedule (which has been agreed to by the Cleanup Team and almost all participating Designated
6 Parties) as follows:

7 (1) **November 1, 2010:** RWQCB Cleanup Team to produce to the Designated Parties
8 the Addendum to the Administrative Record and a redlined version of the DTR (on a hard-disk
9 drive or CD-ROM). The Cleanup Team shall also produce to the Port District for inspection and
10 copying all non-privileged documents that relate to the allegations in Finding 11 of the
11 TCAO/DTR. The Cleanup Team will do the same with respect to Finding 5 if Star & Crescent so
12 requests;

13 (2) **December 3, 2010:** Last day for all Designated Parties to serve written discovery
14 on any other Designated Party pertaining to the revisions made to the TCAO/DTR relative to the
15 December 2009 version of the TCAO/DTR (including, without limitation, discovery relating to
16 Finding 11 and Finding 5);

17 (3) **January 24, 2011:** Last day for the hearing of any motions to compel discovery by
18 the Discovery Referee, subject to any subsequent appeal to the Presiding Officer;

19 (4) **February 4, 2011:** Last day to designate expert and non-expert witnesses on
20 revisions made to the TCAO/DTR relative to the December 2009 version of the TCAO/DTR;

21 (5) **February 25, 2011:** Last day to submit expert counter-designations on revisions
22 made to the TCAO/DTR relative to the December 2009 version of the TCAO/DTR; and

23 (6) **March 31, 2011:** Last day to complete all other discovery, including depositions
24 and expert reports,

25 but as to all such discovery, only that discovery pertaining to revisions made to the
26 TCAO/DTR relative to the prior version of the TCAO/DTR released publicly on December 22,
27 2009, EXCEPT that expert reports and depositions of the Cleanup Team will be for all purposes,
28 and not limited to changes to the TCAO/DTR.

1 The Port District, with concurrence from the Cleanup Team and the City of San Diego
2 ("City"), also submits that the permissible scope of such discovery should expressly include,
3 without limitation, discovery relating to the financial resources and insurance assets of the
4 "Dischargers" who are current or former tenants of the Port District. Such discovery is necessary
5 because the TCAO/DTR now places those tenants' financial resources squarely in issue as a
6 prerequisite for the Port District to establish that it is, at most, "secondarily responsible" for the
7 cleanup of the Shipyard Sediment Site.

8 Accordingly, the Presiding Officer should grant this motion and adopt the proposed
9 schedule and scope of additional discovery to ensure the Port District has a full and fair
10 opportunity to defend itself against the new allegations against it, and to ensure that all parties are
11 afforded due process under the state and federal Constitutions and the Administrative Procedures
12 Act.

13 **II. PERTINENT FACTUAL BACKGROUND**

14 The RWQCB has been conducting proceedings with respect to the investigation and
15 remediation of the Shipyard Sediment Site since 1991. *See* "Final Regional Board Report,
16 Shipyard Sediment Cleanup Levels, NASSCO & Southwest Marine Shipyards, San Diego Bay,
17 dated February 16, 2001 (which may be found at:
18 [http://www.waterboards.ca.gov/sandiego/water_issues/programs/shipyards_sediment/docs/sysemi-
20 mentcleanup021601.pdf](http://www.waterboards.ca.gov/sandiego/water_issues/programs/shipyards_sediment/docs/sysemi-
19 mentcleanup021601.pdf)), at pages 1, 11, 13 (noting that the RWQCB issued NASSCO and
21 Southwest Marine (now BAE Systems) a letter, on January 10, 1991, to conduct a sediment study
22 to determine if sediment cleanup is required within their bay leaseholds). Although the Port
23 District has been a Designated Party in these proceedings (at least since 2005), until just one
24 month ago, it had never been identified as a proposed "Discharger" in any of the Tentative Draft
25 Cleanup and Abatement Orders for the Site.⁴ The circumstances surrounding the Port District's
26 being named in the September 15, 2010, TCAO/DTR are suspect, to say the least.

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⁴ See footnote 1, above.

1 By way of background, on June 9, 2008, following the issuance of the Revised
2 TCAO/DTR that April, the then-Presiding Officer, David King, issued an "Order Referring
3 Proceedings to Mediation," exclusively on the issue of the appropriate cleanup levels to be
4 incorporated into TCAO R9-2005-0126 for the Shipyard Sediment Site. *See Exhibit B* to
5 FitzGerald Declaration.⁵ The naming of potential "Dischargers" was not an approved topic for the
6 mediation. The mediation was subsequently extended by a series of Orders of the Presiding
7 Officer,⁶ even after the Environmental Health Coalition and San Diego Coastkeeper withdrew
8 from the mediation on September 9, 2009.⁷ The Port District likewise withdrew from the
9 mediation (effective January 19, 2010) to allow the then-newly-released December 22, 2009
10 TCAO/DTR to be discussed in the public forum instead of behind closed doors.⁸ The mediation
11 was officially terminated by Mr. King on July 14, 2010. *See "Ruling on Cleanup Team's Motion
12 to Extend Remaining Discovery Deadlines and Related Matters Addressed at Prehearing
13 Conference,"* dated July 16, 2010, attached as **Exhibit E** to the FitzGerald Declaration (without
14 Attachment).

15 The Cleanup Team nevertheless continued to engage in private meetings with previously-
16 named "Dischargers" to work on the revisions to the TCAO/DTR, which included, for the first
17 time, the naming of the Port District as a "Discharger." The Cleanup Team disclosed these
18 meetings in its June 16, 2010, motion to extend the discovery deadlines, wherein it represented the
19 following: "As a result of the Remaining Mediation Parties' development of additional and more
20 robust technical analyses, the Cleanup Team intends to release for public comment a substantially
21 augmented DTR and CAO by August 27, 2010."⁹ But the Cleanup Team did not meet that
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23 ⁵ The June 9, 2008, Order seems to be missing from the RWQCB's website for this proceeding.
24 ⁶ See Mediation Extension Orders, dated September 5, 2008, December 8, 2008, March 20,
2009, June 10, 2009, and September 17, 2009.

25 ⁷ See Memorandum from Presiding Officer David King to Mediator Timothy Gallagher, dated
26 September 17, 2009, attached as **Exhibit C** to FitzGerald Declaration.

26 ⁸ See Letter from Port Attorney Duane E. Bennett to Timothy Gallagher and Christian Carrigan,
27 Esq. (and copied to the Presiding Officer and other Designated Parties), dated February 8,
2010, and attached as **Exhibit D** to the FitzGerald Declaration. This letter does not appear on
the RWQCB's website for these proceedings.

28 ⁹ See Cleanup Team's Notice of Motion and Motion to Extend Discovery Deadlines
(http://www.waterboards.ca.gov/sandiego/water_issues/programs/shipyards_sediment/docs/sediment_cleanup/adt/updates_June_2010/2010_06_16_cleanup_motion.pdf), page 5, citing to
SDUPD'S MOTION TO RE-OPEN AND
EXTEND DISCOVERY DEADLINES, ETC.

1 deadline, and had further private discussions with certain parties before ultimately releasing the
2 new TCAO/DTR on September 15, 2010.¹⁰

3 Before the issuance of the TCAO/DTR on September 15, 2010, the Port District had no
4 prior notice that it would be named as a "Discharger," particularly on the grounds and theories
5 now asserted by the Cleanup Team. In fact, every indication from the Cleanup Team was to the
6 contrary.

7 For example, at the time of the RWQCB's July 14, 2010, hearing on the Cleanup Team's
8 motion to extend discovery, the Executive Officer and member of the Cleanup Team, David
9 Gibson, gave a presentation during which he represented, as one explanation for the proposed
10 extension of the discovery deadlines, that the Cleanup Team was planning to identify an
11 additional "Discharger" in the TCAO/DTR, which it anticipated would be released by August 27,
12 2010—and he identified the new "Discharger" as "Star & Crescent Boat Company," which has
13 now been named in the new TCAO/DTR. *See* Declaration of Sandi L. Nichols ("Nichols Decl.")
14 concurrently submitted in support of this motion, ¶ 2. But at no time during that hearing did Mr.
15 Gibson or anyone else from the Cleanup Team ever state or suggest that the Port District too
16 would be named as a "Discharger" in the new draft TCAO/DTR. *Id.* at ¶ 3.

17 Nor did Mr. Gibson even hint of the possible inclusion of the Port District as a
18 "Discharger" in his August 26, 2010, "Status Report" to Presiding Officer David King and to the
19 San Diego Water Board Members. To the contrary, he once again represented only that:

20 A significant change to the CAO is the addition of a newly
21 discovered Responsible Party, Star and Crescent Boat Company.
22 An appropriate finding naming Star and Crescent as a party
23 responsible for the discharge has been added to the CAO, and a
24 supporting section has been added to the draft Technical Report.

25 *See* FitzGerald Decl., Exh. F.

26 the Declaration of David Barker.

27 ¹⁰ *See* "Status Report—Shipyard Sediment Site Cleanup and Abatement Order and
28 Environmental Impact Report ("Status Report")," dated August 26, 2010, attached as **Exhibit F** to the FitzGerald Declaration, page 2. This Status Report does not appear on the website for this proceeding.

1 The only reference in the Status Report to the Port District was with respect to the Cleanup Team's
2 intention "to approach the San Diego Unified Port District for the additional funding needed to
3 make up the shortfall if the [\$200,000] gap [for engaging a consultant to prepare the
4 Environmental Impact Report ("EIR") for the remediation project] is not filled by September 1,
5 2010." *Id.* The Port District did not agree to the Cleanup Team's request (and, indeed, could not
6 agree without the approval of the Port District's Board of Port Commissioners). FitzGerald Decl.,
7 ¶ 8.

8 Then, on September 8, 2010, just one week before the issuance of the TCAO/DTR, at the
9 request of the Cleanup Team, the Port Attorney and certain Port staff met with Mr. Carrigan, Craig
10 Carlisle and Julie Chan of the Cleanup Team at the RWQCB offices following the RWQCB's
11 public hearing that date. FitzGerald Decl., ¶ 9. The Cleanup Team representatives again were
12 silent about their intention to name the Port District as a "Discharger" in the soon-to-be-released
13 TCAO/DTR. *Id.* Exactly one week later, the Port District was named in the TCAO/DTR, on
14 grounds and theories never before raised or discussed publicly or with the Port District.¹¹

15 Consequently, it was not until after the Port District received and began its review of the
16 September 15, 2010, TCAO/DTR that it first became aware of the new facts, issues, and theories
17 the Cleanup Team contends support its naming of the Port District as a "Discharger" in a CAO for
18 the Shipyard Sediment Site. FitzGerald Decl., ¶ 10; Nichols Decl., ¶ 4. Due process
19 considerations mandate that the Port District now be afforded adequate and meaningful
20 opportunity to fully explore the revisions to the TCAO/DTR, through discovery to the Designated
21 Parties, so it can fully prepare and present its defense and other comments on the new TCAO/DTR
22 and offer the testimony of its experts and other witnesses at the time of the hearing to both contest
23 its inclusion as a "Discharger" and to ensure that the proposed cleanup is properly protective of the
24 beneficial uses of the San Diego Bay resources at the Shipyard Sediment Site. FitzGerald Decl., ¶
25 11; Nichols Decl., ¶ 5.

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27 ¹¹ Indeed, it was not until *just* before the TCAO/DTR was released that the Cleanup Team
28 member responsible for the editing and compiling of the new TCAO/DTR, Lisa Honma, was
even given the insert to the TCAO/DTR that included the sections naming the Port District.
See Nichols Decl., ¶ 4 and Exh. A thereto.

1 **III. THE "MEET AND CONFER" PROCESS**

2 This motion was necessitated after the Port District's two-week-long "meet and confer"
3 efforts with the other Designated Parties failed to produce an agreed-upon timeline and scope for
4 additional discovery. On October 3, 2010, the Port District circulated a proposed Stipulation to
5 Re-Open and Extend Discovery Deadlines. In response to comments received from certain parties
6 that the proposed schedule was too long, Port District counsel consulted with Cleanup Team
7 counsel to discuss a schedule that took those comments into account, while still affording the Port
8 District adequate opportunity to undertake the discovery needed for the Port District to fully
9 respond to the new TCAO/DTR. Nichols Decl., ¶ 6, Exh. B. The Port District then circulated a
10 revised Stipulation, on October 12, 2010, which included the Cleanup Team's commitment to
11 release a redline comparison of the December 2009 and September 2010 TCAOs/DTRs, and the
12 Addendum to the Administrative Record, by November 1, 2010, and which shortened the
13 previously-proposed discovery extension by six weeks, to the end of March 2011, rather than the
14 end of May 2011. *Id.* ¶ 7, Exh. C. On October 14, 2010, the Port District submitted responses to
15 comments received on the revised Stipulation. *Id.*, ¶ 7, Exh. D. Ultimately, all Designated Parties
16 participating in the "meet and confer" process agreed to the currently-proposed discovery
17 deadlines except San Diego Gas and Electric Company ("SDG&E") and the two environmental
18 groups, who argue that all discovery should be completed by the end of February instead. That
19 abbreviated schedule, however, would not allow adequate time for the depositions of the five key
20 Cleanup Team members on the schedule requested by their counsel, after review and analysis of
21 the new documentation yet to be produced by the Cleanup Team. *See* Nichols Decl., ¶ 8.

22 In addition, but not surprisingly, the former and current tenants of the Port District
23 objected to the proposed scope of discovery insofar as it includes inquiry into their respective
24 financial resources, including insurance assets, available to respond to the CAO. *Id.*, ¶ 9. Given
25 the critical importance of that information to the Port District's defense in light of the new
26 provisions in the TCAO/DTR, the Port District could not compromise on that issue. *Id.*

27 This motion is therefore directed to the Presiding Officer pursuant to Government Code
28 section 11445.40 and Paragraph 5 of the Stipulation.

1 **IV. ARGUMENT**

2 **A. THE PRESIDING OFFICER HAS THE AUTHORITY TO AND SHOULD**
3 **GRANT THE PORT DISTRICT'S MOTION TO RE-OPEN AND EXTEND**
4 **THE DISCOVERY DEADLINES AS PROPOSED**

5 Under California's Administrative Procedure Act (Gov. Code, § 11370 et seq.), the
6 presiding officer in an informal adjudicative hearing "shall regulate the course of the proceeding."
7 (Gov. Code, § 11445.40.) The Presiding Officer in this matter has done so on numerous
8 occasions, including issuance of the February 18, 2010 "Order Issuing Final Discovery Plan for
9 Tentative Cleanup and Abatement Order No. R9-2010-0002 And Associated Draft Technical
10 Report (the "Final Discovery Order"), and approval of the Stipulation Regarding Discovery
11 Extension, dated August 9, 2010 (the "Stipulation"), which modified the Final Discovery Order,
12 and which set forth the discovery scope and deadlines that are the subject of this motion. The
13 Presiding Officer has confirmed his authority to rule on procedural matters in the CAO
14 Proceeding. *See* August 10, 2010, Order Denying Motion of NASSCO Requesting a
15 Determination that TCAO R9-2010-0002 is Exempt from CEQA, p. 2 ["The role of the Presiding
16 Officer is to decide procedural matters."]. Furthermore, in the Stipulation, the Designated Parties
17 expressly provided for and acknowledged the Presiding Officer's right to grant permission to a
18 party "to take additional discovery that is not authorized by this stipulation or the terms of the
19 Final Discovery Plan." *See* Stipulation, ¶ 5.

20 The Port District's procedural due process rights would be violated if it is not provided a
21 reasonable and sufficient time to review the September 15, 2010, TCAO/DTR (for which the
22 Cleanup Team still has not published a redline to allow for easy comparison to the December 2009
23 TCAO/DTR) and updated Administrative Record (which has not yet been released), so the Port
24 District can meaningfully prepare for, and conduct discovery in preparation for the hearing on the
25 proposed Order. The action that the Cleanup Team proposes affects the substantive rights of the
26 Port District, constitutes formal agency enforcement, and subjects the Port District to material risk
27 (estimated to be in the millions of dollars). Consequently, the constitutionally-mandated
28 opportunity to be heard must be meaningful. *See generally, Matthews v. Eldridge*, 424 U.S. 319,
333 (1972) ("The fundamental requirement of due process is the opportunity to be heard at a

1 meaningful time and in a meaningful manner.”). To be meaningful, the opportunity to respond
2 requires provision of adequate preparation time. *See Brady v. Gebbie*, 859 F.2d 1543, 1555 (9th
3 Cir. 1988) (finding that defendant did not have sufficient time to prepare for the hearing; thus, he
4 did not have a “meaningful” opportunity to respond to the charges and was denied due process);
5 *see also Kempland v. Regents of University of California*, 155 Cal. App. 3d 644, 649 (1984).

6 **B. THE PORT DISTRICT'S PROPOSED DISCOVERY IS REASONABLY**
7 **LIMITED AND NECESSARY**

8 There is no disagreement amongst the Designated Parties that additional discovery on the
9 revisions to the TCAO/DTR since December 2009 is necessary and appropriate. *See Nichols*
10 *Decl.*, ¶ 8. The current and former tenants of the Port District, however, unreasonably seek to
11 prevent the Port District from pursuing discovery as to their financial resources, including
12 insurance assets, regardless of the fact that the TCAO/DTR now makes those resources the pivotal
13 issue in determining whether the Port District should be identified as "secondarily responsible" for
14 the cleanup of the Site (as it had been in the TCAOs/DTRs for the past five years), rather than
15 being named as a "Discharger." *Id.*, ¶ 9. The new TCAO/DTR renders obvious the Port District's
16 need to pursue this discovery. It states, for the first time:

17 *Although the Port District is a public government entity, and there is*
18 *no evidence in the record that the Port District initiated or*
19 *contributed to the actual discharge of waste to the Shipyard*
20 *Sediment Site, it is nevertheless appropriate to name the Port District*
21 *as a discharger in the CAO to the extent the Port's tenants, past and*
22 *present, have insufficient financial resources to clean up the*
23 *Shipyard Sediment Site and/or fail to comply with the order.*
(Citations.) In the event the Port District's tenants, past and
24 *present, have sufficient financial resources to clean up the*
25 *Shipyard Sediment Site and comply with the Order, then the San*
26 *Diego Water Board may modify its status to secondarily*
27 *responsible party in the future.*

28 September 15, 2010 DTR, page 11-4 (footnote and citations omitted).

29 This about-face by the Cleanup Team, in now making the Port District's "secondary
30 liability" contingent upon a showing of the *adequacy* of the Port's tenant-Dischargers' financial
31 resources,¹² implicitly suggests, without any factual support, that those tenants no longer have the

32 _____
¹² *See* fn. 1, above.

1 necessary financial resources to comply with the CAO. The Port District believes just the
2 opposite is true, and that it can establish, through written and deposition discovery, that those
3 parties have ample financial resources, including available historical liability insurance, sufficient
4 to cover those Dischargers' obligations with respect to the cleanup of the Site. The Port District
5 has evidence—though incomplete—of numerous historical insurance policies that were issued to
6 its tenants for their operations at the Site. But it does not know, without the benefit of further
7 discovery, whether those insurance assets remain available to respond to this cleanup.
8 Consequently, confirmation, through available discovery channels, of the Discharger-tenants'
9 financial resources, including the existence and availability of historical liability insurance
10 policies, will play a key role in the Port District's defense in this proceeding, as well as in the
11 ultimate cleanup of this Site. Allowing discovery of such information is critical to assuring the
12 Port District due process in this proceeding, while simultaneously benefiting the San Diego
13 community and the environment.

14 **C. THERE IS NO POTENTIAL PREJUDICE TO ANY DESIGNATED PARTY**
15 **FROM THE PROPOSED DISCOVERY SCHEDULE**

16 The schedule proposed by the Port District, and agreed to by almost all other parties, is the
17 least amount of time within which the Port District can adequately prepare its responses to the new
18 allegations against it, as well as to the other changes to the TCAO/DTR. This requires adequate
19 time to review and analyze the new TCAO/DTR and related Appendices, as well as the Addendum
20 to the Administrative Record once it is produced; to undertake the focused additional written and
21 deposition discovery; to identify and designate experts; and to submit any expert reports.

22 FitzGerald Decl., ¶ 12; Nichols Decl., ¶ 10. Indeed, the Cleanup Team, the City, BAE Systems,
23 NASSCO, and Campbell Industries have all agreed to the proposed schedule. Nichols Decl., ¶ 8.
24 The environmental groups, on the other hand, seek to unnecessarily truncate the discovery period,
25 claiming that the proposed schedule would coincide with their review of the anticipated draft EIR
26 for the remediation project, so they would not agree to extend the discovery deadline past the end
27 of February 2011. *See* Nichols Decl., ¶ 8.¹³

28 ¹³ The only other party that objected to the proposed discovery schedule was SDG&E, which
opined, without any explanation, that "the proposed schedule for discovery is too long." *See*
SDUPD'S MOTION TO RE-OPEN AND
EXTEND DISCOVERY DEADLINES, ETC.

1 But as the Cleanup Team and others have previously acknowledged in these proceedings,
2 it will take more than six months within which to prepare and circulate the required EIR before a
3 CAO can be adopted by the RWQCB for the Shipyard Sediment Site. The proposed discovery
4 schedule will end long before the EIR is ready and this matter will be heard. Indeed, according to
5 the RWQCB website, the San Diego Water Board does not anticipate that an EIR will be prepared
6 and ready for certification (and, hence, there will be no hearing to adopt a CAO) for at least ten
7 months from now. *See* RWQCB's website page, which can be found at:

8 (http://www.waterboards.ca.gov/sandiego/water_issues/programs/shipyards_sediment/index.shtml

9 ("Once funding is received and a qualified CEQA consultant is retained, the San Diego Water
10 Board is projecting that an administrative draft environmental impact report could be released for
11 public review within 22 weeks of the Board's authorization to the consultant to proceed with the
12 development of an EIR. The Board is also projecting that an EIR could be ready for certification
13 within 11 months of this date.") The Cleanup Team agrees, and sees no reason to shorten the
14 discovery period to the end of February, especially given their preference not to have more than
15 one (and maybe two) of the six remaining Cleanup Team depositions proceed in any given week.
16 *See* Nichols Decl., ¶ 8.

17 There is, thus, no potential prejudice to any Designated Party or the public by extending
18 the discovery cut-off to the end of March 2011, as proposed. A hearing on the TCAO/DTR has
19 not been set, and the Cleanup Team agrees that the hearing is not likely to take place for at least
20 ten months, pending the completion, circulation, and certification of the EIR for the remedial
21 project contemplated in the TCAO/DTR. *See* Nichols Decl., ¶ 11. So extending the discovery
22 deadlines as proposed will not require a continuance or postponement of the hearing of this matter.
23 On the other hand, denying the Port District the opportunity to conduct the requested discovery in
24 the time proposed will irreparably prejudice the Port District and deny it a full and fair opportunity
25 to present its defense in this proceeding. *See* FitzGerald Decl., ¶ 12; Nichols Decl., ¶ 10.

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Nichols Decl., ¶ 8.

1 The Port District is not seeking to unnecessarily delay these proceedings; to the contrary, it
2 has always participated in good faith in seeking to move this process forward through the
3 appropriate procedural channels, and has urged those parties who caused the contamination of the
4 Site to take responsibility for cleaning it up. But now that it has been named as a potential
5 "Discharger" in the TCAO/DTR—for the first time in 20 years since the RWQCB began
6 enforcement actions related to this Site—the Port District is entitled, just as the other
7 "Dischargers" have been for many years, to undertake a meaningful investigation into the basis for
8 its being named as a "Discharger" in the September 15, 2010, TCAO/DTR, and to address the
9 other modifications to the December 2009 TCAO/DTR too. The schedule proposed by the Port
10 District and agreed to by almost all parties is patently reasonable and necessary to avoid the
11 manifest injustice to the Port District that will otherwise result.

12 **V. CONCLUSION**

13 For all the foregoing reasons, the Port District respectfully submits that, pursuant to the
14 authority granted the Presiding Officer under Government Code section 11445.40, and Paragraph
15 5 of the Stipulation, the Presiding Officer should grant the Port District's motion to re-open and
16 extend the discovery deadlines in this administrative enforcement proceeding in accordance with
17 the schedule and scope of discovery proposed in this Motion.

18
19 DATED: October 19, 2010

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP

20
21 By: *Sandi L. Nichols*
22 SANDI L. NICHOLS
23 Attorneys for Designated Party
24 SAN DIEGO UNIFIED PORT DISTRICT
25
26
27
28

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15 Fax: (619) 686-6444
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16 lfitzgerald@portofsandiego.org

17 Attorneys for Designated Party
SAN DIEGO UNIFIED PORT DISTRICT

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

21 IN THE MATTER OF TENTATIVE
CLEANUP AND ABATEMENT ORDER NO.
22 R9-2011-0001 (formerly R9-2010-0002)
(SHIPYARD SEDIMENT CLEANUP)
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**DECLARATION OF LESLIE
FITZGERALD IN SUPPORT OF SAN
DIEGO UNIFIED PORT DISTRICT'S
MOTION TO RE-OPEN AND EXTEND
DISCOVERY DEADLINES**

1 I, LESLIE FITZGERALD, hereby declare that:

2 1. I am an attorney duly licensed to practice law in the State of California and am a
3 Deputy Port Attorney for the San Diego Unified Port District ("Port District"), one of the
4 Designated Parties to the above-captioned administrative enforcement proceeding. I have personal
5 knowledge of the matters set forth herein and could and would testify to them competently if
6 called as a witness.

7 2. Based upon the Draft Tentative Cleanup and Abatement Order No. R9-2010-0002,
8 and related Draft Technical Report, issued on December 22, 2009, the Port District did not
9 identify any expert or other witnesses in this matter. The Port District did, however, reserve its
10 rights to later designate or counter-designate such witnesses and to offer testimony, exhibits,
11 and/or other evidence related to the adoption of the tentative CAO and DTR, and to present
12 testimony from any other person identified by other Designated Parties, among other things.
13 Attached hereto as "**Exhibit A**," is a true and correct copy of my letter, dated July 19, 2010, to
14 Presiding Officer David King, regarding the Port District's Witness Designations.

15 3. Attached hereto as "**Exhibit B**" is a true and correct copy of the "Order Referring
16 Proceedings to Mediation," dated June 9, 2008, issued by Presiding Officer David King in this
17 matter.

18 4. Attached hereto as "**Exhibit C**" is a true and correct copy of the Memorandum
19 from Presiding Officer David King to Tim Gallagher, Mediator, dated September 17, 2009,
20 regarding the mediation in connection with Tentative Cleanup and Abatement order No. R9-2005-
21 0126, in this matter.

22 5. Attached hereto as "**Exhibit D**" is a true and correct copy of the letter from Port
23 Attorney Duane E. Bennett to Timothy Gallagher and the attorney for the designated "Cleanup
24 Team" for the San Diego Regional Water Quality Control Board in this matter, Christian Carrigan,
25 dated February 8, 2010, formally notifying them, along with Presiding Officer David King and the
26 Designated Parties to this proceeding, that the Port District had withdrawn from the mediation
27 effective January 19, 2010.

28

1 6. Attached hereto as "**Exhibit E**" is a true and correct copy of the "Ruling on
2 Cleanup Team's Motion to Extend Remaining Discovery Deadlines and Related Matters
3 Addressed at Prehearing Conference," dated July 16, 2010, issued in this matter by Presiding
4 Officer David King (without the Attachment entitled "San Diego Bay Sediment CAO--All
5 Designated and Interested Contact List").

6 7. Attached hereto as "**Exhibit F**" is a true and correct copy of Executive Officer
7 David Gibson's "Status Report—Shipyard Sediment Site Cleanup and Abatement Order and
8 Environmental Impact Report," to the Presiding Officer and the San Diego Water Board Members,
9 dated August 26, 2010, together with the email from Mr. David Barker transmitting the Status
10 Report. In this Status Report, Mr. Gibson notes that the Cleanup Team intended to request that the
11 Port District fill the funding gap for the cost of the environmental consultant to prepare an
12 Environmental Impact Report for the remediation project for the Shipyard Sediment Site (that gap
13 was estimated in the Status Report to be about \$200,000).

14 8. The Cleanup Team requested that the Port District participate in the funding for the
15 EIR consultant. Because the Port District was not named as a "Discharger" with respect to this
16 Site, and because the Port District representatives did not agree that the Port District could or
17 should bear responsibility for the remediation project or for the EIR consultant, we did not agree
18 to the Cleanup Team's request. Indeed, staff could not agree to provide the requested funding
19 without the approval of the Port District's Board of Port Commissioners.

20 9. On September 8, 2010, at the request of Christian Carrigan, attorney to the Cleanup
21 Team, Port Attorney Duane Bennett and I, together with certain Port District staff, met with Mr.
22 Carrigan, Julie Chan and Craig Carlisle of the Cleanup Team at the RWQCB offices, following
23 the RWQCB's public hearing relating to this matter. At no time did Mr. Carrigan or the Cleanup
24 Team representatives mention that the Port District would be named as a "Discharger" in the soon-
25 to-be-released revised draft Tentative Cleanup and Abatement Order and Draft Technical Report
26 for the Shipyard Sediment Site.

27 10. At no time prior to the issuance by the Cleanup Team of the September 15, 2010,
28 TCAO/DTR had the Port District been informed that the Cleanup Team intended to name the Port

1 District as a "Discharger" in the TCAO/DTR. It was not until the Port District began its review of
2 the new TCAO/DTR (which it still has not completed) that it first became aware of the new facts,
3 issues, and theories the Cleanup Team contends support its naming of the Port District as a
4 "Discharger" in a CAO for the Shipyard Sediment Site.

5 11. The Port District needs a reasonably adequate and meaningful opportunity to fully
6 explore the revisions to the TCAO/DTR, through discovery to the Designated Parties, so it can
7 fully prepare and present its defense and other comments on the new TCAO/DTR and offer the
8 testimony of its experts and other witnesses at the time of the hearing, to both contest its inclusion
9 as a "Discharger" and to ensure that the proposed cleanup is properly protective of the beneficial
10 uses of the San Diego Bay resources at the Shipyard Sediment Site.

11 12. It is my opinion that, absent the opportunity to re-open and extend the discovery
12 deadlines as proposed, the Port District will be irreparably prejudiced and will be denied a full and
13 fair opportunity to present its defense. The schedule proposed by the Port District in this motion is
14 the least amount of time within which the Port District can adequately prepare its responses to the
15 new allegations against it, as well as to the other changes to the TCAO/DTR. This requires
16 adequate opportunity to review the new TCAO/DTR and related Appendices, as well as the
17 Addendum to the Administrative Record, once it is produced; to undertake the focused additional
18 written and deposition discovery; to identify and designate experts; and to submit any expert
19 reports.

20 I declare under penalty of perjury under the laws of the State of California that the
21 foregoing is true and correct and that this Declaration was executed on October 19, 2010, at San
22 Diego, California.

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LESLIE FITZGERALD

EXHIBIT A



3165 Pacific Highway, San Diego, CA 92101
P.O. Box 120488, San Diego, CA 92112-0488
619.686.6200 • www.portofsandiego.org

July 19, 2010

Via Email

David King
Presiding Officer for Prehearing Proceedings
San Diego Regional Water Quality Control Board
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340

**Re: Tentative Cleanup and Abatement Order No. R9-2010-0002;
San Diego Unified Port District Witness Designations**

Dear Mr. King:

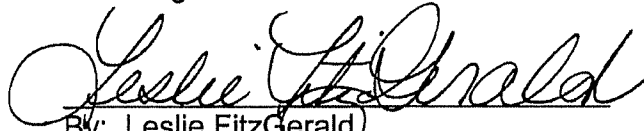
Pursuant to your July 16, 2010, Ruling on Cleanup Team's Motion to Extend Remaining Discovery Deadlines and Related Matters Addressed at Prehearing Conference for Tentative Cleanup and Abatement Order ("CAO") No. R9-2010-0002, the San Diego Unified Port District ("Port District") at this time does not designate any expert or non-expert witnesses.

However, the Port District reserves the right to participate in the counter-designation of expert witnesses as necessary and to designate expert and non-expert witnesses in conjunction with any revised tentative CAO and Draft Technical Report ("DTR"). The Port District further reserves the right to offer testimony, exhibits, and/or other evidence related to the adoption of the tentative CAO and DTR, and to present testimony from any other person identified by other Designated Parties to this proceeding, as well as its rights under applicable laws, regulations and other authorities applicable to the Regional Water Board proceedings.

The Port District looks forward to the adoption of the tentative CAO and the cleanup of the Shipyard Sediment Site.

Respectfully submitted,

San Diego Unified Port District


By: Leslie FitzGerald
Deputy Port Attorney

LAF:lr

EXHIBIT B



Linda S. Adams
Secretary for
Environmental Protection

California Regional Water Quality Control Board San Diego Region

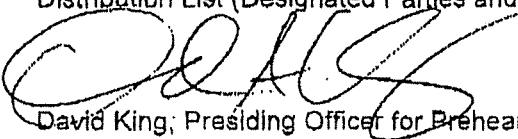
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Arnold Schwarzenegger
Governor

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(858) 467-2952 • Fax (858) 571-6972
<http://www.wqcrboards.ca.gov/sandiego>

TO: Distribution List (Designated Parties and Interested Persons)

FROM: 
David King, Presiding Officer for Prehearing Proceedings
Tentative Cleanup and Abatement Order No. R9-2005-0126
SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD

DATE: June 9, 2008

SUBJECT: ORDER REFERRING PROCEEDINGS TO MEDIATION;
TENTATIVE CLEANUP AND ABATEMENT ORDER NO. R9-2005-0126
(SAN DIEGO BAY SEDIMENT CLEANUP)

By letter dated June 4, 2008, ten of the thirteen Designated Parties jointly requested that the proceedings related to Tentative Cleanup and Abatement Order No. R9-2005-0126 be referred to mediation. BP separately confirmed that it consents to the referral to mediation. Chevron stated that it does not object to mediation, but Chevron subsequently clarified that it was under the mistaken belief that the initial referral to mediation would be limited to cleanup level issues. The remaining Designated Party, Marine Construction and Design Company / Campbell Industries, Inc., has failed to participate in the proceedings to date, but its representative, Peter Schmidt, stated orally to Phil Wyels of the Advisory Team that it does not object to the referral to mediation.

Pursuant to Government Code section 11420.10(a)(1), these proceedings are hereby referred to mediation by a neutral mediator for a period of ninety days, effective immediately. Until Chevron gives its consent to expand the scope of the mediation, the mediation will be limited to cleanup level issues. Upon recommendation by the Designated Parties, Tim Gallagher, Esq., will serve as the mediator. Mr. Gallagher is directed to submit an evaluation of the likelihood of success of the mediation to the Presiding Officer by July 7, and is directed to submit progress reports to the Presiding Officer on July 7, July 21, August 4, and August 18. A final report to the Presiding Officer is due by September 8, 2008. The participants in the mediation are responsible for Mr. Gallagher's compensation.

Accordingly, the schedule for the proceedings contained in the Second Amended Order of Proceedings is hereby stayed for a period of ninety days. At the conclusion of the ninety days, the schedule will resume, subject to any modifications determined to be appropriate by the Presiding Officer.

California Environmental Protection Agency

EXHIBIT C



Linda S. Adams
Secretary for
Environmental Protection

California Regional Water Quality Control Board

San Diego Region

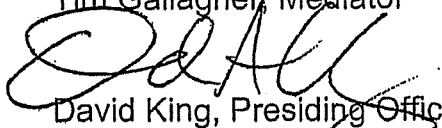
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<http://www.waterboards.ca.gov/sandiego>

TO: Tim Gallagher, Mediator

FROM: 
David King, Presiding Officer for Prehearing Proceedings
Tentative Cleanup and Abatement Order No. R9-2005-0126
SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD

DATE: September 17, 2009

SUBJECT: TENTATIVE CLEANUP AND ABATEMENT ORDER NO. R9-2005-0126

By Order dated July 23, 2009, I, as Presiding Officer for the Prehearing Proceedings, extended the mediation period and continued to stay the schedule of proceedings until I receive a report on the status of mediation. While there have been no public reports on the status of the mediation and resolution of the issues, I have received private reports from the mediator and have been confident that the mediation is progressing adequately.

At the San Diego Water Board's August 12, 2009, meeting, and again on September 9, 2009, representatives of the environmental groups who are designated parties to the above proceeding expressed dissatisfaction with the progress of the mediation and frustration that they have felt excluded from the mediation proceedings. At the September 9, 2009, meeting, these same representatives announced that they are withdrawing from the mediation. While I am disappointed that the environmental groups have felt excluded and are now withdrawing from the mediation, I do not agree that their withdrawal results in unilateral termination of the mediation. While Government Code section 11420.10(a)(1) allows a matter to be referred to mediation upon consent of the parties, it does not provide for unilateral termination of the mediation by a participant after the mediation has commenced. The July 23, 2009, Order therefore remains in effect until further notice.

The mediation has been ongoing, however, since June 4, 2008, several months longer than originally anticipated. By September 30, 2009, the parties to the mediation must submit a proposal, including proposed schedule, outlining the timing of the release of a draft revised Cleanup and Abatement Order and associated technical report for public comment and a proposed schedule for hearing(s) before the San Diego Water Board. I expect that you will work with the designated parties to develop such a proposal.

cc: Distribution List (Designated Parties and Interested Persons)

California Environmental Protection Agency

EXHIBIT D



**Unified Port
of San Diego**

8 February 2010

3165 Pacific Highway, San Diego, CA 92101
P.O. Box 120488, San Diego, CA 92112-0488
619.686.6200 • www.portofsandiego.org

**SENT VIA E-MAIL
& U. S. MAIL**

Timothy P. Gallagher, Esq.
Gallagher & Gallagher
1925 Century Park East #950
Los Angeles, California 90067-2710

Christian M. Carrigan, Esq.
State Water Resources Control Board
Post Office Box 100
Sacramento, California 95812

**Re: San Diego Unified Port District's Withdrawal from Mediation
Regarding Revised Tentative Cleanup And Abatement Order
No. R9-2010-0002 (San Diego Bay Shipyard Sediment Cleanup Matter)**

Dear Messrs. Gallagher & Carrigan:

The San Diego Unified Port District (District) would like to congratulate you on the issuance of revised Tentative Cleanup and Abatement Order (TCAO) No. R9-2010-0002 on December 22, 2009. This achievement is a significant milestone in the Regional Water Quality Control Board's effort to achieve sediment cleanup at the Shipyard Sediment Site (Site) and shows the willingness of the named Dischargers to commit substantial time and effort towards achieving a mediated solution, instead of engaging in costly and prolonged litigation that will only serve to delay the cleanup.

As you know, the Regional Board's Presiding Officer in this matter authorized the mediation process to establish cleanup levels for the Site, which we understand was accomplished and incorporated into the revised TCAO. I have therefore advised you that the District will no longer participate in the mediation process effective January 19, 2010.

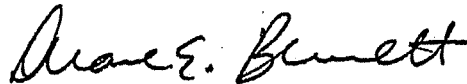
While we will continue to participate in the Regional Board's administrative hearing process, given the issuance of the revised TCAO and commencement of the public comment period, the District believes the administrative proceedings regarding the TCAO, including its proposed scope, named Dischargers, and the like, must now proceed in a public manner consistent with due process and under the applicable rules and regulations. As a public agency, the District must honor its obligations to the public and allow the arguments and positions in this matter to proceed in the public realm.

Although the District was appropriately not named as a Discharger in the 2005 and 2009 TCAOs, the District suggested and participated in the mediation as a Designated Party, consistent with its role as the trustee of the tidelands on behalf of the citizens of the State of California, and its goal of expediting an appropriate cleanup. These efforts also complied with the direction given to the District by the California State Lands Commission by letter dated November 15, 2007.

Despite our withdrawal from the mediation, the District remains committed to supporting and assisting the Regional Water Quality Control Board's efforts to effectuate remediation of the subject Site. At the conclusion of the public proceedings, the District will analyze and assess its position or any role relative to any future mediation process.

Thank you for your time and attention in this matter.

Very truly yours,



DUANE E. BENNETT
PORT ATTORNEY

DEB:sw

cc: David King
San Diego Regional Water
Quality Control Board
San Diego Port Tenants
Association
United States Navy
Coast Law Group
San Diego Coastkeeper
Marine Construction & Design Co.
& Campbell Industries, Inc.
City of San Diego
BAE Systems Ship Repair, Inc.
NASSCO
San Diego Gas & Electric
(all cc's sent via e-mail)

EXHIBIT E



California Regional Water Quality Control Board San Diego Region



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Linda S. Adams
Secretary for
Environmental Protection

Arnold Schwarzenegger
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(858) 467-2952 • Fax (858) 571-6972
[http:// www.waterboards.ca.gov/sandiego](http://www.waterboards.ca.gov/sandiego)

Date: July 16, 2010

To: Designated Parties and Interested Persons

From: David A. King, Presiding Officer for Prehearing Proceedings
Tentative Cleanup and Abatement Order No. R9-2010-0002
SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD

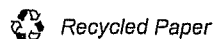
**Subject: Ruling on Cleanup Team's Motion to Extend Remaining Discovery
Deadlines and Related Matters Addressed at Prehearing Conference**

On June 16, 2010, the California Regional Water Quality Control Board, San Diego Region, (San Diego Water Board) Cleanup Team filed a motion to extend the remaining deadlines in the Final Discovery Plan for tentative Cleanup and Abatement Order (CAO) No. R9-2010-0002 (Motion). I requested and received responses to the Motion from the Designated Parties on June 24, 2010. At the July 14, 2010, prehearing conference Designated Parties spoke in support of and in opposition to the Cleanup Team's motion and responded to questions by members of the San Diego Water Board. After considering the Motion, responses to the Motion and the comments of the Designated Parties, and for all the reasons stated at the prehearing conference, I, acting as presiding officer for prehearing proceedings for the above matter, denied the Cleanup Team's Motion. The Cleanup Team's Motion included an alternative request for reconsideration by the full San Diego Water Board as presiding officer. All other board members were present during the prehearing conference, expressed support for the ruling and therefore declined to overrule my decision to deny the Motion. The ruling to deny the Motion stands.

Therefore, in accordance with the Final Discovery Plan adopted February 18, 2010, the discovery period for tentative CAO and the draft Technical Report ends August 23, 2010. As indicated in the June 17, 2010, Request for Responses to the Motion, because the Motion was denied, the Designated Parties have an additional five days from July 14, 2010, to disclose expert and non-expert witnesses under the Final Discovery Schedule. I will timely rule on motions to quash unreasonable or oppressive discovery requests.

At the prehearing conference, I directed the Executive Officer to immediately submit a request to the State Water Resources Control Board for an emergency sole source allocation to authorize the hiring of the identified consultant to complete an

California Environmental Protection Agency



Environmental Impact Report (EIR) for the cleanup project in the event the Designated Parties fail to timely agree to a cost-sharing arrangement to fully compensate the consultant.

Finally, I terminated the mediation to which the matter was formally referred in June 2008. The Designated Parties are welcome to continue mediation or engage in other settlement discussion under their own terms.

DAK:mch:ftm

Attachment: Designated Parties and Interested Persons mailing list

Order No.	R9-2010-0002
CIWQS Place ID	712610
Reg. Measure No.	340860

EXHIBIT F

Nichols, Sandi

From: David Barker [DBarker@waterboards.ca.gov]
Sent: Thursday, August 26, 2010 5:10 PM
To: David King
Cc: Nichols, Sandi; Lloyd Schwartz; Raymond; Ray Parra; Sandor Halvax; James Dragna; Michael McDonough; Asteghik Khajetoorians; Douglas Reinhart; Jack Oman; bbrown; James Mathison; Wentzelee Botha; William Brown; James Handmacher; Brian Wall; Todd Littleworth; Marco Gonzalez; Jim Peugh; Bill Paznokas; Steven Goldberg; Mike Anderson; Barb.J.Irwin@dynegy.com; Ed Kimura; Laura Hunter; Brian Ledger; K Reyna; Miles Scully; Richard Haimann; Karl Lytz; Kelly Richardson; Robert Howard; Rusty Fairey; Christopher Barnes; Michael Chee; Anthony J. Gonzales; Brian Gordon; David Silverstein; Nate Cushman; Laurie Sullivan; Mark Myers; Bob Brodberg; Michael Anderson; Mike Martin; Christopher McNevin; David Merk; Eileen Maher; Leslie FitzGerald; Paul Brown; Pat McLernon; Drew Kleis; Fritz Ortlieb; Kris McFadden; Ruth Kolb; Steve Bay; Bruce Reznik; Gabriel Solmer; Sharon; Justin Hawkins; Jill Tracy; Ken Rowland; Jane Smith; Paul Thayer; Bart Chadwick; Chuck Katz; Tim Gallagher; Thomas Mulder; Melanie Andrews; Thomas Stahl; Alan Monji; Craig Carlisle; Cris Carrigan; Catherine Hagan (George); David Barker; David Gibson; Frank Melbourn; Julie Chan; James Smith; Lisa Honma; Philip Wwyls; OutMail; Tom Alo; Vicente Rodriguez; Pete Nyquist
Subject: Cleanup Team Status Report, Shipyard Sediment Site, CAO R9-2010-0002 & EIR
Attachments: David Barker.vcf; Memo 8-26-2010_1.pdf

Dear Mr King,

Attached is a status report from David Gibson, Executive Officer, on the Shipyard Sediment Site Cleanup and Abatement Order, the draft Technical Report, and the Environmental Impact Report.

Please contact me at the number below or by e-mail if you have any questions or have difficulty opening the attachments.

Sincerely,

David Barker
San Diego Water Board

David Barker
Supervising Engineer
California Regional Water Quality Control Board
San Diego Region
(858) 467-2989

Please take the time to fill out our electronic customer service survey located at <http://www.calepa.ca.gov/Customer/>,



California Regional Water Quality Control Board San Diego Region



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Secretary for
Environmental Protection

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Arnold Schwarzenegger
Governor

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(858) 467-2952 • Fax (858) 571-6972
<http://www.waterboards.ca.gov/sandiego>

TO: David A. King, Hearing Officer for Pre-hearing Proceedings
Shipyard Sediment Site Cleanup and Abatement Order

Honorable San Diego Water Board Members

FROM: David W. Gibson 
Executive Officer
SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD

DATE: August 26, 2010

**SUBJECT: STATUS REPORT – SHIPYARD SEDIMENT SITE CLEANUP AND
ABATEMENT ORDER AND ENVIRONMENTAL IMPACT REPORT**

This memorandum is to inform you of the Cleanup Team's progress in implementing the Board's direction given at the July meeting with respect to the Shipyard Sediment Site Cleanup and Abatement Order (CAO) and Environmental Impact Report (EIR). This memo also includes up-to-date information on the status of the project. This memorandum is the first in what will become a regular series of status reports.

With respect to the EIR, the Cleanup Team is committed to completing the EIR process as quickly as possible and within this fiscal year and to that end is implementing a 3-pronged approach. First, as directed, we are pursuing funding for the EIR from the Cleanup and Abatement Account (CAA). A tentative resolution approving the funding request is on your September Board meeting agenda. The item is scheduled for consideration by the State Water Board at its September 21, 2010 meeting.

The second and preferred approach is for the Responsible Parties to fund the EIR. The Responsible Parties have given me permission to disclose that since the July Board Meeting, an additional \$100,000 in funding has been committed bringing the total funding commitment to \$300,000 of the \$500,000 estimated for the cost of preparing the EIR. Mediator Tim Gallagher continues to press the Responsible Parties to close the funding gap of approximately \$200,000. In addition, the Cleanup Team will approach the San Diego Unified Port District for the additional funding needed to make up the shortfall if the gap is not filled by September 1, 2010. A signed Memorandum of Agreement is the only commitment from the Responsible Parties that I will accept in lieu of drafting the EIR in-house without further delay as described below.

Finally, we are preparing to draft the EIR in-house without delay if the aforementioned efforts are not immediately fruitful or if the request for CAA funds is not approved by State Board. I have set a start date of September 13, 2010 for the initiation of the EIR in-house and to establish milestone tasks and dates and a plan to achieve them on schedule and in time for the Board to consider certification of the EIR and adoption of the CAO in mid-2011. I have begun identifying staff members and resources to redirect to the EIR project and ongoing priorities that may be delayed while those staff are redirected. Key staff members that will be needed to draft the EIR have been engaged on other high priority regulatory duties and unavailable to date, but will be available to start work on the EIR at that time.

With the added workload of preparing for depositions and responding to parties' written discovery, and with the resumption of furloughs, the Cleanup Team will be unable to meet its originally planned release date of August 27, 2010. The Cleanup Team will issue a revised Cleanup and Abatement Order and draft Technical Report no later than September 15, 2010.

Since the tentative CAO and draft Technical Report were issued in December 2009, the Cleanup Team, assisted by the Responsible Parties, has corrected computational errors, standardized analytical methods, improved transparency by moving data and information out of spreadsheets and into newly compiled appendices, improved clarity through text edits, and cleaned up several difficult to read figures. A significant change to the CAO is the addition of a newly discovered Responsible Party, Star and Crescent Boat Company. An appropriate finding naming Star and Crescent as a party responsible for the discharge has been added to the CAO, and a supporting section has been added to the draft Technical Report.

I look forward to providing you regular updates on this project, and can answer any questions you might have at the September 8 Board Meeting.

1 SANDI L. NICHOLS (SBN 100403)
KATHRYN D. HORNING (SBN 185610)
2 ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP
3 Three Embarcadero Center, 12th Floor
San Francisco, CA 94111-4074
4 Phone: (415) 837-1515
Fax: (415) 837-1516
5 E-Mail: snichols@allenmatkins.com
khorning@allenmatkins.com

6 WILLIAM D. BROWN (SBN. 125468)
7 WENTZELEE BOTHA (SBN 207029)
BROWN & WINTERS
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11 DUANE E. BENNETT (SBN 110202)
12 LESLIE ANN FITZGERALD (SBN 149373)
SAN DIEGO UNIFIED PORT DISTRICT
13 3165 Pacific Highway
P O Box 120488
14 San Diego CA 92112
Telephone: (619) 686-6219
15 Facsimile: (619) 686-6444
E-mail: lfitzgerald@portofsandiego.org
dbennett@portofsandiego.org

16
17 Attorneys for Designated Party
SAN DIEGO UNIFIED PORT DISTRICT

18
19 CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

20 SAN DIEGO REGION

21 IN THE MATTER OF TENTATIVE
CLEANUP AND ABATEMENT ORDER NO.
22 R9-2011-0001 (formerly R9-2010-0002)
(SHIPYARD SEDIMENT CLEANUP)

**DECLARATION OF SANDI L. NICHOLS
IN SUPPORT OF SAN DIEGO UNIFIED
PORT DISTRICT'S MOTION TO RE-OPEN
AND EXTEND DISCOVERY DEADLINES**

1 I, SANDI L. NICHOLS, hereby declare that:

2 1. I am an attorney duly licensed to practice law in the State of California and am a
3 partner in the law firm of Allen Matkins Leck Gamble Mallory & Natsis LLP, one of the attorneys
4 of record for the San Diego Unified Port District ("Port District") in the above-captioned
5 administrative enforcement proceeding. I have personal knowledge of the matters set forth herein
6 and could and would testify competently to them if called as a witness.

7 2. I personally attended the San Diego Regional Water Quality Control Board's
8 (SDRWQCB) public hearing on July 14, 2010. During the hearing on the Motion to Extend
9 Discovery Deadlines, submitted by the Cleanup Team for the SDRWQCB in this matter,
10 Executive Officer David Gibson gave a presentation during which he represented, as one
11 explanation for the proposed extension of the discovery deadlines, that the Cleanup Team was
12 planning to identify an additional "Discharger" in the Tentative Cleanup and Abatement Order and
13 Draft Technical Report for the Shipyard Sediment Site, and identified that party at the hearing as
14 "Star & Crescent Boat Company."

15 3. At no time during the July 14, 2010, public hearing did Mr. Gibson (or anyone else
16 from the Cleanup Team) ever state or suggest that the Cleanup Team intended to name the Port
17 District as a "Discharger" in the revised TCAO/DTR.

18 4. At no time prior to the issuance by the Cleanup Team of the September 15, 2010,
19 TCAO/DTR had the Port District been informed that the Cleanup Team intended to name the Port
20 District as a "Discharger" in the TCAO/DTR. Indeed, according to the deposition testimony of
21 Lisa Honma, the Cleanup Team member responsible for the editing and compiling of the new
22 TCAO/DTR, it was not until just before the TCAO/DTR was released that she was even given the
23 insert to the TCAO/DTR that included the sections naming the Port District. A true and correct
24 copy of the pertinent pages of the Deposition of Lisa Honma, taken on October 5, 2010, are
25 attached hereto as "**Exhibit A.**" Consequently, it was not until the Port District began its review
26 of the new TCAO/DTR (which it still has not completed) that it first became aware of the new
27 facts, issues, and theories the Cleanup Team contends support its naming of the Port District as a
28 "Discharger" in a CAO for the Shipyard Sediment Site.

1 5. The Port District needs a reasonably adequate and meaningful opportunity to fully
2 explore the revisions to the TCAO/DTR, through appropriately limited discovery to the
3 Designated Parties, so it can fully prepare and present its defense and other comments on the new
4 TCAO/DTR and offer the testimony of its experts and other witnesses at the time of the hearing,
5 to both contest its inclusion as a "Discharger" and to ensure that the proposed cleanup is properly
6 protective of the beneficial uses of the San Diego Bay resources at the Shipyard Sediment Site.

7 6. This motion was necessitated after the Port District's two-week-long "meet and
8 confer" efforts with the other Designated Parties failed to produce an agreed-upon timeline and
9 scope for additional discovery. In an effort to "meet and confer," the Port District had circulated a
10 proposed Stipulation to Re-Open and Extend Discovery Deadlines. A true and correct copy of
11 that Stipulation with the email transmitting it to the Designated Parties is attached hereto as
12 "**Exhibit B.**" In response to comments received from certain Designated Parties that the proposed
13 schedule was too long, Port District counsel consulted with Cleanup Team counsel to discuss a
14 schedule that took those comments into account, while still affording the Port District adequate
15 opportunity to undertake the discovery needed for the Port District to fully respond to the new
16 TCAO/DTR.

17 7. The Port District then circulated a revised Stipulation, on October 12, 2010. This
18 revised Stipulation had already been agreed to by the Cleanup Team, and included the Cleanup
19 Team's commitment to release a redline comparison of the December 2009 and September 2010
20 TCAOs/DTRs, and the Appendix to the Administrative Record, by November 1, 2010. It also
21 shortened the previously-proposed discovery extension by six weeks, to the end of March 2011,
22 rather than mid-May 2011. A true and correct copy of the compromise Stipulation with the email
23 transmitting it to the Designated Parties is attached hereto as "**Exhibit C.**" Because I had
24 received comments from only two other Designated Parties, I sent a follow-up email to them on
25 October 14, 2010, to respond to those comments and to request any additional comments the
26 Designated Parties had on the proposed revised Stipulation. A true and correct copy of that email
27 is attached hereto as "**Exhibit D.**"

28

1 8. Ultimately, all Designated Parties participating in the "meet and confer" process
2 agreed that additional discovery on the changes to the TCAO/DTR is necessary and appropriate.
3 Almost all Designated Parties (i.e., the Cleanup Team, the City of San Diego, NASSCO, BAE
4 Systems, and Campbell Industries) also agreed to the currently-proposed discovery deadlines.
5 Coastkeeper and the Environmental Health Coalition (joined by SDG&E), on the other hand, seek
6 to unnecessarily truncate the discovery period, claiming that the proposed schedule would
7 coincide with their review of the anticipated draft Environmental Impact Report for the
8 remediation project, so they were unwilling to agree to extend the discovery deadline past the end
9 of February 2011. (SDG&E simply stated, without explanation, that the proposed schedule was
10 "too long.") The abbreviated schedule proposed by the environmental groups and SDG&E,
11 however, would not allow adequate time for the depositions of the five key Cleanup Team
12 members on the schedule requested by their counsel, after review and analysis of the new
13 documentation yet to be produced by the Cleanup Team. Specifically, Mr. Carrigan informed me
14 that he would prefer to have the five key Cleanup Team depositions (which will likely take at least
15 two days a piece) scheduled for no more than one (and possibly two) deposition(s) per week.
16 Those depositions alone, therefore, could take four-to-five weeks to complete.

17 9. The former and current tenants of the Port District who responded to the proposed
18 Stipulation, including NASSCO, BAE Systems, SDG&E, and Campbell Industries, objected to the
19 proposed scope of discovery insofar as it includes inquiry into their respective financial resources,
20 including insurance assets, available to respond to the CAO. (No response was received from Star
21 & Crescent Boat Company.) Given the critical importance of that information to the Port
22 District's defense, the Port District could not compromise on that issue.

23 10. It is my opinion that, absent the opportunity to re-open and extend the discovery
24 deadlines as proposed, the Port District will be irreparably prejudiced and will be denied a full and
25 fair opportunity to present its defense. The schedule proposed by the Port District in this motion is
26 the least amount of time within which the Port District can adequately prepare its responses to the
27 new allegations against it, as well as other changes to the TCAO/DTR. This requires adequate
28 opportunity to review the new TCAO/DTR and related Appendices, as well as the Addendum to

1 the Administrative Record, once it is produced; to undertake the focused additional written and
2 deposition discovery; to identify and designate experts; and to submit any expert reports.

3 11. A hearing on the TCAO/DTR has not been set, and the Cleanup Team agrees (based upon
4 their agreement to the revised proposed Stipulation (Exhibit C hereto)) that the hearing is not
5 likely to take place for at least ten months, pending the completion, circulation, and certification of
6 the EIR for the remedial project contemplated in the TCAO/DTR. So extending the discovery
7 deadlines as proposed will not require a continuance or postponement of the hearing of this matter.

8 I declare under penalty of perjury under the laws of the State of California that the
9 foregoing is true and correct and that this Declaration was executed on October 19, 2010, at San
10 Francisco, California.

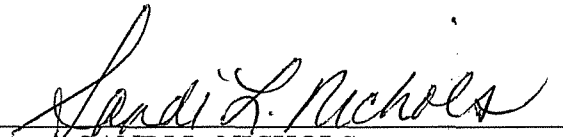
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13 SANDI L. NICHOLS
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EXHIBIT A

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

)
IN THE MATTER OF:)
)
TENTATIVE CLEANUP AND ABATEMENT)
) Order No.
) R9-2010-0002
)
_____)

**VIDEOTAPED DEPOSITION OF LISA HONMA
OCTOBER 5, 2010
SAN DIEGO, CALIFORNIA**

REPORTED BY: JULIE A. MCKAY, CSR NO. 9059



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San Diego, CA
92101

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1 between December 2009 and September 2010, did you make 14:18
2 any of those changes?

3 A. Just the edits that were given to me.

4 Q. And were you given any edits with respect to
5 finding Number 11 relating to the San Diego Unified Port 14:18
6 District?

7 MS. TRACY: Objection. Asked and answered.

8 BY MS. NICHOLS:

9 Q. You can answer.

10 A. Yes. 14:18

11 Q. And in making those changes, were you simply
12 inputting information that was provided to you by
13 someone else?

14 A. Yes.

15 Q. Who provided that information to you? 14:18

16 A. Julie Chan.

17 Q. And do you know if Julie Chan wrote the
18 information that she was giving to you concerning the
19 Port District?

20 A. I do not know. 14:19

21 Q. Do you know if someone else outside the
22 Regional Board may have written that?

23 MR. CARRIGAN: Asked and answered.

24 BY MS. NICHOLS:

25 Q. You can answer the question. 14:19

1 Q. And what about the section on Star & Crescent 14:23
2 Boat Company?

3 A. No.

4 Q. Would it be correct to say, then, that you were
5 the repository for all of the revisions to the DTR and 14:24
6 CAO between December 2009 and September 2010?

7 A. Yes.

8 Q. Do you recall how early in September you
9 received the email from Julie Chan or Dave Barker that
10 contained the changes to the -- strike that. 14:24

11 Do you recall when in September, how early, you
12 know, first week, second week of September, before the
13 report came out that you received the changes regarding
14 Finding Number 11 in the DTR?

15 A. Second week, maybe. 14:25

16 Q. So just before it was released?

17 A. Maybe. Yes.

18 Q. Okay. Do you recall how many days you had to
19 get that all together before the DTR was actually
20 published on September 15th? 14:25

21 A. No.

22 Q. Do you feel -- strike that.
23 Do you recall feeling rushed to get that done?

24 A. Yes. Well, yes.

25 Q. Do you recall when you received the changes 14:25

1 STATE OF CALIFORNIA)

: ss.

2 COUNTY OF SAN DIEGO)

3 I, Julie A. McKay, Certified Shorthand Reporter in
4 and for the State of California, Certificate No. 9059,
5 do hereby certify:

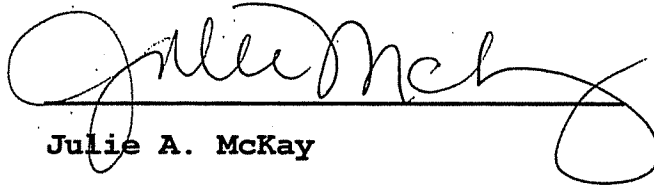
6 That the witness in the foregoing deposition was by
7 me first duly sworn to testify the truth, the whole
8 truth, and nothing but the truth in the foregoing cause;
9 that the deposition was taken before me at the time and
10 place herein named; that said deposition was reported by
11 me in shorthand and transcribed, through computer-aided
12 transcription, under my direction; and that the
13 foregoing transcript is a true record of the testimony
14 elicited at proceedings had at said deposition.

15 I do further certify that I am a disinterested
16 person and am in no way interested in the outcome of
17 this action or connected with or related to any of the
18 parties in this action or to their respective counsel.

19 In witness whereof, I have hereunto set my hand
20 this 14th day of October, 2010.

21

22



Julie A. McKay

23

CSR No. 9059

24

25

EXHIBIT B

Nichols, Sandi

From: Nichols, Sandi
Sent: Sunday, October 03, 2010 11:12 PM
To: kelly.richardson@lw.com; jeff.carlin@lw.com; mike.tracy@dlapiper.com; matthew.dart@dlapiper.com; raymond.parra@baesystems.com; michael.mcdonough@bingham.com; chrismcnevin@pillsburylaw.com; bledger@gordonrees.com; kreyna@gordonrees.com; ccarrigan@waterboards.ca.gov; marco@coastlawgroup.com; jvhandmacher@bvmm.com; jtracy@sempra.com; sharon@sdpta.com; nate.cushman@navy.mil; thomas.stahl@usdoj.gov; melanie.andrews@usdoj.gov; roslyn.tobe@navy.mil; laurah@environmentalhealth.org; gabe@sdcoastkeeper.org; scott.spear@usdoj.gov; sarah@SSHBClaw.com
Cc: Duane Bennett; Leslie FitzGerald; Bill Brown; Wentzelee Botha; Lisa O'Neal
Subject: "Meet and Confer" re Proposed Stipulation to Re-Open and Extend Discovery for Limited Purpose
Attachments: SF-#794349-v1-PROPOSED_STIPULATION_RE_DISCOVERY_EXTENSION.pdf

Dear Counsel,

Those counsel who were present at the conclusion of the deposition of Ben Tobler last Thursday were made aware of the Port District's intention to file a motion with the Presiding Officer to re-open and extend discovery deadlines to address the revisions made to the TCAO/DTR in the September 15, 2010 version (as compared to the December 22, 2009, version). Cris Carrigan and Mike Tracy suggested that the Port District first circulate a proposed Stipulation in an effort to "meet and confer" before submitting the motion. The Port District agrees that an effort to meet and confer should first be made.

Attached for your consideration is a proposed Stipulation to Re-Open and Extend Discovery Deadlines Solely To Address Revisions to the TCAO/DTR, which sets forth the bases for the Port District's request. Please let me know by Tuesday, October 5, 2010, whether your client is willing to enter into the proposed Stipulation.

Thank you very much.

Regards,

Sandi

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CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION

IN THE MATTER OF TENTATIVE
CLEANUP AND ABATEMENT ORDER NO.
R9-2011-0001 (formerly R9-2010-0002)
(SHIPYARD SEDIMENT CLEANUP)

**STIPULATION TO RE-OPEN AND
EXTEND DISCOVERY DEADLINES
SOLELY TO ADDRESS REVISIONS TO
THE TENTATIVE CLEANUP AND
ABATEMENT ORDER AND DRAFT
TECHNICAL REPORT**

C.C.P. 2024.060

Presiding Officer David A. King

WHEREAS, on February 18, 2010 the Presiding Officer to the foregoing matter entered a Final Discovery Plan ("Discovery Order") providing that all discovery in this proceeding would be completed by August 23, 2010, and governed generally by the California Code of Civil Procedure unless modified by the Final Discovery Plan;

WHEREAS, on August 9, 2010, the Designated Parties entered into a "Stipulation Regarding Discovery Extension ("August 9, 2010 Stipulation")," and submitted the same to the Presiding Officer, to extend certain discovery deadlines for the limited purposes set forth in that Stipulation;

WHEREAS, the August 9, 2010 Stipulation expressly provided, in Paragraph 5, that: This stipulation does not prohibit any party from seeking permission from the Presiding Officer to take additional discovery that is not authorized by this stipulation of the terms of the Final Discovery Plan";

1 WHEREAS, the San Diego Unified Port District ("Port District") was, for the first time in
2 this proceeding, named as a "Discharger" in the Tentative Cleanup and Abatement Order No. R9-
3 2011-0001 and related Draft Technical Report, issued by the Cleanup Team on September 15,
4 2010 (collectively, "TCAO/DTR"), on grounds previously not raised in any prior Tentative
5 Cleanup and Abatement Orders or Draft Technical Reports issued in these proceedings;

6 WHEREAS, other changes have been made in the TCAO/DTR that relate to the scope of
7 and basis for the proposed remedial footprint and remedial action since the issuance of the
8 December 22, 2009, Tentative Cleanup and Abatement Order No. R9-2010-0002;

9 WHEREAS, the Port District (like the environmental organizations and Star & Crescent
10 Boat Company) did not participate in the discussions between the other Designated Parties relating
11 to the revisions made in the TCAO/DTR;

12 WHEREAS, the Port District has informed the other Designated Parties that it has not had
13 an opportunity to complete its review and analysis of the revisions made in the TCAO/DTR and
14 related Appendices, or to discuss such matters with potential experts as may be needed for the Port
15 District to adequately protect and defend its interests in this proceeding, and the updated
16 Administrative Record relating to such revisions has not yet been published by the Cleanup Team;

17 WHEREAS, under the existing Discovery Order and August 9, 2010 Stipulation, the Port
18 District would be denied the opportunity to designate experts and other witnesses, and to
19 undertake discovery on matters pertaining to the revisions made in the TCAO/DTR;

20 WHEREAS, the Port District has requested that the other Designated Parties agree to re-
21 open and extend the discovery deadlines previously set in this proceeding pursuant to Code of
22 Civil Procedure section 2024.060, the Port District's prior reservation of its rights to seek
23 additional discovery relating to changes in the TCAO/DTR, and Paragraph 5 of the August 9,
24 2010 Stipulation, in order to conduct discovery pertaining to the revisions made in the
25 TCAO/DTR;

26 WHEREAS, California Code of Civil Procedure section 2024.060 provides that the parties
27 to an action may consent to the extension of the time for completion of discovery proceedings,
28

1 without court approval, where such an extension will not require a continuance or postponement
2 of trial;

3 WHEREAS, a hearing on the merits of the TCAO/DTR has not been set, and is not likely
4 to take place for at least a year, pending the completion, circulation, and certification of the EIR
5 for the remedial project contemplated in the TCAO/DTR; and

6 WHEREAS, to assure that the Port District and others are not denied their rights of due
7 process in this proceeding, all Designated Parties agree to re-open and extend the discovery
8 deadlines, but only for the specific and limited purposes provided herein, and subject to the terms
9 and conditions set forth below.

10 NOW THEREFORE, the Designated Parties hereby stipulate and agree, through
11 their undersigned counsel below, to the following:

12 (1) to re-open and extend by 120 days, to and including January 24, 2011, the September
13 26, 2010, cut-off for the written discovery period, as set forth in the August 9, 2010 Stipulation;

14 (2) to re-open and extend, to and including February 23, 2011 (i.e., 30 days from the
15 proposed close of written discovery), the June 22, 2010, deadline for expert and non-expert
16 witness designations on cleanup levels and liability issues;

17 (3) to re-open and extend, to and including March 16, 2011 (i.e., 21 days from the
18 proposed expert designations), the July 7, 2010, deadline for expert counter-designations for
19 experts' opinions on cleanup levels and liability issues; and

20 (4) to extend to and including May 16, 2010, the October 26, 2010, deadline for all other
21 discovery, including depositions and expert reports, to include discovery against all Designated
22 Parties (and not just the Cleanup Team),

23 but as to all such discovery, only that discovery pertaining to revisions made to the
24 TCAO/DTR relative to the prior version of the TCAO/DTR released publicly on December 22,
25 2009 (including, without limitation, discovery relating to the financial resources and insurance
26 assets of the "Dischargers" who are current or former tenants of the Port District).

27 IT IS SO STIPULATED.

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[INSERT DATE AND SIGNATURE BLOCKS FOR ALL DESIGNATED PARTIES]

EXHIBIT C

Nichols, Sandi

From: Nichols, Sandi
Sent: Tuesday, October 12, 2010 4:21 PM
To: Cris Carrigan; raymond.parra@baesystems.com; michael.mcdonough@bingham.com; jvhandmacher@bvmm.com; marco@coastlawgroup.com; matthew.dart@dlapiper.com; mike.tracy@dlapiper.com; laurah@environmentalhealth.org; bledger@gordonrees.com; kreyana@gordonrees.com; jeff.carlin@lw.com; kelly.richardson@lw.com; nate.cushman@navy.mil; roslyn.tobe@navy.mil; chrismcnevin@pillsburylaw.com; gabe@sdcoastkeeper.org; sharon@sdpta.com; jtracy@sempra.com; sarah@SSHBClaw.com; melanie.andrews@usdoj.gov; scott.spear@usdoj.gov; thomas.stahl@usdoj.gov
Cc: Bill Brown; Lisa O'Neal; Wentzelee Botha; Duane Bennett; Leslie FitzGerald
Subject: RE: "Meet and Confer" re Proposed Stipulation to Re-Open and Extend Discovery for Limited Purpose
Attachments: SF-#794349-v3-PROPOSED_STIPULATION_RE_DISCOVERY_EXTENSION.DOC

Dear Counsel:

The Port District has considered the comments received on the Port District's prior proposed Stipulation to re-open and extend the discovery deadlines. In an effort to accommodate the concerns raised regarding the length of time it will take to complete the discovery, we have worked with counsel for the Cleanup Team on a revised proposed discovery schedule, as well as on some revisions to the Recitals. Attached above is a form of Stipulation that reflects the Recitals and discovery deadlines agreed to by the Port District and Cleanup Team.

You will see that we did not revise the scope of discovery as requested by the tenants and the City. The revised TCAO/DTR, for the first time, seeks to make the Port District a primarily responsible party to the TCAO until it is shown that "the Port District's tenants, past and present, have sufficient financial resources to clean up the Shipyard Sediment Site and comply with the Order...." Upon such showing, "the San Diego Water Board may modify [the Port District's] status to secondarily responsible party...." Consequently, the financial resources, including insurance assets, of the Port District's current and former tenant-"Dischargers" is placed squarely in issue and the Port District is entitled to discovery on that issue to defend itself and establish that, at most, it should be designated as a "secondarily responsible" party to the final order.

We would therefore appreciate your prompt response as to whether you will stipulate to (1) the proposed discovery schedule; and (2) the proposed scope of discovery, so, if necessary, the Port District can narrow the remaining issues to be addressed in a motion to the Presiding Officer.

Thank you very much.

Regards,

Sandi

From: Cris Carrigan [mailto:CCarrigan@waterboards.ca.gov]
Sent: Friday, October 08, 2010 10:17 AM
To: Nichols, Sandi; raymond.parra@baesystems.com; michael.mcdonough@bingham.com; jvhandmacher@bvmm.com; marco@coastlawgroup.com; matthew.dart@dlapiper.com; mike.tracy@dlapiper.com; laurah@environmentalhealth.org; bledger@gordonrees.com; kreyana@gordonrees.com; jeff.carlin@lw.com; kelly.richardson@lw.com; nate.cushman@navy.mil; roslyn.tobe@navy.mil; chrismcnevin@pillsburylaw.com; gabe@sdcoastkeeper.org; sharon@sdpta.com; jtracy@sempra.com; sarah@SSHBClaw.com; melanie.andrews@usdoj.gov; scott.spear@usdoj.gov; thomas.stahl@usdoj.gov
Cc: Bill Brown; Lisa O'Neal; Wentzelee Botha; Duane Bennett; Leslie FitzGerald
Subject: Re: "Meet and Confer" re Proposed Stipulation to Re-Open and Extend Discovery for Limited Purpose

Counsel; The Cleanup Team responds to Ms. Nichols' proposed Stipulation on behalf of the SDUPD as follows:

Observations:

First, the Cleanup Team observes that some of the recitals in the Stipulation are inaccurate, and some important information that should be included is omitted. However, in the event the Cleanup Team's counter-proposal for discovery is accepted, these deficiencies should be fairly straightforward or even unnecessary to correct.

Second, while the Cleanup Team agrees that all parties, including SDUPD and Star & Crescent, should have the opportunity to engage in discovery regarding "new" topics in the DTR and CAO that could not, with reasonable diligence, have been previously inquired about, continuing the discovery period through May 2011 is unwarranted. While we may disagree about what topics are truly "new" and could not, with reasonable diligence, have been enquired about previously, the Cleanup Team, for its part, intends to construe the issue in a way that favors the exchange of relevant, non-privileged information, rather than curtails it. We observe that, according to its discovery responses, SDUPD has two large law firms and at least six experienced attorneys at its disposal to engage in its discovery endeavors.

Third, the Cleanup Team's proposal, set forth below, is based on its need to achieve various interim milestones associated with presenting the CAO and DTR to the Board for its consideration at the earliest practicable time, and on the corresponding workload projections we have made to achieve that objective. Accordingly, the Cleanup Team's proposal is not intended to foreclose the other Designated Parties from agreeing to different discovery parameters, so long as those agreements do not impact the Cleanup Team or its stated goal.

Fourth, the Cleanup Team believes it is unduly burdensome, oppressive and essentially harassing for its members to be subjected to depositions at this time under the broad reservations of rights being made by SDUPD (and others), and with the likely outcome that they will all be required to provide further deposition testimony again, three or more months from now.

Proposal:

November 1, 2010: The Cleanup Team will make available a complete update to the Administrative Record, and will provide the Designated Parties with a "redline" version of the DTR. Also, the Cleanup Team will produce to SDUPD for inspection and copying, all non-privileged documents that relate to the allegations in paragraph 12 of the CAO/DTR. The Cleanup Team will do the same with respect to paragraph 5 if Star & Crescent so requests.

November 19, 2010: Last day for all parties serve written discovery on "new" topics on the Cleanup Team, which may include, but is not limited to, requests relating to paragraph 12 (or 5).

December 23, 2010: Last day for the Cleanup Team to respond to "new" discovery served on November 19.

January 14, 2011: Last day to designate expert and non-expert witnesses on "new" topics.

January 28, 2011: Last day to make expert witness counter-designations on "new" topics.

March 4, 2011: Last Day to submit expert reports. Discovery closes.

Under this proposal, the Cleanup Team seeks the agreement of all Designated Parties, particularly those who have already noticed the depositions of Cleanup Team members, to continue all further Cleanup Team depositions until January and/or February, 2011. We believe that will allow SDUPD, Star & Crescent, and other Designated Parties who wish inquire about the "new" topics," the opportunity to have reviewed all relevant documents and discovery responses and to take the depositions of Cleanup Team members without reservations.

We are not unmindful of the potential need for motion(s) to compel further discovery responses in this proceeding, but believe that by providing for complete written discovery responses by December 23, and allowing well over two months until the close of discovery after that, this proposal accommodates this potential need.

The Cleanup Team remains committed to presenting the CAO to the Board for its consideration as soon as possible, consistent with regulatory and statutory requirements and the Parties' due process rights. Today is a furlough day and I will not be working after I hit the "send" button on this message, but I look forward to reviewing your respective

responses and discussing these matters in more detail Monday. I am available Monday from 10 until 11:15 and from 12 until the end of the day. Thanks! Cris

Christian M. Carrigan
Senior Staff Counsel
Office of Enforcement
State Water Resources Control Board
1001 I Street, 16th Floor [95814]
P.O. Box 100
Sacramento, CA 95812-0100
Phone 916 322-3626

>>> "Nichols, Sandi" <snichols@allenmatkins.com> 10/3/2010 11:12 PM >>>

Dear Counsel,

Those counsel who were present at the conclusion of the deposition of Ben Tobler last Thursday were made aware of the Port District's intention to file a motion with the Presiding Officer to re-open and extend discovery deadlines to address the revisions made to the TCAO/DTR in the September 15, 2010 version (as compared to the December 22, 2009, version). Cris Carrigan and Mike Tracy suggested that the Port District first circulate a proposed Stipulation in an effort to "meet and confer" before submitting the motion. The Port District agrees that an effort to meet and confer should first be made.

Attached for your consideration is a proposed Stipulation to Re-Open and Extend Discovery Deadlines Solely To Address Revisions to the TCAO/DTR, which sets forth the bases for the Port District's request. Please let me know by Tuesday, October 5, 2010, whether your client is willing to enter into the proposed Stipulation.

Thank you very much.

Regards,

Sandi

IRS Circular 230 Disclosure: To ensure compliance with requirements imposed by the IRS, please be advised that any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used or relied upon, and cannot be used or relied upon, for the purpose of (i) avoiding penalties under the Internal Revenue Code, or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

Confidentiality Notice: The information contained in this electronic e-mail and any accompanying attachment(s) is intended only for the use of the intended recipient and may be confidential and/or privileged. If any reader of this communication is not the intended recipient, unauthorized use, disclosure or copying is strictly prohibited, and may be unlawful. If you have received this communication in error, please immediately notify the sender by return e-mail, and delete the original message and all copies from your system. Thank you.

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CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION

IN THE MATTER OF TENTATIVE
CLEANUP AND ABATEMENT ORDER NO.
R9-2011-0001 (formerly R9-2010-0002)
(SHIPYARD SEDIMENT CLEANUP)

**STIPULATION TO RE-OPEN AND
EXTEND DISCOVERY DEADLINES
SOLELY TO ADDRESS REVISIONS TO
THE TENTATIVE CLEANUP AND
ABATEMENT ORDER AND DRAFT
TECHNICAL REPORT**

C.C.P. 2024.060

Presiding Officer David A. King

WHEREAS, on February 18, 2010 the Presiding Officer to the foregoing matter entered a Final Discovery Plan ("Discovery Order") providing that all discovery in this proceeding would be completed by August 23, 2010, and governed generally by the California Code of Civil Procedure unless modified by the Final Discovery Plan;

WHEREAS, on August 9, 2010, the Designated Parties entered into a "Stipulation Regarding Discovery Extension ("August 9, 2010 Stipulation")," and submitted the same to the Presiding Officer, to extend certain discovery deadlines for the limited purposes set forth in that Stipulation;

WHEREAS, the August 9, 2010 Stipulation expressly provided, in Paragraph 5, that: This stipulation does not prohibit any party from seeking permission from the Presiding Officer to take additional discovery that is not authorized by this stipulation of the terms of the Final Discovery Plan";

1 WHEREAS, the San Diego Unified Port District ("Port District") was, for the first time in
2 this proceeding, named as a "Discharger" in the Tentative Cleanup and Abatement Order No. R9-
3 2011-0001 and related Draft Technical Report, issued by the Cleanup Team on September 15,
4 2010 (collectively, "TCAO/DTR"), on grounds previously not raised against the Port District in
5 any prior Tentative Cleanup and Abatement Orders or Draft Technical Reports issued in these
6 proceedings;

7 WHEREAS, other changes have been made in the TCAO/DTR since the issuance of the
8 December 22, 2009, Tentative Cleanup and Abatement Order No. R9-2010-0002;

9 WHEREAS, the Port District has informed the other Designated Parties that it has not had
10 an opportunity to complete its review and analysis of the revisions made in the TCAO/DTR and
11 related Appendices, or to discuss such matters with potential experts as may be needed for the Port
12 District to adequately protect and defend its interests in this proceeding, and the updated
13 Administrative Record relating to such revisions has not yet been published by the Cleanup Team;

14 WHEREAS, under the existing Discovery Order and August 9, 2010 Stipulation, the time
15 has passed for the Port District to designate experts and other witnesses, and to undertake
16 discovery on matters pertaining to the revisions made in the TCAO/DTR;

17 WHEREAS, the Port District has requested that the other Designated Parties agree to re-
18 open and extend the discovery deadlines previously set in this proceeding pursuant to Code of
19 Civil Procedure section 2024.060, the Port District's prior reservation of its rights to seek
20 additional discovery relating to changes in the TCAO/DTR, and Paragraph 5 of the August 9,
21 2010 Stipulation, in order to conduct discovery pertaining to the revisions made in the
22 TCAO/DTR;

23 WHEREAS, California Code of Civil Procedure section 2024.060 provides that the parties
24 to an action may consent to the extension of the time for completion of discovery proceedings,
25 without court approval, where such an extension will not require a continuance or postponement
26 of trial;

27 WHEREAS, a hearing on the merits of the TCAO/DTR has not been set, and is not likely
28 to take place for at least ten months, pending the completion, circulation, and certification of the

1 EIR for the remedial project contemplated in the TCAO/DTR so extending the discovery
2 deadlines as proposed will not require a continuance or postponement of the hearing of this matter;
3 and

4 WHEREAS, to assure that the Port District and others are not denied their rights of due
5 process in this proceeding, all Designated Parties agree to re-open and extend the discovery
6 deadlines, but only for the specific and limited purposes provided herein, and subject to the terms
7 and conditions set forth below.

8 NOW THEREFORE, the Designated Parties hereby stipulate and agree, through
9 their undersigned counsel below, to the following new discovery deadlines:

10 (1) **November 1, 2010:** RWQCB Cleanup Team to produce to the Designated Parties
11 the Addendum to the SAR and a redlined version of the DTR (on a hard-disk drive or CD-ROM).
12 The Cleanup Team shall also produce to the Port District for inspection and copying all non-
13 privileged documents that relate to the allegations in Finding 11 of the TCAO/DTR. The Cleanup
14 Team will do the same with respect to Finding 5 if Star & Crescent so requests;

15 (2) **December 3, 2010:** Last day for all Designated Parties to serve written discovery
16 on any other Designated Party pertaining to the revisions made to the TCAO/DTR relative to the
17 December 2009 version of the TCAO/DTR (including, without limitation, discovery relating to
18 Finding 11 and Finding 5);

19 (3) **January 24, 2010:** Last day for the hearing of any motions to compel discovery by
20 the Discovery Referee;

21 (4) **February 4, 2010:** Last day to designate expert and non-expert witnesses on
22 revisions made to the TCAO/DTR relative to the 12/09 version of the TCAO/DTR;

23 (5) **February 25, 2010:** Last day to submit expert counter-designations on revisions
24 made to the TCAO/DTR relative to the 12/09 version of the TCAO/DTR; and

25 (6) **March 31, 2010:** Last day to complete all other discovery, including depositions
26 and expert reports,

27 but as to all such discovery, only that discovery pertaining to revisions made to the
28 TCAO/DTR relative to the prior version of the TCAO/DTR released publicly on December 22,

1 2009 (including, without limitation, discovery relating to the financial resources and insurance
2 assets of the "Dischargers" who are current or former tenants of the Port District), EXCEPT that
3 depositions of the Cleanup Team will be for all purposes, and not limited to changes to the
4 TCAO/DTR.

5 IT IS SO STIPULATED.

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7 [INSERT DATE AND SIGNATURE BLOCKS FOR ALL DESIGNATED PARTIES]
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EXHIBIT D

Nichols, Sandi

From: Nichols, Sandi
Sent: Thursday, October 14, 2010 1:23 PM
To: 'Jill Witkowski'; 'Cris Carrigan'; 'raymond.parra@baesystems.com'; 'michael.mcdonough@bingham.com'; 'jvhandmacher@bvmm.com'; 'marco@coastlawgroup.com'; 'matthew.dart@dlapiper.com'; 'mike.tracy@dlapiper.com'; 'laurah@environmentalhealth.org'; 'bledger@gordonrees.com'; 'kreyana@gordonrees.com'; 'jeff.carlin@lw.com'; 'kelly.richardson@lw.com'; 'nate.cushman@navy.mil'; 'roslyn.tobe@navy.mil'; 'chrismcnevin@pillsburylaw.com'; 'Gabriel Solmer'; 'sharon@sdpta.com'; 'jtracy@sempra.com'; 'sarah@SSHBClaw.com'; 'melanie.andrews@usdoj.gov'; 'scott.spear@usdoj.gov'; 'thomas.stahl@usdoj.gov'
Cc: 'Bill Brown'; 'Lisa O'Neal'; 'Wentzelee Botha'; 'Duane Bennett'; 'Leslie FitzGerald'; Nichols, Sandi
Subject: RE: "Meet and Confer" re Proposed Stipulation to Re-Open and Extend Discovery for Limited Purpose

Counsel,

So far, only SDG&E and Coastkeeper/EHC and the Cleanup Team have responded to the revised proposed Stipulation offered by the Port District in its further effort to "meet and confer" regarding the discovery deadlines in this matter. I would appreciate a response from the rest of you no later than 5:00 p.m. today. If we do not receive your response, we will assume that your clients have rejected the Stipulation, including both the proposed discovery schedule and the proposed scope of discovery, respectively, and we will proceed accordingly.

With respect to the comments we have received, we respond as follows:

1. The proposed discovery schedule is the least amount of time within which the Port District can complete its discovery, particularly given the Cleanup Team's expressed desire not to have more than one deposition per week for the key depositions (e.g., Carlisle, Chan, Barker, Alo), which are likely to take at least two days per witness. The schedule proposed by the environmental groups does not permit enough time for the tasks contemplated in the Stipulation, all of which are necessary for the Port District to have a full and fair opportunity to participate in this proceeding. The proposed schedule should not unreasonably interfere with the parties' review and comment on the DEIR. Even assuming the DEIR is prepared in the timeframe currently contemplated—which may prove to be optimistic—there is adequate time provided to permit the discovery and DEIR review on parallel tracks. And the proposed schedule concludes well before the anticipated hearing date for this matter. We therefore cannot agree to the environmental groups' proposed discovery schedule.
2. We agree with the comments of the environmental groups as to the deadline for expert reports and will make that change to our proposal.
3. We are puzzled by SDG&E's inquiry regarding the need for discovery as to the current and former Port Tenant Dischargers' insurance assets. As previously explained, the current version of the TCAO/DTR places the financial resources of these entities squarely in issue in Finding 11. Insurance assets that are or may be available to pay for the cleanup are plainly relevant to evaluating the Discharger-Tenants' financial resources. The Port District does not intend to seek information that it already has in its possession, including documents already produced by it or others as part of the Initial Disclosures in the related federal court litigation. But there still are gaps in the policies provided, and missing information as to whether the historical policies are still available to provide coverage for this cleanup. It is possible that with respect to entities that are no longer in existence, insurance may be the primary or only asset available to satisfy a particular Discharger's cleanup obligation. In other cases, insurance may provide additional evidence of an entity's available financial resources to comply with the final CAO. Consequently, discovery as to the financial resources, including insurance assets, of the Port District's current and former tenants is necessary and appropriate on the issues raised by the TCAO/DTR and to establish the Port District's defenses in this proceeding.

We look forward to receiving any further comments this afternoon.

Regards,

Sandi

From: Nichols, Sandi

Sent: Wednesday, October 13, 2010 10:34 AM

To: Jill Witkowski; Cris Carrigan; raymond.parra@baesystems.com; michael.mcdonough@bingham.com; jvhandmacher@bvmm.com; marco@coastlawgroup.com; matthew.dart@dlapiper.com; mike.tracy@dlapiper.com; laurah@environmentalhealth.org; bledger@gordonrees.com; kreyana@gordonrees.com; jeff.carlin@lw.com; kelly.richardson@lw.com; nate.cushman@navy.mil; roslyn.tobe@navy.mil; chrismcnevin@pillsburylaw.com; Gabriel Solmer; sharon@sdpta.com; jtracy@sempra.com; sarah@SSHBClaw.com; melanie.andrews@usdoj.gov; scott.spear@usdoj.gov; thomas.stahl@usdoj.gov

Cc: Bill Brown; Lisa O'Neal; Wentzelee Botha; Duane Bennett; Leslie FitzGerald

Subject: RE: "Meet and Confer" re Proposed Stipulation to Re-Open and Extend Discovery for Limited Purpose

Counsel:

Rather than respond to each individual email, the Port District will await receipt of comments from any other Designated Party wishing to comment and then we will respond to the comments collectively. We would appreciate receiving your comments today so we can move forward expeditiously.

Jill, we will be sure to add you to the circulation list.

Regards,

Sandi

From: Jill Witkowski [mailto:jill@sdcoastkeeper.org]

Sent: Wednesday, October 13, 2010 10:24 AM

To: Jill Witkowski; Cris Carrigan; Nichols, Sandi; raymond.parra@baesystems.com; michael.mcdonough@bingham.com; jvhandmacher@bvmm.com; marco@coastlawgroup.com; matthew.dart@dlapiper.com; mike.tracy@dlapiper.com; laurah@environmentalhealth.org; bledger@gordonrees.com; kreyana@gordonrees.com; jeff.carlin@lw.com; kelly.richardson@lw.com; nate.cushman@navy.mil; roslyn.tobe@navy.mil; chrismcnevin@pillsburylaw.com; Gabriel Solmer; sharon@sdpta.com; jtracy@sempra.com; sarah@SSHBClaw.com; melanie.andrews@usdoj.gov; scott.spear@usdoj.gov; thomas.stahl@usdoj.gov

Cc: Bill Brown; Lisa O'Neal; Wentzelee Botha; Duane Bennett; Leslie FitzGerald

Subject: RE: "Meet and Confer" re Proposed Stipulation to Re-Open and Extend Discovery for Limited Purpose

Counsel:

San Diego Coastkeeper and Environmental Health Coalition provide the following meet and confer response to the Port's revised proposed stipulation.

Conflict with Draft EIR Comment Period

Coastkeeper and EHC still fail to see the need for this discovery process to continue to the end of March 2011. The proposed extended discovery deadline would coincide with when the parties will be reviewing and commenting on the draft EIR—according to the latest estimated schedule included in the most recent Executive Officer's report. The parties will only have 6 weeks to review the Draft EIR, and it does not make any sense to be finalizing expert reports for 2/3 of that limited comment period. ***San Diego Coastkeeper and***

EHC will not agree to extend the discovery deadline past the end February, given that the Draft EIR is slated to be released March 3, 2011.

Potential Conflict with RAP Public Comment Period and Review of Environmental Impacts

Coastkeeper and EHC note that the Executive Officer's revised schedule does not incorporate deadlines for the Remedial Action Plan, including public review and comment on the RAP. Public review and comment on the RAP and its environmental impacts is of the utmost importance to this process because it is where the most impactful decisions in this cleanup process will be made. Dragging out the discovery process longer than necessary could either truncate the review process for the RAP or push the hearing back even further. Coastkeeper and EHC oppose either of those outcomes.

Expert Reports

Coastkeeper and EHC note that under the current language in the proposed stipulation, parties would need to submit an expert report on everything but changes in the revised DTR/CAO at the end of the current discovery period and then submit an additional expert report on the changes by the end of March 2011. Coastkeeper and EHC suggest the following language change (below in red) to reflect that parties will submit **one expert report for all purposes** at the close of the extended discovery period:

“but as to all such discovery, only that discovery pertaining to revisions made to the TCAO/DTR relative to the prior version of the TCAO/DTR released publicly on December 22, 2009 (including, without limitation, discovery relating to the financial resources and insurance assets of the "Dischargers" who are current or former tenants of the Port District), EXCEPT that expert reports and depositions of the Cleanup Team will be for all purposes, and not limited to changes to the TCAO/DTR.”

Please add me to the distribution list

Again, please add my e-mail to your “all parties” sediment distribution list and instruct your assistants to do the same. I have been left off several of the recent e-mails, including the discussions regarding this meet and confer.

Thank you,

Jill Witkowski
Staff Attorney
San Diego Coastkeeper®

www.sdcoastkeeper.org
2825 Dewey Rd, Suite 200
San Diego, CA 92107
619.758.7743 x119

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From: Nichols, Sandi [mailto:snichols@allenmatkins.com]

Sent: Tuesday, October 12, 2010 4:21 PM

To: Cris Carrigan; raymond.parra@baesystems.com; michael.mcdonough@bingham.com; jvhandmacher@bvmm.com; marco@coastlawgroup.com; matthew.dart@dlapiper.com; mike.tracy@dlapiper.com; laurah@environmentalhealth.org; bledger@gordonrees.com; kreyana@gordonrees.com; jeff.carlin@lw.com; kelly.richardson@lw.com; nate.cushman@navy.mil; roslyn.tobe@navy.mil; chrismcnevin@pillsburylaw.com; Gabriel Solmer; sharon@sdpta.com; jtracy@sempra.com; sarah@SSHBClaw.com; melanie.andrews@usdoj.gov; scott.spear@usdoj.gov;

thomas.stahl@usdoj.gov

Cc: Bill Brown; Lisa O'Neal; Wentzelee Botha; Duane Bennett; Leslie FitzGerald

Subject: RE: "Meet and Confer" re Proposed Stipulation to Re-Open and Extend Discovery for Limited Purpose

Dear Counsel:

The Port District has considered the comments received on the Port District's prior proposed Stipulation to re-open and extend the discovery deadlines. In an effort to accommodate the concerns raised regarding the length of time it will take to complete the discovery, we have worked with counsel for the Cleanup Team on a revised proposed discovery schedule, as well as on some revisions to the Recitals. Attached above is a form of Stipulation that reflects the Recitals and discovery deadlines agreed to by the Port District and Cleanup Team.

You will see that we did not revise the scope of discovery as requested by the tenants and the City. The revised TCAO/DTR, for the first time, seeks to make the Port District a primarily responsible party to the TCAO until it is shown that "the Port District's tenants, past and present, have sufficient financial resources to clean up the Shipyard Sediment Site and comply with the Order...." Upon such showing, "the San Diego Water Board may modify [the Port District's] status to secondarily responsible party...." Consequently, the financial resources, including insurance assets, of the Port District's current and former tenant-"Dischargers" is placed squarely in issue and the Port District is entitled to discovery on that issue to defend itself and establish that, at most, it should be designated as a "secondarily responsible" party to the final order.

We would therefore appreciate your prompt response as to whether you will stipulate to (1) the proposed discovery schedule; and (2) the proposed scope of discovery, so, if necessary, the Port District can narrow the remaining issues to be addressed in a motion to the Presiding Officer.

Thank you very much.

Regards,

Sandi

1 **PROOF OF SERVICE**

2 I am employed in the County of San Francisco, State of California. I am over the age of
3 eighteen (18) and am not a party to this action. My business address is Three Embarcadero
Center, 12th Floor, San Francisco, CA 94111-4074.

4 On October 19, 2010, I served the within documents described as:

5 **SAN DIEGO UNIFIED PORT DISTRICT'S NOTICE OF MOTION AND MOTION
6 TO RE-OPEN AND EXTEND DISCOVERY DEADLINES; MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT**

7 **DECLARATION OF LESLIE FITZGERALD IN SUPPORT OF SAN DIEGO
8 UNIFIED PORT DISTRICT'S MOTION TO RE-OPEN AND EXTEND
DISCOVERY DEADLINES**

9 **DECLARATION OF SANDI L. NICHOLS IN SUPPORT OF SAN DIEGO
10 UNIFIED PORT DISTRICT'S MOTION TO RE-OPEN AND EXTEND
DISCOVERY DEADLINES**

11 **PROOF OF SERVICE**

12 on the interested parties in this action as stated on the attached mailing list:

13 **BY E-MAIL OR ELECTRONIC TRANSMISSION:** Based on and in accordance with
14 a court order or agreement of the parties to accept service by e-mail or electronic
15 transmission, I caused a true copy of the document to be sent to the persons at the
16 corresponding electronic address as indicated in the attached Service List on the above-
17 mentioned date. My electronic notification address is knewsome@allenmatkins.com. I am
readily familiar with this firm's Microsoft Outlook electronic mail system and did not
receive any electronic message or other indication that the transmission was unsuccessful.

18 I declare under penalty of perjury under the laws of the State of California that the
foregoing is true and correct.

19 Executed on October 19, 2010, at San Francisco, California.

20 Kathryn Newsome
21 (Type or print name)

Kathryn Newsome
(Signature of Declarant)

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