

Primary Dischargers

Presentation by the City of San Diego
before the
Regional Water Quality Control Board

November 9, 14-16, 2011

The bottom right corner of the slide features a decorative graphic of several concentric circles, resembling ripples on water, rendered in a lighter shade of blue against the background.

The San Diego Unified Port District: Primarily Responsible Discharger

The record supports naming the San Diego Unified Port District (“Port District”) as a primarily responsible discharger due to:

(1) discharges to the San Diego Bay by the Port District’s tenants

(2) discharges to the San Diego Bay from the MS4 system, which is owned and operated by the Port District

The San Diego Unified Port District: Primarily Responsible Discharger

Port District: An Overview

- The Port District leased the Shipyards Tidelands property it holds in trust on behalf of the People of the State of California to, among others, San Diego Marine Construction Company (Star & Crescent Boat Company's predecessor in interest) and Campbell Industries.
- The Port District is also an owner/operator of the municipal separate storm sewer system (MS4) through which it discharges waste to San Diego Bay subject to the terms and conditions of a National Pollutant Discharge Elimination System (NPDES) Storm Water Permit.

(California Regional Water Quality Control Board, San Diego Region, Response to Comments Report ("Response to Comments"), p. 11-1, August 23, 2011.)

The San Diego Unified Port District: Primarily Responsible Discharger

The Port District is Legally Liable for its Tenants' Discharges

- (1) The Regional Board maintains that trustees, like the Port, are liable under the California Water Code for discharges by their tenants.
- (2) The Cleanup Team identified the Port District as primarily responsible “to the extent the Port’s tenants, past and present, have insufficient financial resources to cleanup the Shipyard Sediment Site and/or fail to comply with the order.” (TCAO Finding 11; DTR § 11.2.)
- (3) The Port District has failed to meet its burden of proving that each of its tenants has the financial resources to conduct the cleanup.
 - San Diego Marine Construction Company (“SDMCC”), a Port District tenant from 1963-1972, ceased to exist as an entity many years ago.
 - Campbell Industries leased Port District property for shipbuilding purposes from 1972-1979 and has been out of business for many years.
 - Star & Crescent, as a legal successor to SDMCC, has stipulated that its assets total between \$750,000-\$1 million; a sum likely far short of what will be required to conduct cleanup operations at the Site.

[cont.]

The San Diego Unified Port District: Primarily Responsible Discharger

Port District is a Primarily Liable Discharger for Discharges from the MS4 System

“The Port District’s attempt to limit the MS4 system for which it is responsible to that which is not part of its tidelands leases to other entities is improper. The Port District is responsible for all storm water runoff collected from the tidelands area, whether it falls outside or within one of its leaseholds.”

(Response to Comments at p. 11-34)

The San Diego Unified Port District: Primarily Responsible Discharger

Port District is a Primarily Liable Discharger for Discharges from the MS4

The Port District's expert, Robert Collacott, admits that the "portion of the Port District that is not leased to tenants and is tributary to outfall SW4 is limited to portions of Belt Street (approx. 1 acre) consisting of an estimated one-half mile (1/2 mile street) of curb and gutter, four storm drain inlets, and an estimated 770 feet of underground storm drains 24-inches in diameter and smaller."

(The CUT Response, pp. 11-26, quoting Declaration of Robert Collacott In Support of the San Diego Unified Port District's Submission of Comments, Evidence, and Legal Argument, at p. 4:9-14.)

The San Diego Unified Port District: Primarily Responsible Discharger

Port District is a Primarily Liable Discharger for Discharges from the MS4

•“The Port District’s argument that it does not own or operate any of those portions of the MS4 system that outfall through SW04 and SW09 is based on the erroneous assertion that the City of San Diego’s retention of an easement for its MS4 system to pass through the Port District’s tideland properties foisted the responsibility for discharges from the tideland properties onto the City. The Port District is wrong.”

•“Indeed, the MS4 permit issued by the San Diego Water Board recognizes this. The City’s easements merely allow its storm drains to pass through the tidelands to drain the upland areas into San Diego Bay. The Port District is fully responsible under the MS4 permit and its agreements with the co-permittees to take all necessary actions to prevent discharges of pollutants into the MS4 system from the tidelands areas, including both public areas and those leased to other entities.“

(The CUT Response at pp. 11-33 [emphasis added].)

Star & Crescent: Primary Discharger

Star & Crescent: An Overview

Star & Crescent Boat Company (“Star & Crescent”) should remain a primary discharger due to its status as the successor-in-interest to San Diego Marine Construction Company (“SDMCC”).

Star & Crescent: Primary Discharger

Star & Crescent's Role in the Federal Litigation re: the Shipyard Sediment Site

- In the related federal lawsuit, the City of San Diego (“the City”) seeks to determine responsibility for the contamination of the Shipyard Sediment Site and to recover costs required to remediate that contamination.
- During the course of discovery and investigation, including an examination of records from the Secretary of State and the California State Archives, the City discovered the relationship between SDMCC and Star & Crescent, which forms the basis for Star & Crescent's successor liability and responsibility as a primary discharger of contaminants into the Site.

Star & Crescent: Primary Discharger

Star & Crescent's Motion for Summary Judgment

On April 21, 2011, Star & Crescent filed a motion seeking summary judgment on the following grounds:

- (1) there is no evidence that Star & Crescent contributed to any of the environmental contamination at the Shipyard Site,
- (2) there is no evidence that Star & Crescent is the successor-in-interest to SDMCC/Star & Crescent Investment Co. ("Investment Co."), and
- (3) the District has no reasonable probability of locating evidence proving that Star & Crescent is the successor-in-interest to SDMCC/Investment Co.

After a full briefing period and consideration, the Federal Court denied Star & Crescent's motion. The Order was recently accepted into the Administrative Record.

Star & Crescent: Primary Discharger

Successor Liability

The general rule of successor liability under the laws of California is that the corporate purchaser of another corporation's assets presumptively does not assume the seller's liabilities, unless:

- (1) there is an express or implied agreement of assumption;**
- (2) the transaction amounts to a consolidation or merger of the two corporations;**
- (3) the purchasing corporation is a mere continuation of the seller; or**
- (4) the transfer of assets to the purchaser is for the fraudulent purpose of escaping liability for the seller's debts.**

Ortiz v. South Bend Lathe (1975) 46 Cal. App. 3d 842, 846, disapproved on other grounds in *Ray v. Alad Corp.* (1977) 19 Cal. 3d 22, 34 [emphasis added]; *Fisher v. Allis-Chalmers Corp. Prod. Liab. Trust* (2002) 95 Cal.App.4th 1182, 1188.

Star & Crescent: Primary Discharger

Issue #1: Whether Star & Crescent Expressly or Impliedly Agreed to Assume Liability from Investment Co.

The Court stated, “[t]he undisputed facts indicate that S&C Boat expressly assumed the liabilities listed in the Investment Co.’s offer.” (Order Denying Motion for Summary Judgment (“Order”) at pp. 7:18-19, *City of San Diego v. National Steel and Shipbuilding Company, et al.* (S.D.Cal. October 27, 2011).)

Further, the Court noted that “SDMCC operated its boat division, S&C Boat Company, beginning in 1925 and 1) utilized two shore boat landings located within the Shipyard Sediment Site; and 2) utilized SDMCC’s Shipyard Sediment Site from 1959 until 1972 for the construction, repair, and fueling of its marine vessels.” (Order at p. 7:20-23.)

Star & Crescent: Primary Discharger

Issue #1: Whether Star & Crescent Expressly or Impliedly Agreed to Assume Liability from Investment Co.

Thus, the court found a genuine issues of material fact exists as to:

- (1) whether Star & Crescent contributed to the environmental contamination at the Site and
- (2) whether Star & Crescent assumed liability for contamination when it accepted Investment Co.'s written offer to transfer Investment Co.'s assets to Star & Crescent in exchange for Star & Crescent's assumption of Investment Co.'s debts and liabilities and 1,500 shares of Star & Crescent's stock. (Order at p. 7: 23-27.)

Star & Crescent: Primary Discharger

Issue #2: Whether Star & Crescent is a Mere Continuation of SDMCC

In California, to show a company is a legal successor because it is a mere continuation of the preceding company, *one or both* of the following factual elements must be shown:

(1) inadequate consideration was given for the predecessor corporation's assets and made available for meeting the claims of its unsecured creditors;

(2) one or more persons were officers, directors, or stockholders of both corporations.

Ray v. Alad, supra, 19 Cal. 3d at p. 29 (citing cases).

Star & Crescent: Primary Discharger

Issue #2: Whether Star & Crescent is a Mere Continuation of SDMCC

The Court found a genuine issue of material fact exists as to whether the transfer of Star & Crescent's stock to Investment Co. was for adequate consideration. (Order at p.8:12-13.)

To support this finding, the Court noted the opposition's arguments that the consideration given by Star & Crescent to Investment Co. was grossly inadequate because, in exchange for Investment Co.'s **\$800,000** Harbor Excursion business Star & Crescent only paid consideration in the amount of roughly **\$101,000** [1500 shares of Star & Crescent valued at \$15,000 and liabilities assumed by Star & Crescent valued at \$86,000]. (Order at p. 9:6-13.)

Star & Crescent: Primary Discharger

Issue #3: Whether the Transfer of the Predecessor's Business to Star & Crescent was Fraudulent

The Court found a genuine issue of material fact exists as to whether the transfer of the predecessor's business was fraudulent. (Order at p. 9:15-17.)

The Court based this finding on the following facts:

- (1) The sudden and unexplained resignation of all of Star & Crescent's directors two days after Star & Crescent was incorporated;
- (2) The fact that the directors were then replaced by Hall family members; and
- (3) The fact that the predecessor and Star & Crescent were closely run inter-related family businesses. (Order at p. 9:17-21.)

PCBs and The Silvergate Power Plant Operations and Potential Discharges



"To C.W. Discharge Tunnel"

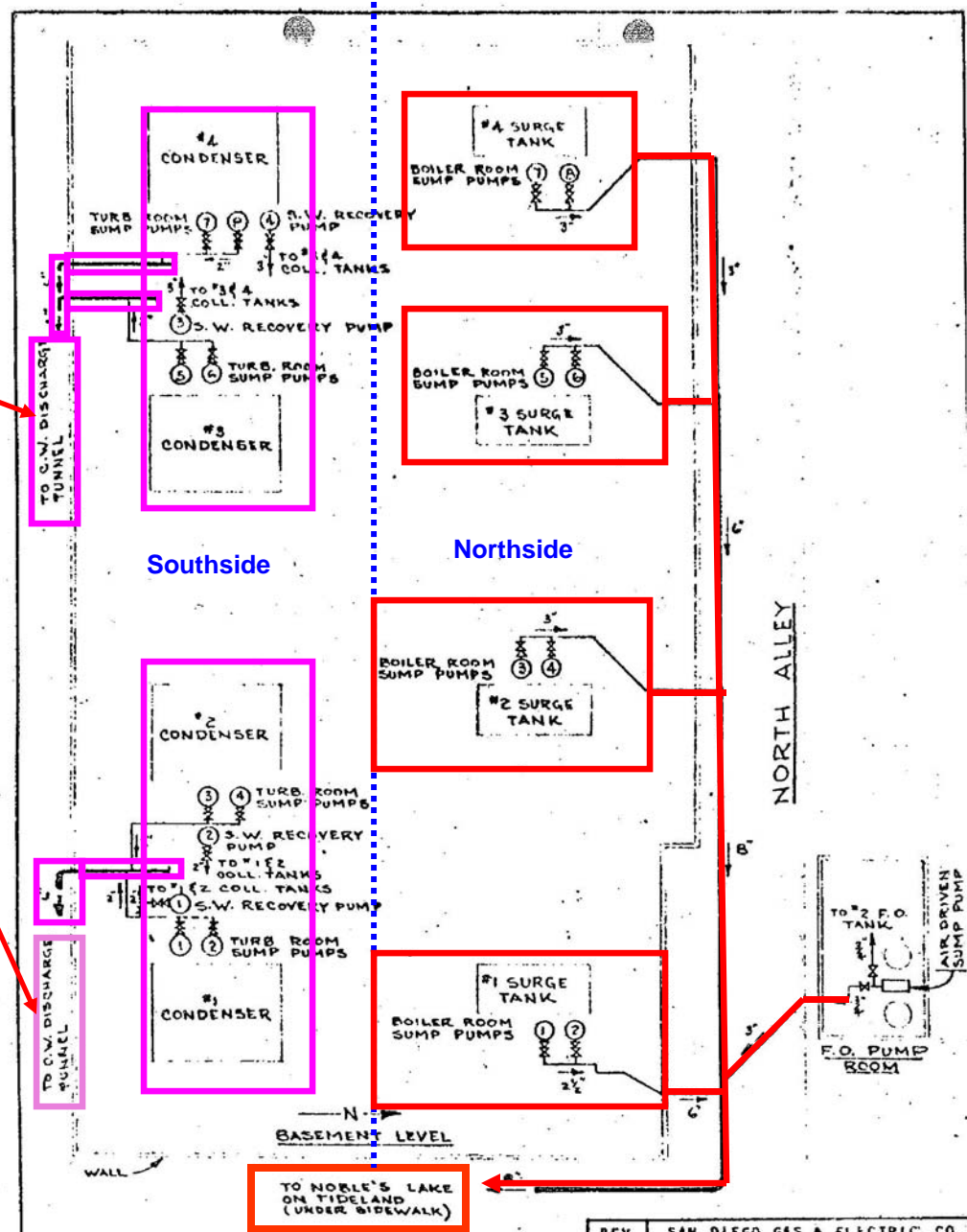


FIG. 1

REV.	SAN DIEGO GAS & ELECTRIC CO
	E.P. DEPT. SILVER GATE STATION
	BILGE SYSTEM EXISTING
	ALL UNITS
BY RDT	SCALE E.P. 1700
DATE 8-14-00	NAME

Source: Site Assessment Report, Landslide Tidelands Lease Area
Silver Gate Power Plant, San Diego, CA July 14, 2004, ENV America Inc

Approximate Boundary of
San Diego Marine Construction, Inc.

Approximate
location of
Oil/Water
Separator

Surface
Discharge
from
oil/water
separator
location

Pond?

CW
Inlet

CW
Outlet

Source: SDHS, 82-13673-2362 Aerial of Waterfront Piers
1950.tif

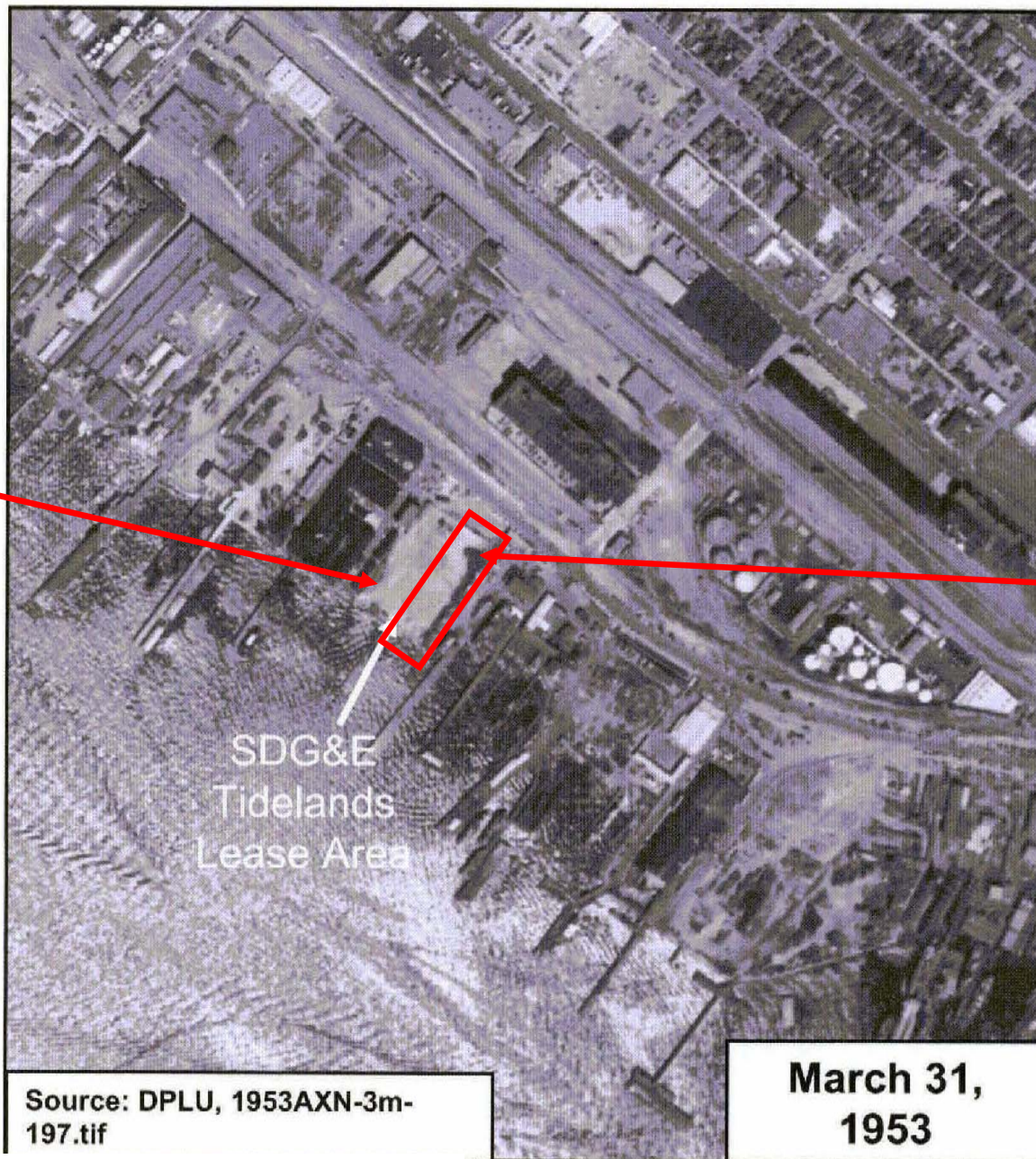
June 1950



New Pond

F:\SDG&E\Silvergate\Wasteponds SA\SA report\Draft\Part 2 Aerial Photos
Source: Site Assessment Report, Landslide Tidelands Lease Area
Silver Gate Power Plant, San Diego, CA July 14, 2004, ENV America Inc.

No Pond Present



Surface Discharge to San Diego Bay from Oil/Water Separator Location (see 1955 Slides)

SDG&E
Tidelands
Lease Area

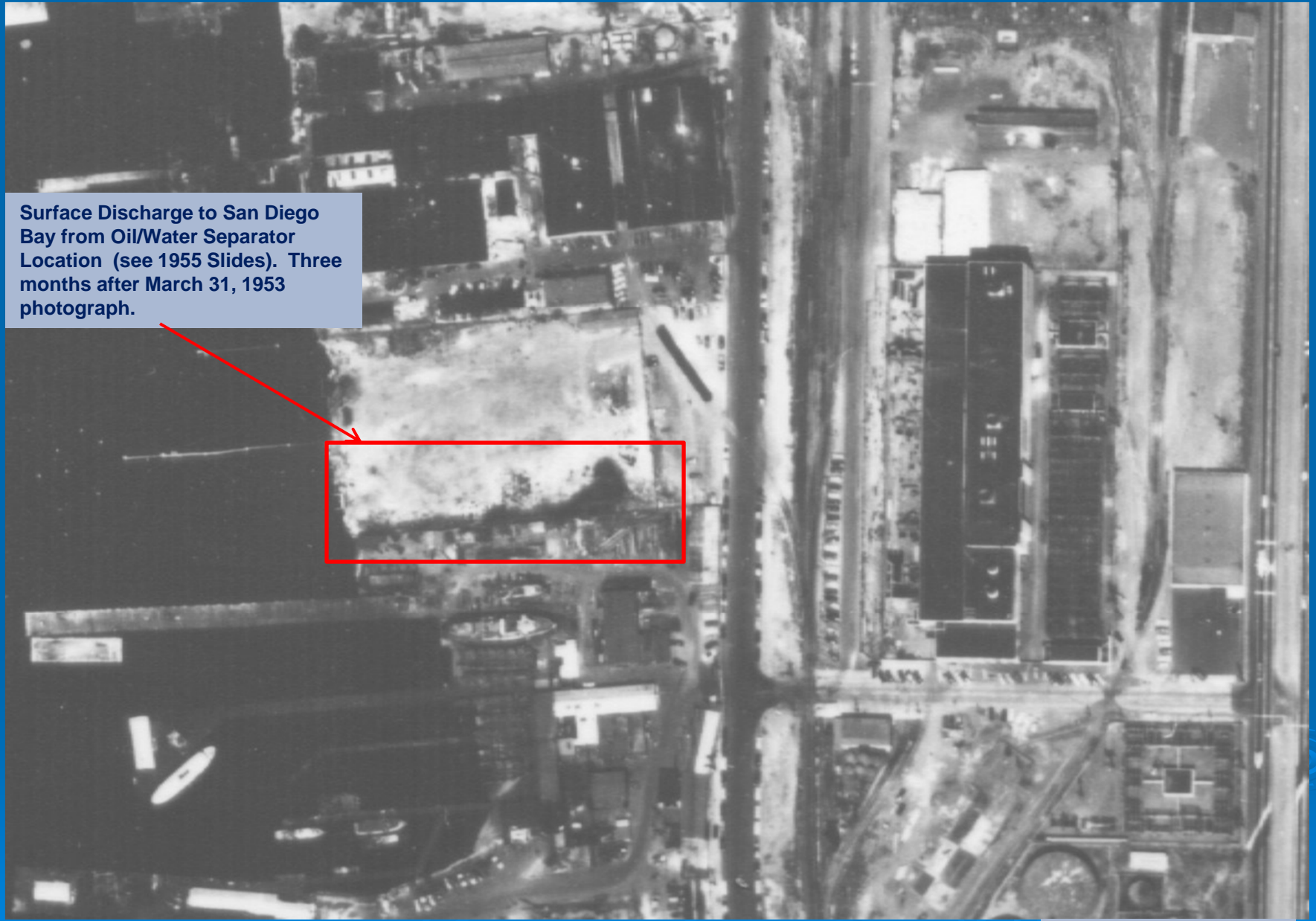
Source: DPLU, 1953AXN-3m-197.tif

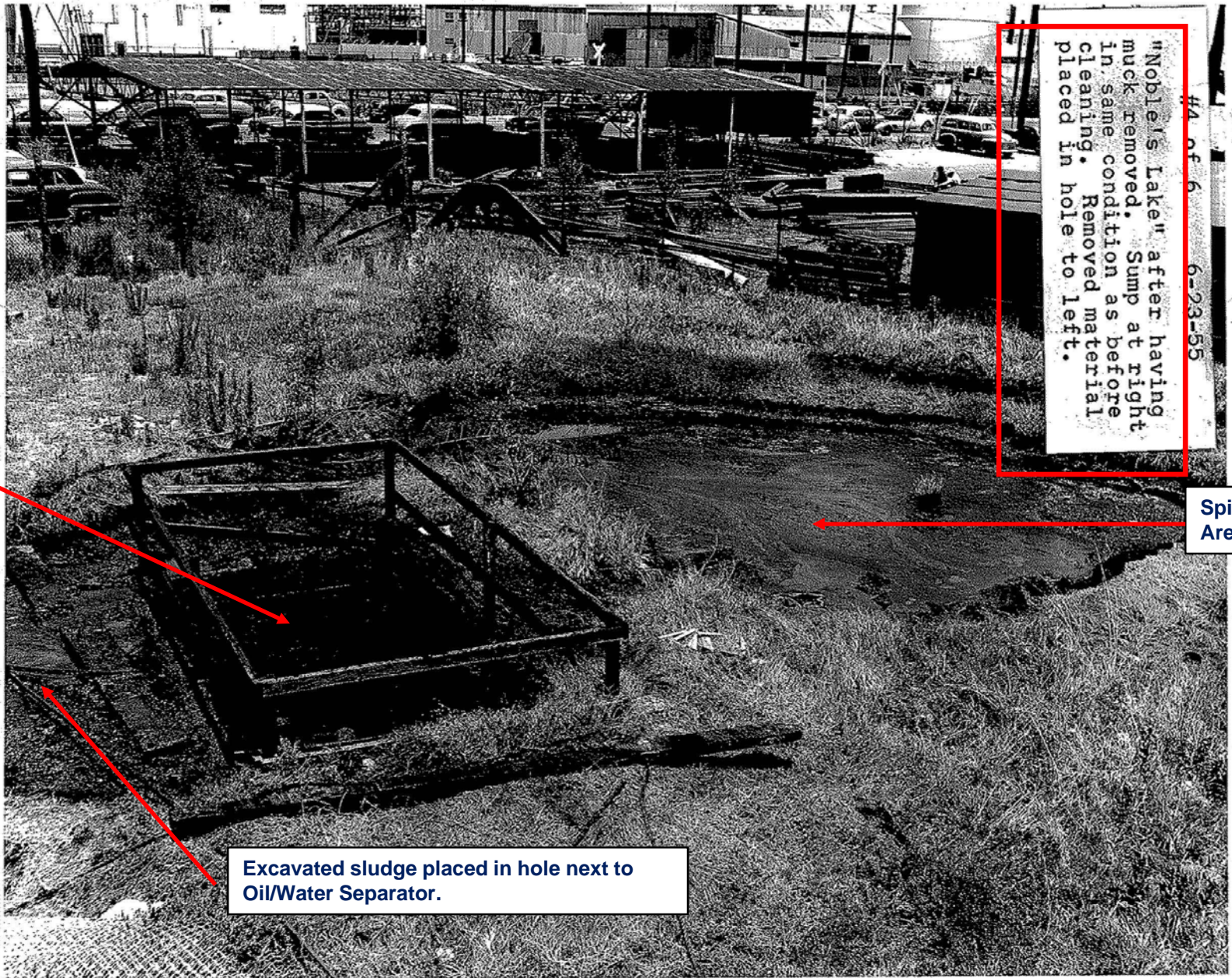
March 31,
1953

Surface Discharge to San Diego Bay from Oil/Water Separator Location (see 1955 Slides). Three months after March 31, 1953 photograph.



June 30, 1953





Oil/Water Separator

#4 of 6 6-23-55
"Noble's Lake" after having muck removed. Sump at right in same condition as before cleaning. Removed material placed in hole to left.

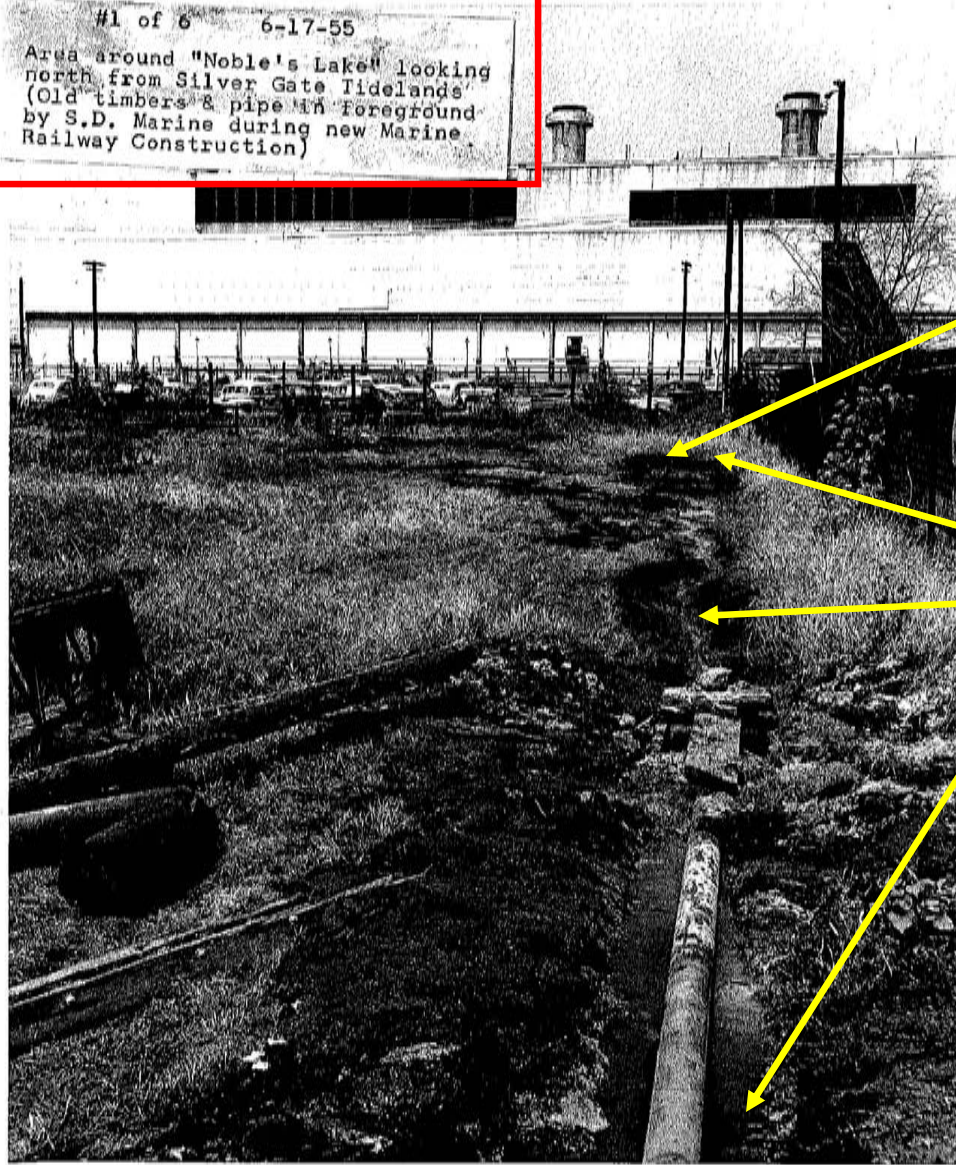
Spill Area

Excavated sludge placed in hole next to Oil/Water Separator.

June 23, 1955

Source: Technical Report for RWQCB Investigation Order No. R9-2004-0026
Silver Gate Power Plant, San Diego, CA July 14, 2004, ENV America Inc.

#1 of 6 6-17-55
Area around "Noble's Lake" looking
north from Silver Gate Tidelands
(Old timbers & pipe in foreground
by S.D. Marine during new Marine
Railway Construction)



Surface drainage
noted on 1950,
1952-3 aerial
photos

Active surface
drainage from
oil/water
separator

June 17, 1955

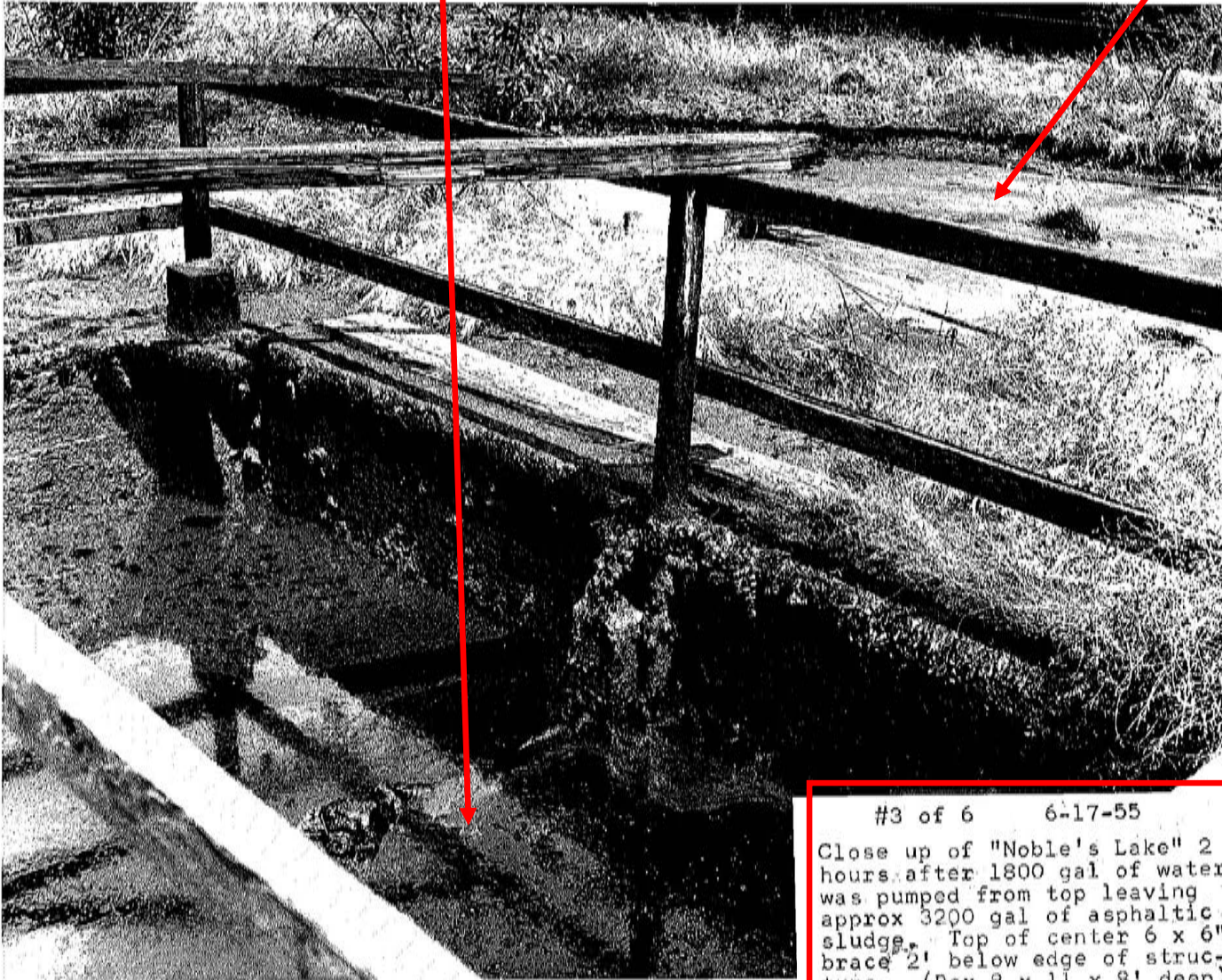
Source: Technical
Report for RWQCB
Investigation Order No.
R9-2004-0026
Silver Gate Power Plant,
San Diego, CA July 14,
2004, ENV America Inc.

Source: SDG&E

F:\SDG&E\Silvigate\Wasteponds SAISA report\Draft\Part 2 Aerial Photos

Asphaltic Sludge

Spill Area



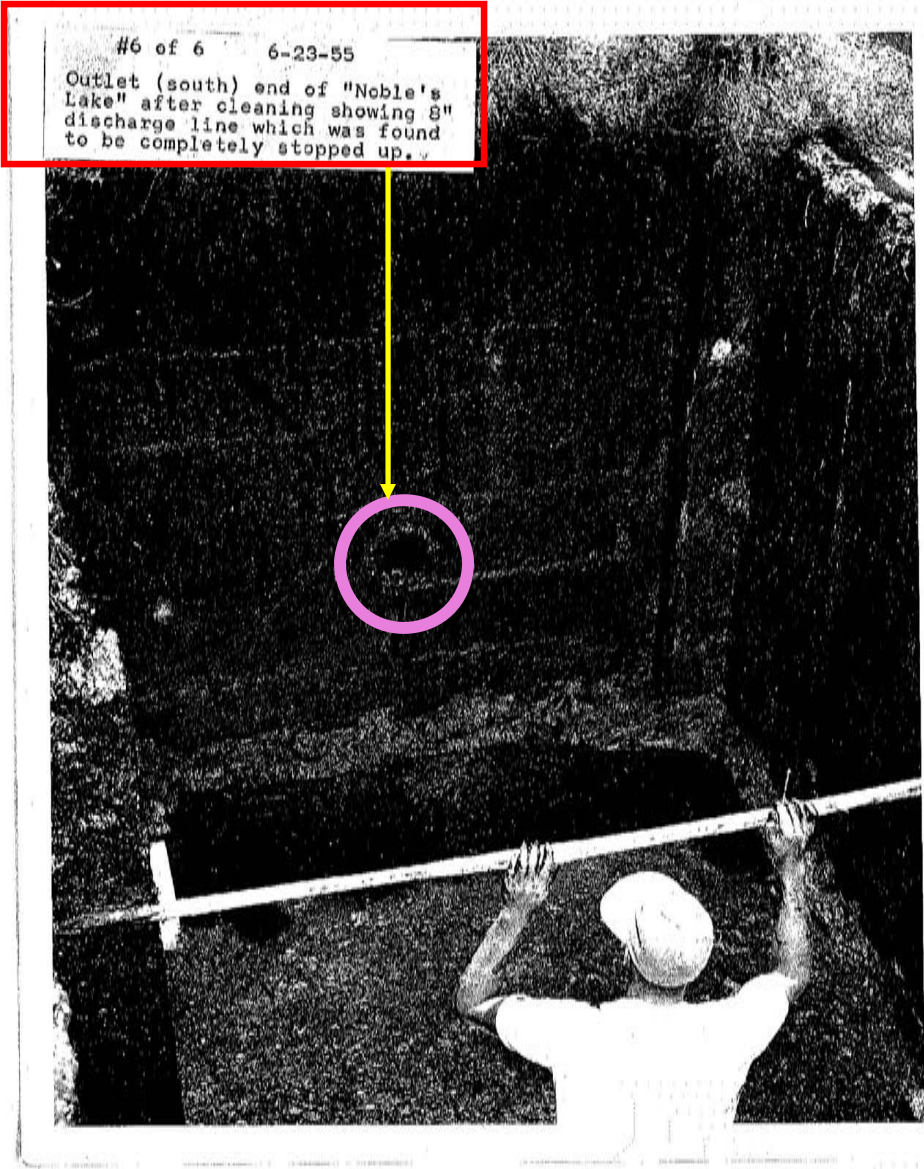
#3 of 6 6-17-55
Close up of "Noble's Lake" 2
hours after 1800 gal of water
was pumped from top leaving
approx 3200 gal of asphaltic
sludge. Top of center 6 x 6"
brace 2' below edge of struc-
ture. (Box 8 x 11 x 8' deep)

Source: SDG&E

June 17, 1955

Source: Technical Report for RWQCB Investigation Order No. R9-2004-0026
FAS Silver Gate Power Plant, San Diego, CA July 14, 2004, ENV America Inc.

SAR 193576



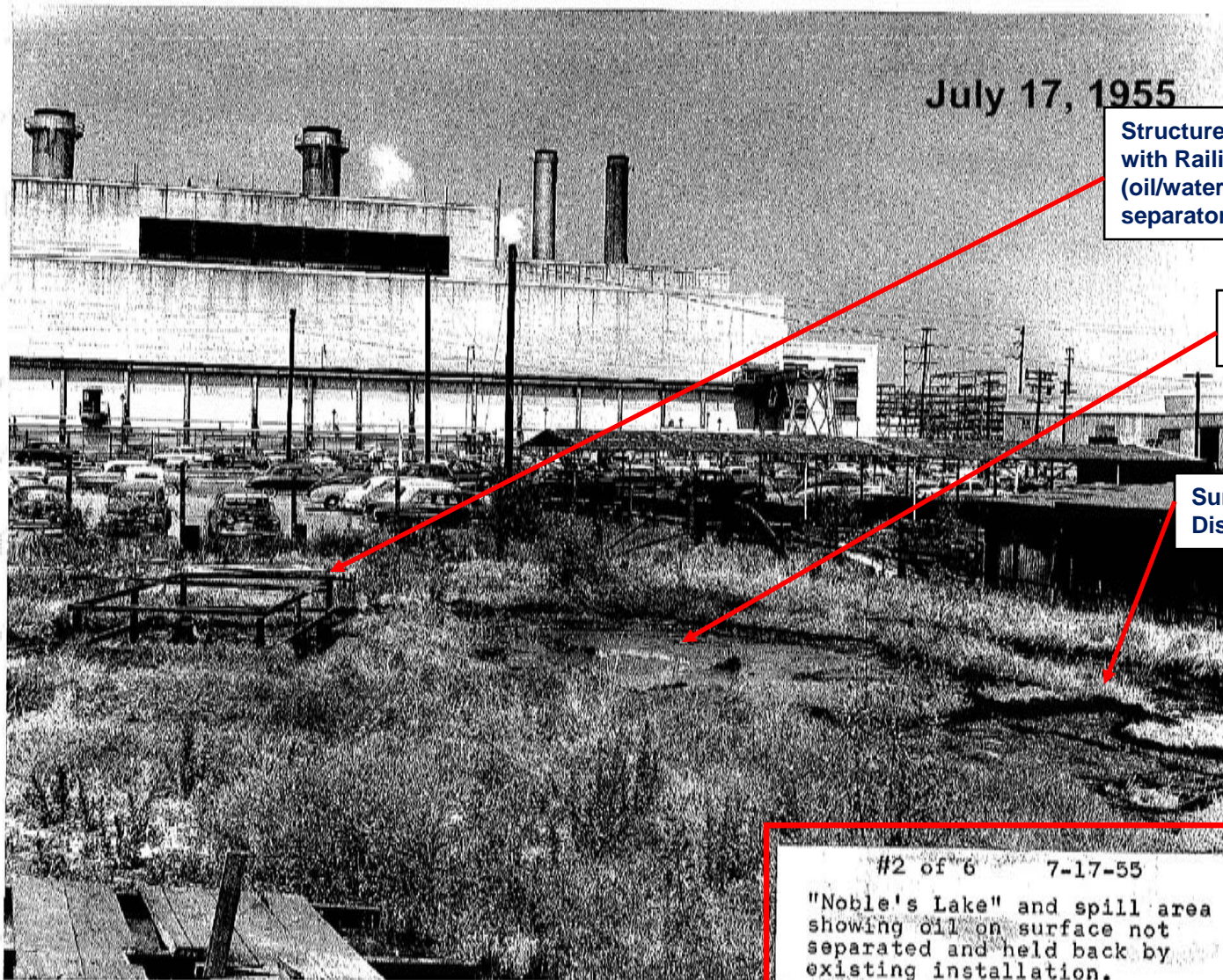
Source: SDG&E
F:\SDG&E\Silvergate\Wasteponds

Source: Technical Report for RWQCB Investigation Order No. R9-2004-0026
Silver Gate Power Plant, San Diego, CA July 14, 2004, ENV America Inc.

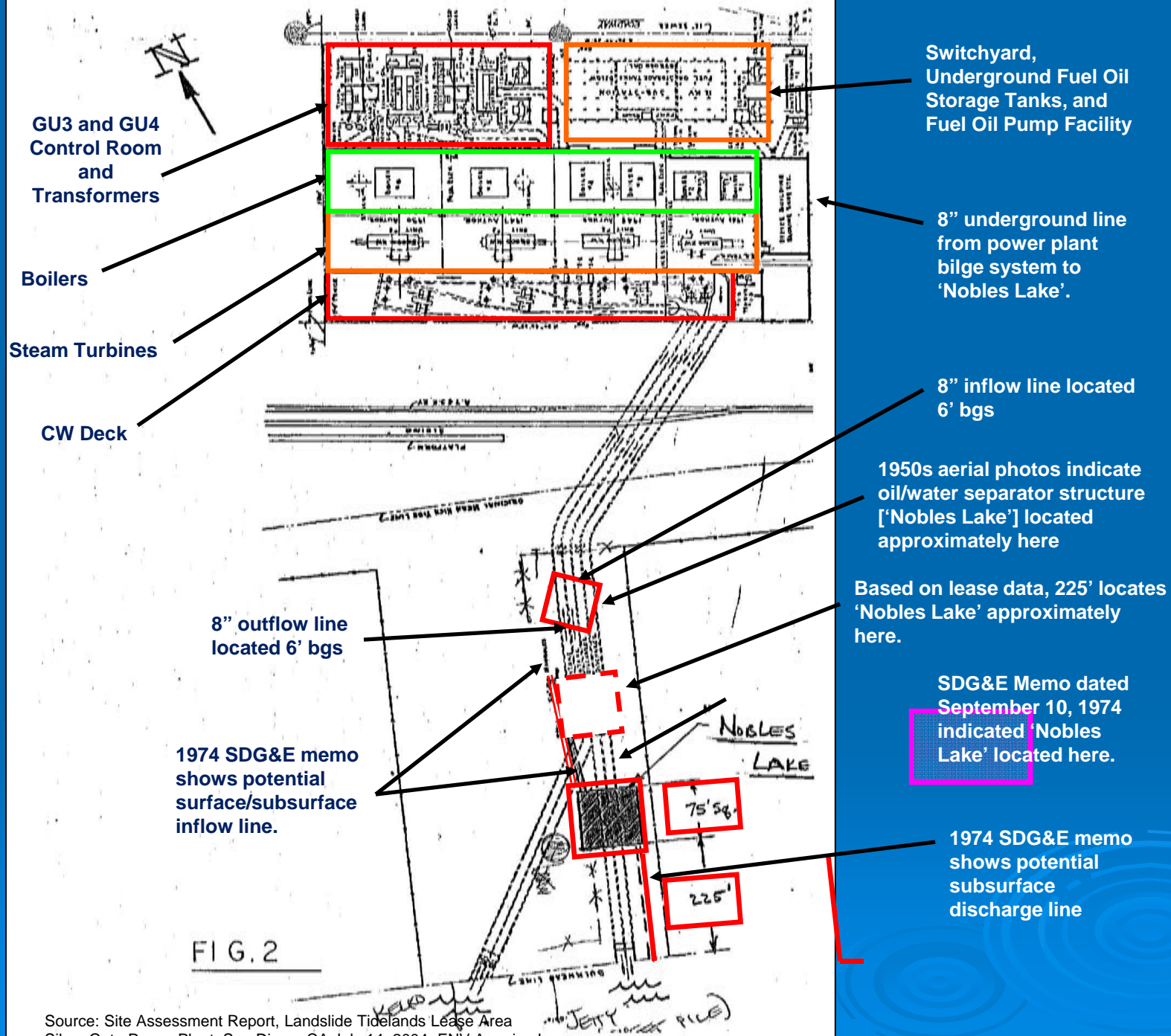
June 23, 1955

SAR 193579



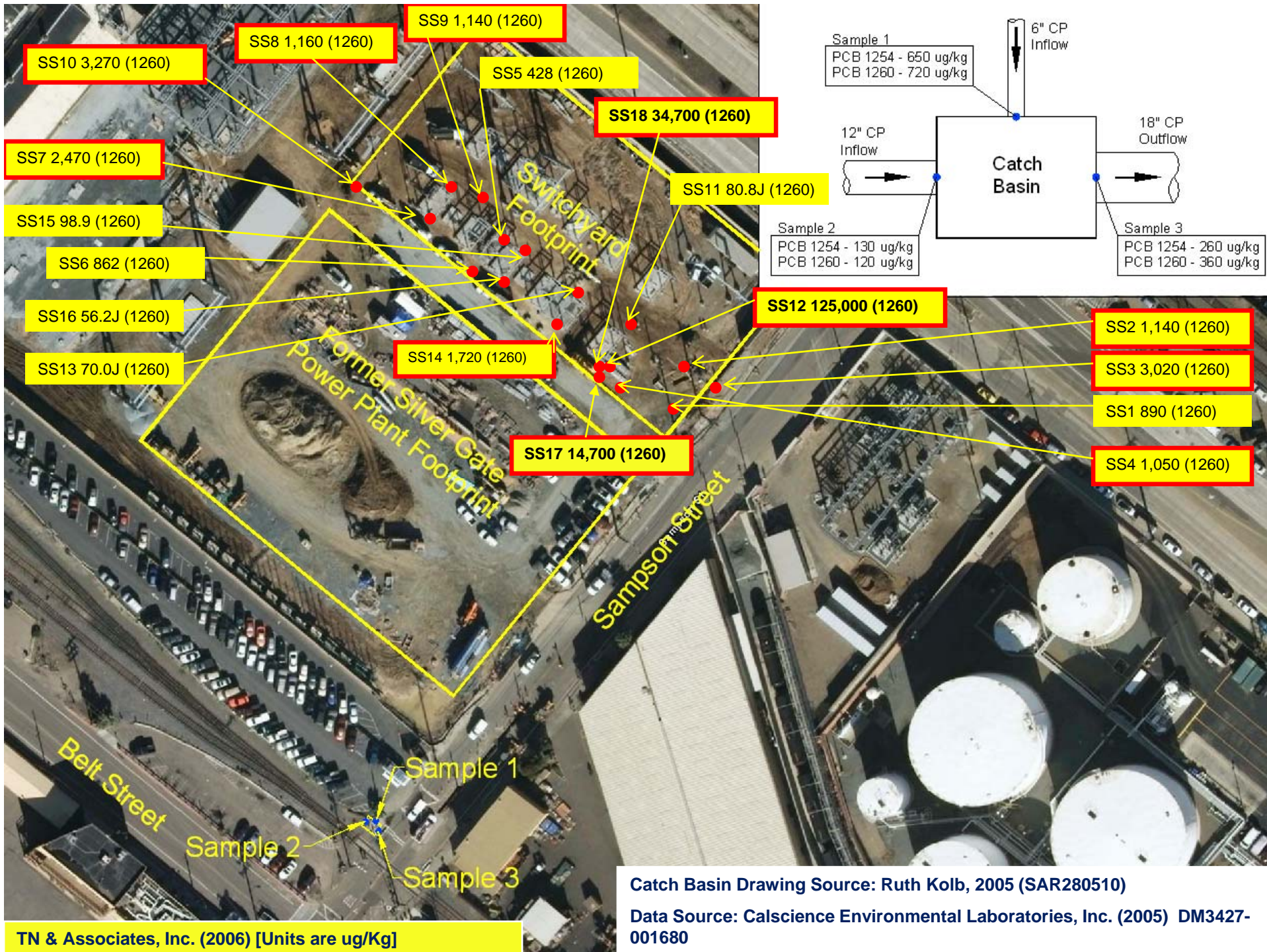


Source: Technical Report for RWQCB Investigation Order No. R9-2004-0026
Silver Gate Power Plant, San Diego, CA July 14, 2004, ENV America Inc.



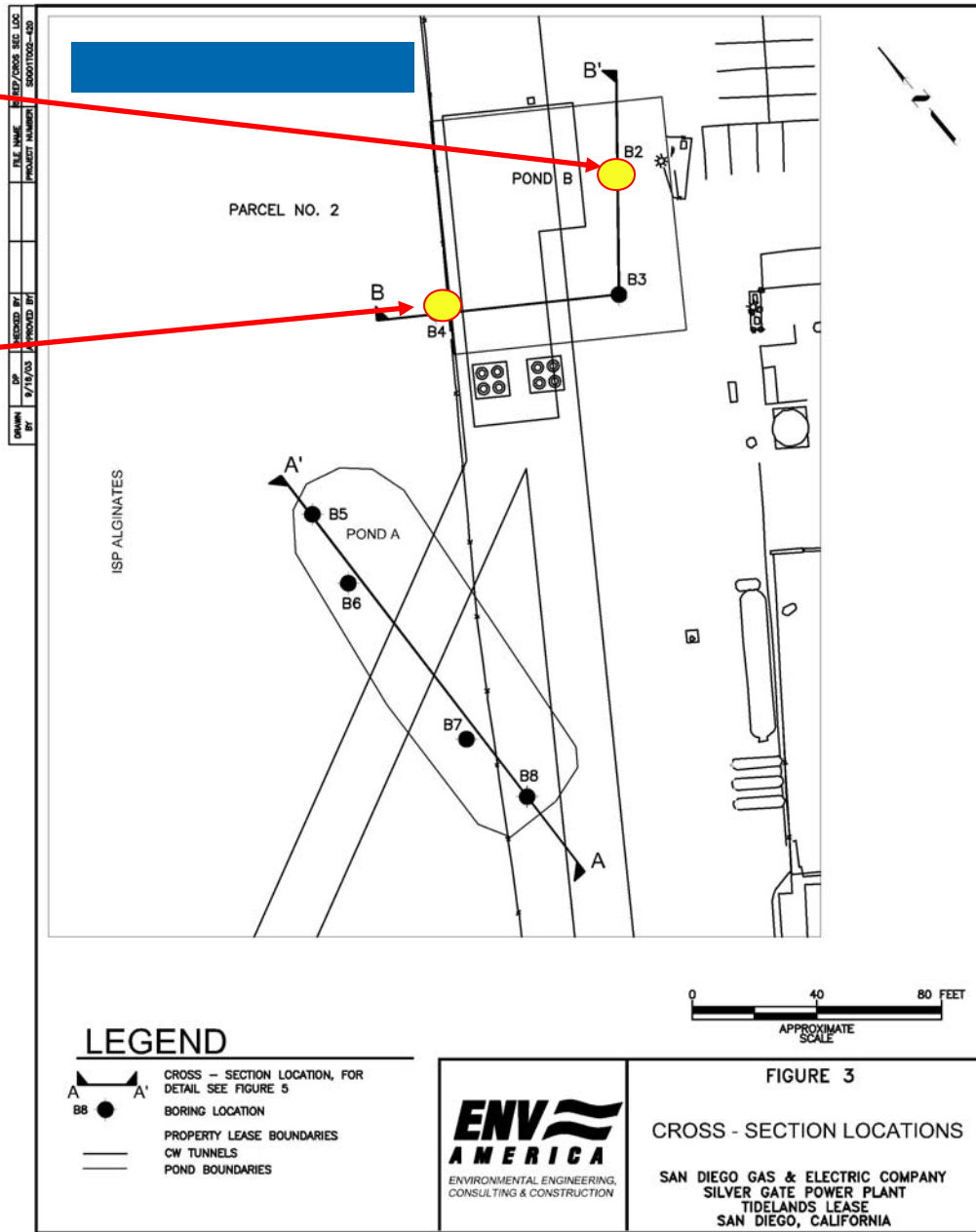
Source: Site Assessment Report, Landslide Tidelands Lease Area Silver Gate Power Plant, San Diego, CA July 14, 2004, ENV America Inc.

SAR193399

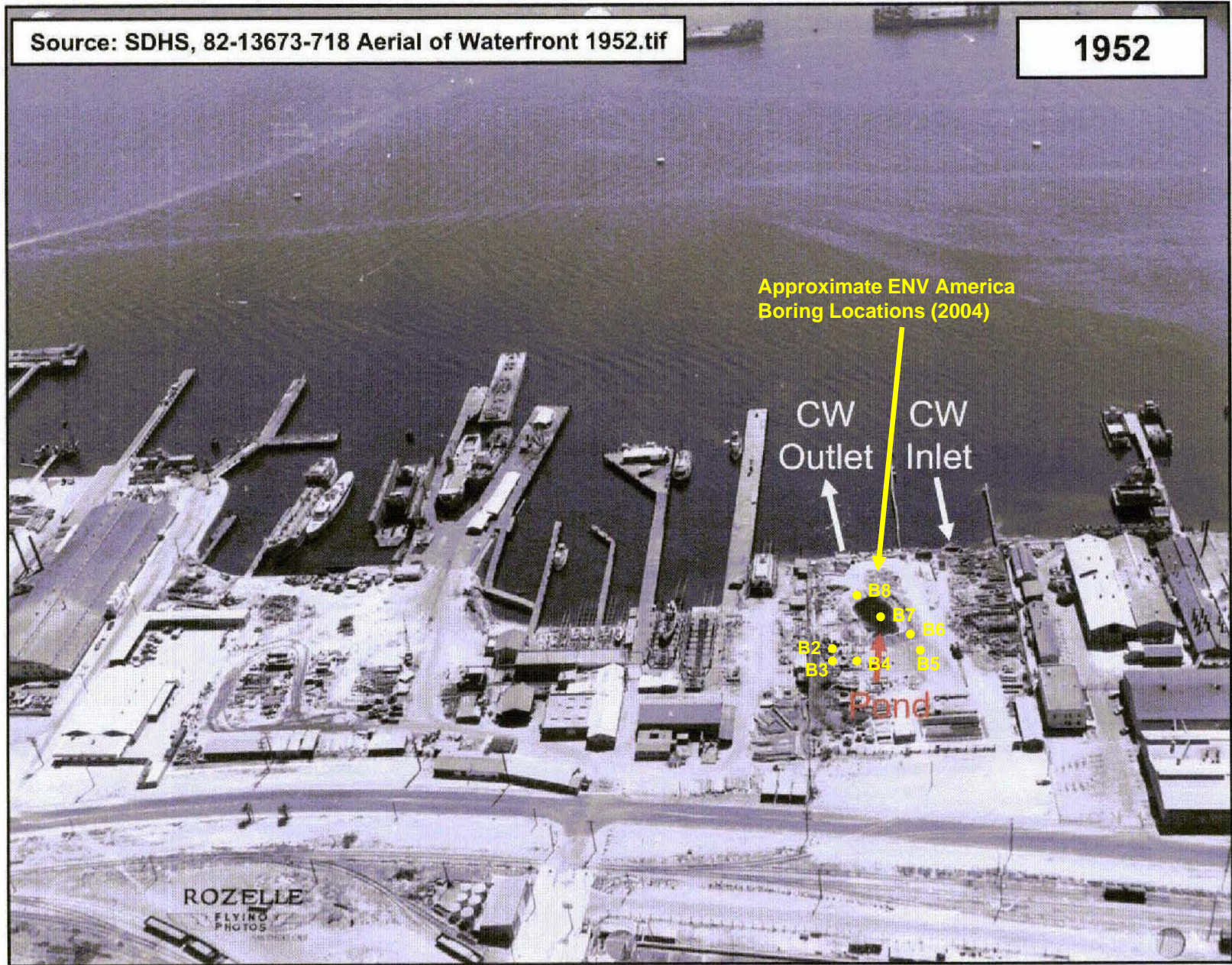


Location	Depth (ft)	PCBs (ug/Kg)
B2	2.0	380 (1260)
	3.0	NA
	8.0	NA
B3	2.0	NA
	4.0	ND
	9.0	NA
B4	3.0	2,800 (1254) 1,600 (1260)
	4.0	NA
	9.0	NA
B5	2.0	ND
	4.0	NA
	9.0	NA
B6	2.0	ND
	3.0	NA
	8.0	NA
B7	2.0	ND
	4.0	NA
	8.0	NA
B8	2.0	NA
	4.0	NA
	10.0	NA

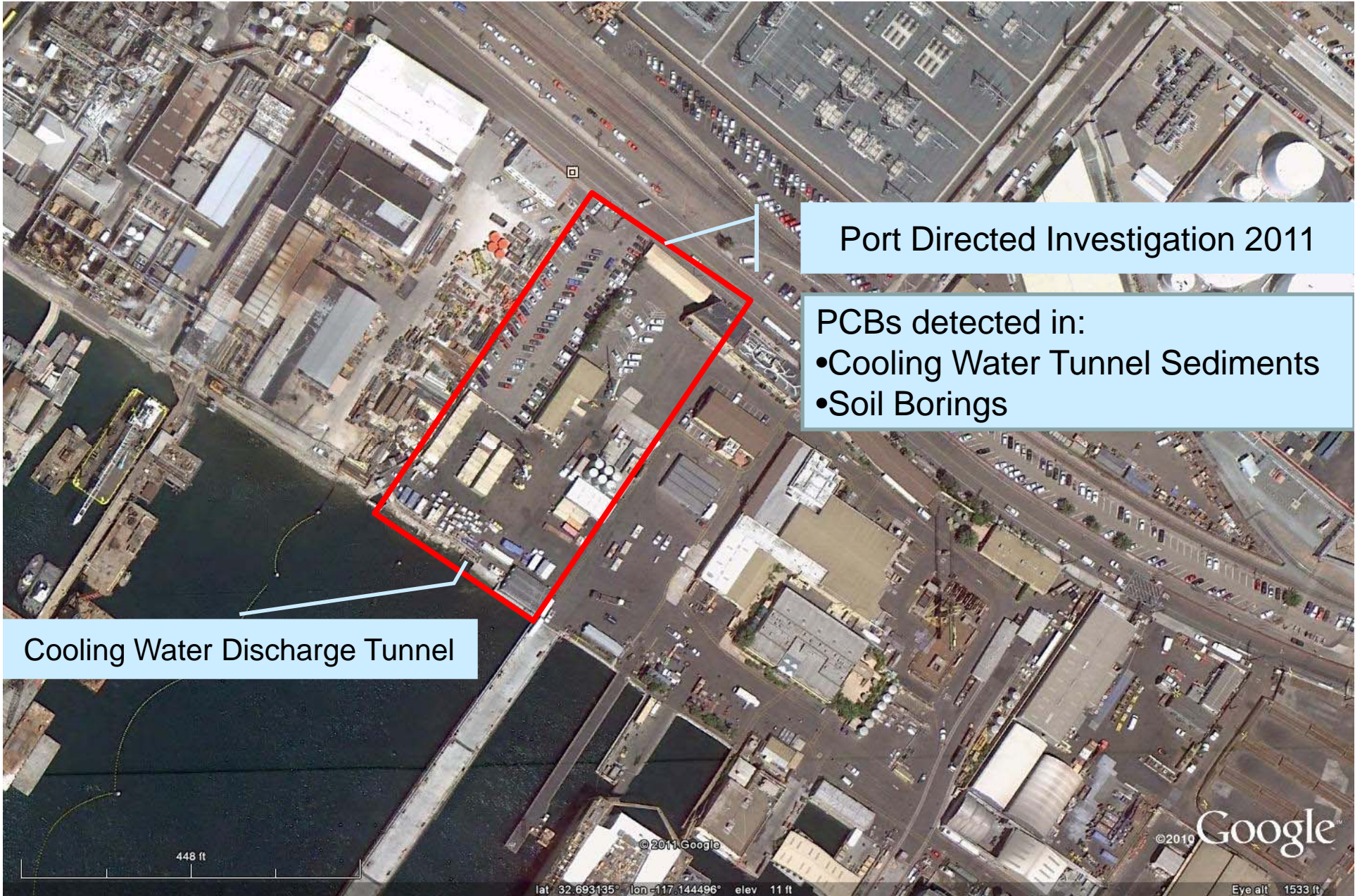
ND - Not Detected
 NA - Not Analyzed
 1254 - Aroclor 1254
 1260 - Aroclor 1260



Source: Site Assessment Report, Landslide Tidelands Lease Area Silver Gate Power Plant, San Diego, CA July 14, 2004, ENV America Inc.



Source: Site Assessment Report, Landslide Tidelands Lease Area
Silver Gate Power Plant, San Diego, CA July 14, 2004, ENV America Inc.



Port Directed Investigation 2011

- PCBs detected in:
- Cooling Water Tunnel Sediments
 - Soil Borings

Cooling Water Discharge Tunnel

448 ft

© 2011 Google
lat 32.693135° lon -117.144496° elev 11 ft

© 2010 Google

Eye alt 1533 ft



Conclusions

- Silvergate Power Plant discharged PCBs to San Diego Bay
 - Cooling Water Discharge
 - Nobles Pond Ditch
 - Runoff to MS4 system to outfall SW-4
- PCBs are still in San Diego Bay near Silvergate discharge points