

**Mitigation Monitoring and Reporting Program (MMRP)**

Mitigation Measures	Responsible Party	Timing for Mitigation Measure
<p><b>Mitigation Measure 4.5.6:</b> The contractor shall ensure that construction crews and work vessel crews are briefed daily on the potential for sea turtles and marine mammals to be present and provided with identification characteristics of sea turtles, seals, sea lions, and dolphin. The project marine biologist shall periodically confirm that this measure is implemented and include verification in a monthly monitoring report.</p>	<p>Contractor and Project Marine Biologist, as verified by the San Diego Water Board</p>	<p>Ongoing throughout dredging operations and application of clean sand cover</p>
<p><b>Mitigation Measure 4.5.7:</b> The contractor shall ensure that all construction activity be temporarily stopped if a sea turtle or marine mammal is sighted within 100 meters of the construction zone until the sea turtle or marine mammal is safely outside the outer perimeter of project activities. The biological monitor, who will be on site periodically during dredging activities, shall have the authority to halt construction operation and shall determine when construction operations can proceed. The California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) shall verify implementation of this mitigation measure.</p>	<p>Contractor and Project Marine Biologist, as verified by the San Diego Water Board</p>	<p>Ongoing throughout dredging operations and application of clean sand cover</p>
<p><b>Mitigation Measure 4.5.8:</b> The biological monitor shall prepare an incident report of any green sea turtle or marine mammal activity in the project area and shall inform the contractor to have his/her crews be aware of the potential for additional sightings. The report shall be provided within 24 hours to the California Department of Fish and Game (CDFG) and National Marine Fisheries Service (NMFS). In the event a sea turtle, pinniped, or cetacean is injured or killed as consequence of a collision, the vessel operator and the appointed shipyard safety personnel shall be required to immediately notify the NMFS (Southwest Division) and shall submit a written, follow-up report within 24 hours of the incident. Any injured sea turtle or marine mammal shall be transported to an agency-approved treatment facility. The California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) shall verify implementation of this mitigation measure.</p>	<p>Project Marine Biologist, as verified by the San Diego Water Board</p>	<p>Upon sighting of green sea turtle or marine mammal during dredging operations and application of clean sand cover</p>
<p><b>Mitigation Measure 4.5.9:</b> A qualified biologist familiar with the California least tern and other special-status seabirds and waterfowl shall be retained and be on site to assess the roosting and foraging behavior of special-status seabirds and waterfowl at the Shipyard Sediment Site and selected staging area(s) immediately prior to and during the initial start-up phase of dredging and clean sand cover placement activities. Once it has been determined that activities are not adversely affecting seabirds and waterfowl, the biologist shall not be required to be on site continuously; however, monitoring shall</p>	<p>Project Biologist, as verified by the San Diego Water Board</p>	<p>Prior to and ongoing throughout dredging operations and application of clean sand cover</p>

**Mitigation Monitoring and Reporting Program (MMRP)**

Mitigation Measures	Responsible Party	Timing for Mitigation Measure
<p>be performed at least once per week (or more often if required by the resource agencies) to adequately assess whether substantial adverse impacts to special-status seabirds and waterfowl are resulting from project activities (e.g., disrupting nesting or foraging activities, harassing roosting birds). The biologist shall be present during either of the selected dredge scheduling options. In the event of an imminent threat to California least tern and/or other special-status species, the monitor shall immediately contact the contractor's construction manager. In the event the construction manager/contractor is not available, the monitor shall have the authority to redirect or halt construction activities if determined to be necessary. The California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) shall verify implementation of this mitigation measure.</p>		
<p><b>Mitigation Measure 4.5.10:</b> If Staging Area 5 is selected, prior to initiation of dredging and during final design, the contractor shall endeavor to restrict dewatering and treatment activities to within the western and northern portions of the staging area to the extent feasible. To the extent practicable, activities shall be conducted in locations where existing buildings obstruct sensitive habitat areas from noise sources. The staging area layout shall be submitted to the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) (and to the resource agencies, if required) for review and approval.</p>	<p>Shipyards and San Diego Water Board</p>	<p>Prior to initiation of dredging operations</p>
<p><b>Mitigation Measure 4.5.11:</b> If Staging Area 5 is selected, the California Department of Fish and Game (CDFG) shall be notified not less than 30 days in advance and shall be given the opportunity to provide recommended measures to minimize impacts from increased noise and human activity to species in the Sweetwater Marsh Unit of the San Diego Bay National Wildlife Refuge (NWR). All agency-recommended measures (or agency-approved substitute measures, if recommended measures are infeasible) shall be implemented throughout the duration of project activities in Staging Area 5. At a minimum, the applicant shall conduct pre-activity nesting bird surveys within 300 feet of all noise-intensive activities if such activities will be initiated within the breeding season for special-status species (conservatively February 1 through August 31). If nesting birds are identified within 300 feet of activities, a qualified (and, if appropriate based on the species, agency-permitted) biological monitor shall be present on site to observe the behavior of the nesting birds during initiation of</p>	<p>Project Biologist, as verified by the San Diego Water Board</p>	<p>Not less than 30 days prior to initiation of dredging operations and ongoing every 2 weeks or more frequently during nesting season</p>

**Mitigation Monitoring and Reporting Program (MMRP)**

Mitigation Measures	Responsible Party	Timing for Mitigation Measure
<p>activities. The biological monitor shall have the authority to temporarily halt or redirect activities in the event that adverse effects to the birds are evident (e.g., there is a risk of nest failure or other indication of harassment, as defined by the Endangered Species Act). If adverse effects to nesting birds appear to be likely, the monitor shall recommend additional measures (e.g., installation of sound barriers, limiting duration of activities, relocating activities to another area, or postponing activities until the nest is no longer active) in concert with resource agency personnel.</p> <p>Regardless of whether nesting birds are identified during pre-activity nesting bird surveys, the biological monitor shall inspect the site and any adjacent areas supporting potential nesting habitat at least every 2 weeks during project activities that are conducted during the nesting season (conservatively February 1 through August 31) and shall report monthly to the State Water Resources Control Board (State Water Board).</p>		
<p><b>4.6 Air Quality</b></p> <p><b>Mitigation Measure 4.6.1:</b> The contractor shall be required by contract specifications to ensure that dredging, treatment, and haul activities are timed so as not to interfere with peak-hour traffic and to minimize obstruction of through traffic lanes adjacent to the site. If necessary, a flag person shall be retained by the construction supervisor to maintain safety adjacent to existing roadways. Contract specifications shall be included in the proposed project construction documents, which shall be reviewed by the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) prior to the issuance of construction permits. The San Diego Water Board shall verify implementation of this measure.</p>	Contractor, as verified by the San Diego Water Board	Ongoing during dredging, treatment and haul activity
<p><b>Mitigation Measure 4.6.2:</b> During dredging and dewatering activities, the contractor shall support and encourage ridesharing and transit incentives for the construction crew. These specifications shall be included in the proposed project's construction documents, which shall be reviewed by the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) prior to the issuance of a construction permit.</p>	Contractor, as verified by the San Diego Water Board	Ongoing during dredging, and dewatering operations
<p><b>Mitigation Measure 4.6.3:</b> During dredging and dewatering activities, the contractor shall ensure that on-site vehicle speed shall be limited to 15 miles per hour (mph). Contract specifications shall be included in the proposed project construction documents, which shall be reviewed by the California Regional Water</p>	Contractor, as verified by the San Diego Water Board	Ongoing during dredging, and dewatering operations

**Mitigation Monitoring and Reporting Program (MMRP)**

Mitigation Measures	Responsible Party	Timing for Mitigation Measure
<p>Quality Control Board, San Diego Region (San Diego Water Board) prior to the issuance of construction permits. The San Diego Water Board shall verify implementation of this measure.</p>		
<p><b>Mitigation Measure 4.6.4:</b>            During dredging and dewatering activities, the contractor shall ensure that all on-site roads are paved. Contract specifications shall be included in the proposed project construction documents, which shall be reviewed by the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) prior to the issuance of construction permits. The San Diego Water Board shall verify implementation of this measure.</p>	<p>Contractor, as verified by the San Diego Water Board</p>	<p>Ongoing during dredging, and dewatering operations</p>
<p><b>Mitigation Measure 4.6.5:</b>            During dredging and dewatering activities, the contractor shall adhere to San Diego Air Pollution Control District (APCD) Rule 55 to ensure that all material excavated or graded is sufficiently watered to prevent airborne dust from being visible beyond the property line. Watering with complete coverage, and/or surfactants shall be applied to stockpiles of dirt, inactive construction areas, and construction roads if and as necessary. Contract specifications shall be included in the proposed project construction documents, which shall be reviewed by the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) prior to the issuance of construction permits. The San Diego Water Board shall verify implementation of this measure.</p>	<p>Contractor, as verified by the San Diego Water Board</p>	<p>Ongoing during dredging, and dewatering operations</p>
<p><b>Mitigation Measure 4.6.6:</b>            During dredging and dewatering activities, the contractor shall ensure that all earthmoving activities cease during periods of high winds (i.e., greater than 25 mph averaged over 1 hour). Contract specifications shall be included in the proposed project construction documents, which shall be reviewed by the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) prior to the issuance of construction permits. The San Diego Water Board shall verify implementation of this measure.</p>	<p>Contractor, as verified by the San Diego Water Board</p>	<p>Ongoing during dredging, and dewatering operations</p>
<p><b>Mitigation Measure 4.6.7:</b>            During dredging and dewatering activities, the contractor shall ensure that all material transported off site is either sufficiently wet or securely covered to prevent excessive amounts of dust. In addition, per San Diego Air Pollution Control District (APCD) Rule 55, the construction contractor shall ensure that visible roadway dust from track-out/carry-out be minimized. Contract specifications shall be included in the proposed project construction documents, which shall be reviewed by the California Regional Water Quality Control Board, San Diego Region (San Diego</p>	<p>Contractor, as verified by the San Diego Water Board</p>	<p>Ongoing during dredging, treatment and haul activity</p>

**Mitigation Monitoring and Reporting Program (MMRP)**

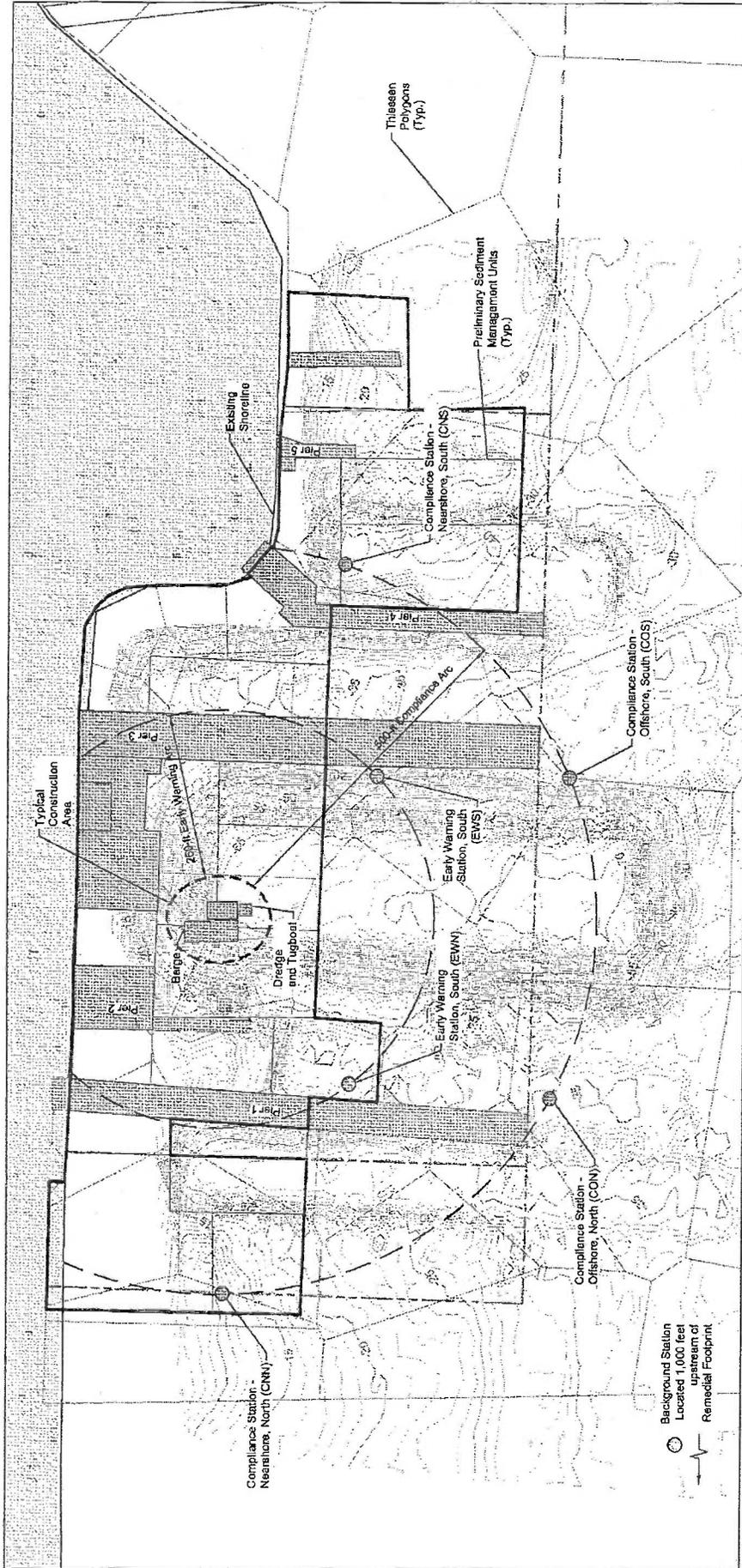
Mitigation Measures	Responsible Party	Timing for Mitigation Measure
<p>Water Board) prior to the issuance of construction permits. The San Diego Water Board shall verify implementation of this measure.</p> <p><b>Mitigation Measure 4.6.8:</b> The contractor shall be required by contract specifications to ensure that all diesel-powered equipment used are retrofitted with after-treatment products (e.g., engine catalysts) to the extent that they are readily available in the San Diego Air Basin (SDAB). Contract specifications shall be included in the proposed project construction documents, which shall be reviewed by the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) prior to issuance of a construction permit. The San Diego Water Board shall verify implementation of this measure.</p>	<p>Contractor, as verified by the San Diego Water Board</p>	<p>Ongoing during dewatering and treatment operations</p>
<p><b>Mitigation Measure 4.6.9:</b> The contractor shall be required by contract specifications to ensure that all heavy-duty diesel-powered equipment operating and refueling at the project site use low oxides of nitrogen (NO<sub>x</sub>) diesel fuel to the extent that it is readily available and cost effective (up to 125 percent of the cost of California Air Resources Board [ARB] diesel) in the San Diego Air Basin (SDAB). (This does not apply to diesel-powered trucks traveling to and from the project site.) Contract specifications shall be included in the proposed project construction documents, which shall be reviewed by the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) prior to issuance of a construction permit.</p>	<p>Contractor, as verified by the San Diego Water Board</p>	<p>Ongoing during dewatering and treatment operations</p>
<p><b>Mitigation Measure 4.6.10:</b> The San Diego Water Board shall verify implementation of this measure. The contractor shall be required by contract specifications to ensure that alternative fuel construction equipment (i.e., compressed natural gas, liquid petroleum gas, and unleaded gasoline) are utilized to the extent 1) that the equipment is readily available and 2) if such equipment is available in the San Diego Air Basin (SDAB), it is also cost effective. Contract specifications shall be included in the proposed project construction documents, which shall be reviewed by the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) prior to issuance of a construction permit. The San Diego Water Board shall verify implementation of this measure.</p>	<p>Contractor, as verified by the San Diego Water Board</p>	<p>Ongoing during dewatering and treatment operations</p>
<p><b>Mitigation Measure 4.6.11:</b> The contractor shall be required by contract specifications to ensure that construction equipment engines are maintained in good condition and in proper tune per manufacturer's specification for the duration of construction. Contract specifications shall be included in the proposed project construction documents, which shall be reviewed by the California</p>	<p>Contractor, as verified by the San Diego Water Board</p>	<p>Ongoing during dewatering and treatment operations</p>

**Mitigation Monitoring and Reporting Program (MMRP)**

Mitigation Measures	Responsible Party	Timing for Mitigation Measure
<p>Regional Water Quality Control Board, San Diego Region (San Diego Water Board) prior to issuance of a construction permit. The San Diego Water Board shall verify implementation of this measure.</p> <p><b>Mitigation Measure 4.6.12:</b> The contractor shall be required by contract specifications to ensure that construction-related equipment, including heavy-duty equipment, motor vehicles, and portable equipment, is turned off when not in use for more than 5 minutes. Contract specifications shall be included in the proposed project construction documents, which shall be reviewed by the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) prior to issuance of a construction permit. The San Diego Water Board shall verify implementation of this measure.</p>	<p>Contractor, as verified by the San Diego Water Board</p>	<p>Ongoing during dewatering and treatment operations</p>
<p><b>Mitigation Measure 4.6.13:</b> The contractor shall be required by contract specifications to ensure that construction operations rely on the electricity infrastructure surrounding the construction site rather than electrical generators powered by internal combustion engines to the extent feasible. Contract specifications shall be included in the proposed project construction documents, which shall be reviewed by the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) prior to issuance of a construction permit. The San Diego Water Board shall verify implementation of this measure.</p>	<p>Contractor, as verified by the San Diego Water Board</p>	<p>Ongoing during dewatering and treatment operations</p>
<p><b>Mitigation Measure 4.6.14:</b> The contractor shall utilize alternative-fueled construction equipment to the maximum extent feasible. All diesel-powered construction equipment shall meet or exceed Tier III standards, or shall be equipped with ARB-verified oxidation catalysts and diesel particulate filter emission controls, using the greatest control efficiency for the specific category of equipment where feasible. The construction contractor shall demonstrate that these verified/certified technologies are available to be used at the time of project dredging and dewatering activities. These specifications shall be included in the proposed project's construction documents, which shall be reviewed by the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) prior to the issuance of a construction permit. The San Diego Water Board shall verify implementation of this measure.</p>	<p>Contractor, as verified by the San Diego Water Board</p>	<p>Ongoing during dewatering and treatment operations</p>
<p><b>Mitigation Measure 4.6.15:</b> To accelerate the decomposition process and reduce odor impacts, the contractor shall apply a mixture of Simple Green and water (a ratio of 10:1) to the dredged material to the extent odor issues arise with respect to particular portions of the dredged material. Contract specifications shall be</p>	<p>Contractor, as verified by the San Diego Water Board</p>	<p>Ongoing during dredging and dewatering operations</p>

**Mitigation Monitoring and Reporting Program (MMRP)**

Mitigation Measures	Responsible Party	Timing for Mitigation Measure
<p>included in the proposed project construction documents, which shall be reviewed by the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) prior to the issuance of construction permits. The San Diego Water Board shall verify implementation of this measure.</p>		
<p><b>4.7 Global Climate Change</b>            There are no additional mitigation measures for this topic</p>		
<p>A turion is a specialized overwintering bud produced by aquatic herbs.</p>		



**LEGEND:**

- Compliance Station
- Background Station
- Early Warning Station
- Remedial Footprint
- Existing Bathymetry
- Lease Line

**SOURCE:** Contours from Southwest Marine survey dated January 2012. Sampling locations from Equipment 2003. Shipyard from EWSN GIS.

**HORIZONTAL DATUM:** California State Plane NAD83, Zone 6, U.S. Feet.

**VERTICAL DATUM:** Mean Lower Low Water (MLLW).

**R9-2013-0093**  
**ATTACHMENT C**  
**RECEIVING WATER MONITORING DIAGRAM**



**Figure 1**  
 Typical Water Quality Monitoring Plan  
 San Diego Shipyard Sediment Site

# Attachment C

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

**Final Response to Comments Report**

**Tentative Order No. R9-2013-0093**

**WASTE DISCHARGE REQUIREMENTS  
FOR**

**NATIONAL STEEL AND SHIPBUILDING COMPANY**

**BAE SYSTEMS SAN DIEGO SHIP REPAIR, INC.**

**SAN DIEGO UNIFIED PORT DISTRICT**

**UNITED STATES NAVY**

**SAN DIEGO BAY ENVIRONMENTAL RESTORATION FUND – NORTH**

**SAN DIEGO BAY ENVIRONMENTAL RESTORATION FUND – SOUTH**

**July 10, 2013**

## STATE OF CALIFORNIA

EDMUND G. BROWN, JR. Governor  
MATT RODRIQUEZ, Agency Secretary, California Environmental Protection Agency



### State Water Resources Control Board

Felicia Marcus, <i>Chair</i>	Attorney
Frances Spivy-Weber, <i>Vice Chair</i>	Public
Tam M. Doduc	Civil Engineer
Dorene D'Adamo	Water Quality
Stephen Moore	Sanitary Engineer

Tom Howard, *Executive Director*

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

Tomas Morales, *Chair*  
Gary Strawn, *Vice Chair*  
Eric Anderson  
Henry Abarbanel  
Sharon Kalemkiarian  
Vacant  
Vacant

David W. Gibson, *Executive Officer*  
James Smith, *Assistant Executive Officer*

Catherine Hagan, *Senior Staff Counsel, Office of Chief Counsel*  
Nathan Jacobsen, *Staff Counsel, Office of Chief Counsel*

This report was prepared under the direction of

David T. Barker, *P.E., Supervising WRC Engineer, Surface Water Basins Branch*  
Eric Becker, *P.E. Senior Water Resource Control Engineer, Southern Watershed Unit*

by

Jody Ebsen, *P.G. Engineering Geologist*

12	<p><b>COMMENT:</b> The Waste Discharge Requirements cannot legally list the San Diego Bay Environmental Restoration Funds as dischargers. The Waste Discharge Requirements list both the San Diego Bay Environmental Restoration Fund North and San Diego Bay Environmental Restoration Fund South as dischargers. Tentative Order No. R9-2013-0093 § II(F) at 7. These funds are not "persons" subject to regulation under the Clean Water Act or the Porter-Cologne Water Quality Control Act. See 33 U.S.C. § 1362(5); Cal. Water Code Div. 7 § 13050(c). Including these funds as dischargers creates the possibility of confusing who is actually responsible for doing the cleanup—which are the Responsible Parties under the Cleanup and Abatement Order. The Responsible Parties cannot be shielded from liability for having to clean up the Shipyard site in a way that protects water quality by creating "funds" that apply for the permit. Unless the funds' trustee agrees to be listed as a discharger and accepts liability for the cleanup, the funds should not be listed as dischargers.</p> <p><b>RESPONSE:</b> The San Diego Water Board named the San Diego Bay Environmental Restoration Fund North and San Diego Bay Environmental Restoration Fund South are dischargers where the entities submitted and are named in the Reports of Waste Discharge and the fund signatories will be the same entities which are named Dischargers in the Cleanup and Abatement Order. Water Code Section 13050(c) does not provide an exhaustive definition of the term "person." As suggested by the term "includes", Section 13050(c) is not intended to provide a complete list of what is a "person" under this division of the Water Code. "Person" is construed broadly under the Water Code to include corporations, general partnerships, limited partnerships, trusts, estates, and individuals or corporations "doing business as" an unincorporated business. Therefore, San Diego Bay Environmental Restoration Fund North and San Diego Bay Environmental Restoration Fund South are considered "persons" as construed under the Water Code.</p> <p>It is not the intent of the San Diego Water Board to shield the Dischargers named in the Cleanup and Abatement Order from the responsibility of sediment remediation at the Shipyard Site. The Tentative Order names the Dischargers with the ownership and control of the Shipyard Sediment Remediation Project, namely NASSCO, BAE Systems, and the Restoration Funds as primarily responsible. The San Diego Water Board has the discretion to name the Port District and the Navy as secondarily responsible. The San Diego Water Board may seek enforcement against all or any of these entities for violations of the Tentative Order. Additionally, all Dischargers named in the Cleanup and Abatement Order are accountable for compliance</p>	Commenter: San Diego Coastkeeper
----	--	-------------------------------------

	<p>with the Cleanup and Abatement Order, and the San Diego Water Board may pursue enforcement against any or all of these entities as well.</p>	
<p>13</p>	<p><b>COMMENT:</b> The Waste Discharge Requirements should list the City of San Diego, San Diego Gas &amp; Electric, and San Diego Marine Construction Company, Campbell Industries as dischargers. The Waste Discharge Requirements recognize that the City of San Diego, San Diego Gas &amp; Electric, and Campbell Industries are responsible parties under the Cleanup and Abatement Order. See Tentative Order § II(F) at 7. However, the Waste Discharge Requirements fail to include these responsible parties as dischargers. See Tentative Order at 1, 4. Listing all responsible parties as dischargers increases accountability and ensures that the cleanup proceeds in an efficient and effective manner.</p> <p><b>RESPONSE:</b> The Porter-Cologne Water Quality Control Act requires all persons discharging waste to file a report of a waste discharge<sup>1</sup>. BAE Systems, NASSCO and San Diego Bay Environmental Restoration Fund North and San Diego Bay Environmental Restoration Fund South filed Reports of Waste Discharges for the Shipyard Sediment Remediation Project to address sediment cleanup including the dredging of sediment, the dewatering and solidification of the dredged materials, and the transport and removal of material to an appropriate landfill for disposal. As the entities proposing to discharge waste attributable to the Project, BAE Systems, NASSCO and San Diego Bay Environmental Restoration Fund North and San Diego Bay Environmental Restoration Fund South are all persons named as Discharger(s) in the Tentative Order and responsible to comply with the waste discharge requirements of the Tentative Order. The Tentative Order does not name as permittees any entities that did not file a Report of Waste Discharge in application for waste discharge requirements for the Shipyard Sediment Remediation Project. The San Diego Regional Board recognizes the City of San Diego, San Diego Gas &amp; Electric and Campbell Industries are all dischargers responsible for the cleanup</p>	<p>Commenter: San Diego Coastkeeper</p>

<sup>1</sup> Wat. Code, § 13260 ("(a) All of the following persons shall file with the appropriate regional board a report of the discharge, containing the information which may be required by the regional board: (1) Any person discharging waste, or proposing to discharge waste, within any region that could affect the quality of the waters of the state [emphasis added]).

	<p><b>The Background Station Should Be Located Upstream Of The Remedial Footprint</b></p> <p><b>COMMENT:</b> The Waste Discharge Requirements note that the background station will be located 1,000 feet from the dredging activity in the direction of the head of the bay and beyond the influence of construction activities. See Tentative Order § VII(B)(2)(c) at 26. But in the Receiving Water Monitoring Diagram, the station is located south, or downstream, of the remedial footprint. See Tentative Order Attachment C. Because an accurate background measurement is vital to the success of water quality monitoring, the background station must be upstream of the remedial footprint and beyond the influence of construction activities.</p> <p><b>RESPONSE:</b> While the narrative description in the Tentative Order and the Remedial Monitoring Plan described in Attachment C of the RAP both correctly describe the required location of the background station, Attachment C, Figure 1 of the Tentative Order depicts the background station in error. The actual position of the background monitoring station will be located 1,000 feet toward the head of the Bay from the remedial footprint and beyond the influence of dredging. This figure will be corrected and included in the Revised Tentative Order.</p>	<p>Commenter: San Diego Coastkeeper</p>
<p>38</p>	<p><b>The Port District Objects To Being Named As A Discharger</b></p> <p><b>COMMENT:</b> The Port District is not the party proposing to make the discharges for which the WDRs are being issued, nor is it the operator of any of the facilities on which the discharges are proposed to be made; it is merely the non-operating landlord and public trustee of the subject tidelands under the San Diego Unified Port District Act (Harb. &amp; Nav. Code, App. 1).</p> <p><b>RESPONSE:</b> Various State Water Resources Control Board (State Water Board) Orders and policy memoranda clearly establish that the San Diego Water Board has the discretion to name the Port District as a "Discharger" in the Tentative Order even though it will not be involved in or controlling the day to day operations of the Project, subject to certain considerations. In Order No. WQ 90-3 the State Water Board held that the Port District may properly be named as a "Discharger" in waste discharge requirements (WDRs) under the California Water Code with the provision that 1) the WDRs should not hold the Port District responsible for the day to day operation of the regulated facilities or for monitoring requirements and 2) the WDRs must provide the Port District with the opportunity to attain tenant compliance prior to San Diego Water Board enforcement action against the Port District. The inclusion of the Port District as a "Discharger" in the Tentative Order, under these circumstances, is discretionary. This being</p>	<p>Commenter: San Diego Unified Port District</p>
<p>39</p>		

	<p>said, it is not the customary practice of the San Diego Water Board to name the Port District as primarily responsible in WDRs or NPDES permits issued to its tenants. Moreover the Port District, in its comment letter, offered its assistance in maintaining the Project applicants' compliance with the Tentative Order as well as its independent assistance in enforcing the Coastal Development Permits as necessary. Based on these considerations the Tentative Order will be revised to remove the Port District as a Discharger. The San Diego Water Board may exercise its discretion during these proceedings to name the Port District as a Discharger which is secondarily liable for permit obligations under the Tentative Order.</p> <p>In applying similar reasoning, the Tentative Order will be revised to also exclude the U.S. Navy as a Discharger. The Tentative Order also includes the U.S. Navy as a "Discharger" based on its ownership of the S-Lane parcel where sediment dewatering and stockpiling operations are scheduled to occur. As with the Port District, the U.S. Navy is a "non-operating" landowner and will not be engaged with the day to day operations of the Project at the S-Lane parcel. The inclusion of the U.S. Navy as a "Discharger" in the Tentative Order, under these circumstances is not mandatory. Based on these considerations the Tentative Order will be revised to remove the U.S. Navy as a Discharger. The San Diego Water Board may exercise its discretion during these proceedings to name the U.S. Navy as a Discharger which is secondarily liable for permit obligations under the Tentative Order.</p>	
40	<p><b>COMMENT:</b> Consistent with the 1990 agreement between the State Water Board, the Regional Board, and the Port District, the Regional Board's long-standing business practice has been not to name the Port District as primarily liable in WDRs issued for work to be performed by or on behalf of its tenants and there is no reason to depart from that practice in connection with these WDRs.</p> <p><b>RESPONSE:</b> See response to comment 39.</p>	Commenter: San Diego Unified Port District
41	<p><b>COMMENT:</b> In no event can the Port District be liable for any proposed activities or WDRs issued with respect to the "S Lane," which is owned by the United States Navy, and over which the Port District has no jurisdictional authority.</p> <p><b>RESPONSE:</b> Comment noted. Persons who own land on which a discharge is occurring can properly be included as "dischargers" in waste discharger requirements under the California</p>	Commenter: San Diego Unified Port District

Final Response To Comments  
Tentative Order No. R9-2013-0093

	<p>Water Code. This principle is based on three elements: ownership of the land, knowledge of the activity and the ability to control it where the source of the discharge is the land and the activities on the land. The application of these general principles to the S-Lane parcel would support the Port District's position that it should not be held accountable as a public trustee for discharges from the S-Lane parcel over which it has no jurisdiction with the possible exception of discharges from the S Lane Parcel into a municipal separate storm water (MS4) conveyance system owned or operated by the Port District.</p>	
--	--	--

# Attachment D

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

SAN DIEGO REGION

TOMAS MORALES, CHAIR

In the Matter of the )  
Regional Board )  
Public Meeting/Hearing )  
Item 6 )  
\_\_\_\_\_ )

CERTIFIED  
COPY

TRANSCRIPT OF PROCEEDINGS

San Diego, California

Wednesday, July 10, 2013

Reported by:

ERIN WINN  
CSR No. 13579

Job No. :  
B9823WQSD

*Kennedy*

COURT REPORTERS, INC.

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

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

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

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

SAN DIEGO REGION

TOMAS MORALES, CHAIR

In the Matter of the )  
Regional Board )  
Public Meeting/Hearing )  
Item 6 )  
\_\_\_\_\_ )

TRANSCRIPT OF PROCEEDINGS, taken at  
9174 Sky Park Court, San Diego, California,  
commencing at 10:35 a.m. on Wednesday,  
July 10, 2013, heard before the SAN DIEGO  
REGIONAL WATER QUALITY CONTROL BOARD,  
reported by ERIN WINN, CSR No. 13579,  
a Certified Shorthand Reporter in and for  
the State of California.

APPEARANCES:

CHAIRPERSON:	Tomas Morales
VICE CHAIR:	Gary Strawn
BOARD MEMBERS:	Henry Abarbanel Eric Anderson Sharon Kalemkiarian
EXECUTIVE OFFICER:	David Gibson
ALSO PRESENT:	Catherine Hagan James Smith Chris Witte

1 component to improving water quality in San Diego Bay. At  
2 this time staff recommends adoption of the revised order.

3 And as some housekeeping, as Chairman Morales  
4 indicated, there are a couple of errata sheets floating  
5 around, both for the tentative order and for the response  
6 to comments document. Copies have been passed out, and  
7 there are copies available on the back table.

8 So if you have questions?

9 MR. MORALES: Okay.

10 MS. EBSSEN: Thank you.

11 MR. MORALES: Thank you.

12 MR. BARKER: Excuse me, Mr. Chair. For the record, my  
13 name is David Barker. I just wanted to add on a little to  
14 what Ms. Ebsen concerning the naming of the dischargers in  
15 the order.

16 As you can probably read in the  
17 Executive Officer's summary report, the staff removed the  
18 Port District and the U.S. Navy as primarily responsible  
19 parties under the order. However, in the  
20 Executive Officer's report, we explained that it is within  
21 the Board's discretion to name the Port District and the  
22 Navy as a secondarily liable party in the order subject to  
23 certain conditions. And staff is open to listening to the  
24 testimony on this matter and may have recommendations for  
25 you after that.

1 that SDG&E and BAE attempt to work those out.

2 But in no way has the Port been in any way an  
3 obstructionist at all. And we look forward to adopting  
4 the CDPs at our next meeting and having the work go  
5 forward.

6 And I'm happy to address the concerns or  
7 questions that any staff or Board members may have.  
8 Thank you.

9 MR. ABARBANEL: Does the Port dispute its being named  
10 as discharger under the CAO?

11 MS. GROSS: Yes. Board member, as you know, we do  
12 name -- we have disputed and filed a petition with the  
13 State Board along with all of the other dischargers on  
14 various grounds.

15 MR. ABARBANEL: Yes? Okay. Thank you. The Port is a  
16 public agency; isn't it?

17 MS. GROSS: Yes, it is.

18 MR. ABARBANEL: Don't you think it ought to be a good  
19 citizen?

20 MS. GROSS: Yes, and I believe it is.

21 MR. ABARBANEL: So you have said that you have not  
22 obstructed conversations between SDG&E and BAE?

23 MS. GROSS: No. We have not obstructed access to the  
24 property, sir.

25 MR. ABARBANEL: Pardon me?

1 MS. GROSS: Well, we could get third-party claims, or  
2 we could get enforcement proceedings from you all separate  
3 and apart from CAO enforcement proceedings because there  
4 are different requirements in the WDRs that are in  
5 addition to and on top of the regulatory and compliance  
6 measures in the CAO.

7 MR. ABARBANEL: I wonder if I can ask Sharon's  
8 question and the Chairman's question in another way.

9 MR. MORALES: Sure you can.

10 MR. ABARBANEL: As I understand it from you, you were  
11 named as a discharger. You have CDP authority through the  
12 Coastal Commission. And you're the landlord. You're  
13 intimately connected with the success or failure of the  
14 San Diego Bay cleanup project.

15 Why doesn't the Port stand up as a good citizen,  
16 drop the argument that you are not a discharger, acquire  
17 the control that you say that you don't have by joining  
18 the cleanup, and stop acting as a bad representative of  
19 me? Why not?

20 MS. GROSS: Well, I --

21 MR. ABARBANEL: I know you don't have the authority to  
22 do that. I'm asking you to convey that to the Port  
23 commissioners who do have the authority and are the  
24 representatives of the people who will benefit from the  
25 cleanup of San Diego Bay, which is everyone in this room.

1 MS. GROSS: Well, with all due respect, member of the  
2 Board, naming us on the WDRs is not going to get the  
3 cleanup done any --

4 MR. ABARBANEL: I'm not asking you about that. I'm  
5 asking you to rise above, in my opinion, the irresponsible  
6 position that the Port has taken and take responsibility  
7 for this beneficial act for the citizens of San Diego.

8 Why cannot the Port do that?

9 MS. GROSS: Well, I respectfully disagree with your --

10 MR. ABARBANEL: You may do so. I'm asking you to  
11 convey that to the Port Commission, not on behalf of the  
12 Board. They are not going to vote on that. Just on  
13 behalf of the 3 million people who live in San Diego  
14 County.

15 MS. GROSS: All right.

16 MR. ABARBANEL: They count, too.

17 MS. GROSS: Is there any other questions?

18 MR. STRAWN: I have a question, but I'm not going to  
19 address it to you. I'd like staff to basically step in  
20 here.

21 In your recommendation --

22 MS. KALEMKIARIAN: We all agree with your question  
23 that you haven't asked yet, Gary.

24 MR. STRAWN: Well, I was hearing two things. And I'm  
25 going, "What? Why? What am I" -- can you answer the

1 operating the dredging project, but they own the land on  
2 which that activity is occurring. And so the State Board  
3 order indicated that the regional boards had the  
4 discretion to name the Port District in the order subject  
5 to two stipulations.

6           One was that the Board not hold the Port District  
7 accountable for day-to-day operations of the project or  
8 for submission of monitoring reports. And the second  
9 condition was that the Board would not take action against  
10 the Port District for any incidents of non-compliance with  
11 the order until the Port had been given the opportunity to  
12 gain compliance from its tenants. And those two actions  
13 are described in the EO report.

14           And right now, it's not the standard practice of  
15 the Regional Board on San Diego Bay permits to name the  
16 Port District as a secondarily liable party, although we  
17 have the discretion to do so as I explained. And so kind  
18 of based on those considerations, we just removed the Port  
19 District from the order. But I know there's special  
20 considerations on this cleanup, and that -- so I left open  
21 the possibility that during these proceedings and after  
22 hearing the testimony, the Board could name the San Diego  
23 Unified Port District as a secondarily liable party in the  
24 order as a discharger.

25           And so that's basically staff's rationale. And

1 as I mentioned earlier this morning, we have some proposed  
2 language available that would accomplish that.

3 MR. ABARBANEL: I wonder if I may ask Gary's question  
4 another way both to you, Dave, and anybody else on the  
5 staff.

6 MR. MORALES: Actually, you can't ask it. Oh, we can  
7 at this point.

8 MR. ABARBANEL: I'll ask Ether (phonetic).

9 MR. MORALES: Whoever can answer -- the cloud. We  
10 don't know what --

11 MR. ABARBANEL: After only a decade of contentious  
12 adversarial and finally agreeable conversations, cleanup  
13 and abatement order was issued in 2012 for the San Diego  
14 Bay.

15 MR. MORALES: Two decades.

16 MR. ABARBANEL: Two decades? I'm sorry. What's a  
17 decade here or there? You know, why rush?

18 And dischargers were named. They may contend  
19 that they shouldn't be named. That's their privilege.  
20 But they were named.

21 Why isn't every discharger who was named a  
22 responsible party for every aspect of the cleanup?

23 MR. BARKER: Well, in answer to that, the Board has a  
24 straight pathway to take enforcement against any party  
25 that violates any aspect of the cleanup and abatement

1 order irrespective of what parties are named in this  
2 order. This order is regulating discharges from a  
3 remediation project that is intended to implement the  
4 requirements of the CAO. And so we have named in this  
5 order the parties that applied for the permit and are  
6 going to be serving as the project operators. But that --

7 MR. ABARBANEL: I understand.

8 MR. BARKER: Yeah. Okay.

9 MR. ABARBANEL: I'm not arguing that anybody is  
10 violating the order -- the CAO.

11 MR. BARKER: Yeah.

12 MR. ABARBANEL: What I'm trying to say -- isn't the  
13 simplest position that this Board could take is that all  
14 parties named as dischargers are responsible for the  
15 implementation of the CAO? The one that's in front of us  
16 now? The ones that would be in front of us over the new  
17 few years? And as this cleanup maybe actually gets  
18 started?

19 MR. MORALES: Could I maybe try and ask it a different  
20 way?

21 MR. ABARBANEL: Of course.

22 MR. MORALES: Well, you know, why are we creating,  
23 like, a Venn diagram where there's, like, not overlap? In  
24 other words, I think Henry is asking rather than give  
25 people a reason to make a claim that, "Hey, we're

1 responsible over here but not over here" -- if everybody  
2 in the circle is responsible here, here, here, and here,  
3 nobody can be pointing fingers that it relates to  
4 something else.

5 MR. ABARBANEL: That's it. Yes.

6 MS. HAGAN: May I offer a clarification?

7 MR. MORALES: Yeah.

8 MS. HAGAN: Nothing that you do today affects the  
9 decision that you made to name the parties to the cleanup  
10 and abatement order.

11 MR. MORALES: Right.

12 MR. ABARBANEL: Understood.

13 MS. HAGAN: Nothing you do today --

14 MR. MORALES: We're not revisiting that.

15 MS. HAGAN: Failure to comply -- failure to implement  
16 the dredging that's proposed in a timely fashion subjects  
17 everybody named on the cleanup order to potential  
18 enforcement for not complying with the cleanup order. In  
19 my view, the waste discharge requirements are a mechanism  
20 to implement -- to permit the activity that's required to  
21 comply with the cleanup and abatement order.

22 But waste discharge requirements are usually  
23 issued to first the entities who applied for them who will  
24 actually conduct the activities and, in some instances, to  
25 the landowner. Because the landowner, if they're not the

1 discharger themselves conducting the activity, has  
2 ownership of the land, ability to control access to the  
3 land, ability to regulate the activity occurring on the  
4 land. So they have a special position that some of the  
5 other named entities in the cleanup order do not have  
6 unless they are also a landowner in the location where the  
7 dredging is actually occurring.

8 MR. MORALES: Am I missing something, or is that  
9 arguing in favor of having more people? And  
10 particularly --

11 MS. HAGAN: No. I'm just trying to clarify that I  
12 don't think you have --

13 MR. MORALES: No. I know you're not arguing --

14 MS. HAGAN: Yeah.

15 MR. MORALES: -- the position. I want to be clear.

16 MS. HAGAN: The legal basis I think is tenuous for  
17 naming all of the parties to the cleanup order to these  
18 waste discharge requirements because they don't have --  
19 unless they are all part of the group that's actually out  
20 there every day doing the work, they don't have a direct  
21 role in it in how the waste discharge requirements and the  
22 activities it permits are implemented.

23 MR. MORALES: Except that they would still be  
24 responsible under the CAO for what was done by the people  
25 that are --

1 speakers -- apologies to those of you who have given us  
2 green cards. We will break for lunch at that point. So  
3 we'll hear from public after a brief lunch break.

4 MR. SILVERSTEIN: Okay. But you do want to hear some  
5 brief comments from the Navy; right?

6 MR. MORALES: Brief is good.

7 MR. SILVERSTEIN: Brief. Brief. Okay. This is Dave  
8 Silverstein. I'm here for the Navy.

9 We weren't going to say very much about this  
10 because we would like you to adopt WDRs because we're  
11 anxious that this project goes forward, too. We don't  
12 want to miss -- we don't want to miss any deadlines under  
13 the CAO.

14 I'm a little interested, let's say, in this idea  
15 of adding -- of just adding everybody who's in the CAO to  
16 the WDRs. I think that what's going on here is that the  
17 reason the attention is on the Port is because the Port  
18 hasn't cooperated in this process. Other parties like the  
19 Navy has cooperated. The Navy has cooperated a great  
20 deal.

21 The Navy hasn't said, "We're not a party. You  
22 know, you need to throw us out of here. We're  
23 cooperating." We're going to -- we're doing our best to  
24 make land available for sediment management so this thing  
25 can go forward. And I don't think you gain anything from

1 MR. MORALES: That's fine. Now, before we close,  
2 staff?

3 UNIDENTIFIED SPEAKER: Good afternoon, everyone. At  
4 this time staff would recommend adopting the tentative  
5 order with the four errata sheets as described.  
6 Thank you. That's it.

7 MS. KALEMKIARIAN: Staff isn't changing its  
8 recommendation then as to the Port?

9 UNIDENTIFIED SPEAKER: I have -- not at this time.

10 MS. KALEMKIARIAN: Okay. Just asking so that we know.

11 So you're leaving that to us? To our discretion?

12 MR. MORALES: That's why we make the big bucks.

13 MS. KALEMKIARIAN: Exactly.

14 MR. YOUNG: This is Vanessa Young. I just wanted to  
15 clarify -- as David Barker said, we do have and have  
16 prepared additional language. But it was our original  
17 intention kind of in narrowing the scope of those who we  
18 named in the WDRs. And that we do have that language at  
19 this time if the Board would like to add it.

20 I did have one clarifying question I wanted to  
21 ask Ms. Hagan, if possible, on Errata 3. And it was just  
22 a question in regards to the last sentence. Just in terms  
23 of the last sentence starting with, "Nothing in this order  
24 shall be construed as a finding" --

25 MR. MORALES: Oh, that's 4.

1 the project site excluding the S-Lane parcel is also  
2 responsible for compliance with this order subject to" --  
3 and then what we have as footnote 1 -- Order Number WQ903,  
4 et cetera, et cetera, to the end of that paragraph. So  
5 that captures the limitations from the prior State Board  
6 agreement or order.

7 Would that work?

8 MS. HAGAN: I do want to point out you are not bound  
9 to -- if you choose to name the Port because they are also  
10 named on the cleanup and abatement order --

11 MR. MORALES: We don't have to?

12 MS. HAGAN: You are not bound by the secondary  
13 responsibility statements in the Order 90-3 --

14 MR. MORALES: Oh, even better.

15 MS. HAGAN: I don't believe the Board is bound in any  
16 way by that particular agreement or understanding in that  
17 precedential order. So I wanted to make -- I may not have  
18 made that clear. I did a little more research over the  
19 lunchtime, and so I wanted to point that out to you.

20 MR. MORALES: In that case, I would strike that entire  
21 portion in that I guess it becomes just a single sentence  
22 almost.

23 Is the remainder of the language --

24 MS. KALEMKIARIAN: Well, I mean, we're simply --  
25 Mr. Chair, we just put them back in. I mean, that's the

1 is responsible.

2 So that will change elements of each of the three  
3 errata, I believe. But our intention is just to put the  
4 Port District back in, to leave the deletion of the Navy,  
5 and then to adjust the other errata as necessary to be in  
6 compliance with that intention.

7 MR. ABARBANEL: I'll second that. Time for  
8 discussion?

9 MR. MORALES: Discussion.

10 MR. ABARBANEL: Okay. I have to say I second the  
11 motion, and I will vote for it. But I wanted to make some  
12 comments because a lot of today was discovering that  
13 certain parties -- in particular, BAE and NASSCO --  
14 understood what the goal of the CAO was from last year.  
15 And while I think some of the other parties probably  
16 understood it, not all of them were here, and I appreciate  
17 that. Thank you.

18 I would have been most proud of the Port had they  
19 come in and demanded to do what this motion does so that  
20 they would be a responsible part of our government, and  
21 they didn't. I'm sorry that we have to do it for you. I  
22 don't understand why.

23 But maybe you, Port -- aren't very many Port  
24 people here still. Maybe the Port should think over what  
25 it means to be responsible and the benefit that they and

1 other people achieve by cleaning up the bay after -- I  
2 learned only 20 years of discussion -- we figured out how  
3 to do. I would really appreciate that.

4 I don't think they should keep coming back here  
5 and tell us they don't want to play. That's done. And to  
6 say it again, it's not part of this motion but part of my  
7 comments. Doesn't matter what I say now.

8 I really think that after 20 years of discussion,  
9 there was a decision made. It was a community decision.  
10 I came in on the end of it. Tomas and I had the privilege  
11 of discussing it and voting on it but also the privilege  
12 of not having to spend weeks and weeks and weeks and weeks  
13 of listening to testimony to get to where we've gotten to.  
14 We made that decision.

15 There is a real benefit for everybody for  
16 cleaning up the San Diego Bay. Let's just get to it. And  
17 instead of dissecting who's responsible for what micro  
18 part of it, that everybody accept that they're all  
19 responsible for all of it. And that we should, in our  
20 future pieces of action whether they're WDRs or ABCs or  
21 the PQLs or whatever labels they are -- everybody should  
22 say, "Let's all get together and do it." I hope that will  
23 be the case.

24 Thank you.

25 MR. ANDERSON: I was just going to comment in that the

# Attachment E

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

SAN DIEGO REGION

GRANT DESTACHE, CHAIR

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

CERTIFIED  
COPY

TRANSCRIPT OF PROCEEDINGS

San Diego, California

Wednesday, November 16, 2011

Reported by:

ERIN WINN  
CSR No. 13579

Job No. :  
B7674WQSD

*Kennedy*

COURT REPORTERS, INC.

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

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

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

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

SAN DIEGO REGION

GRANT DESTACHE, CHAIR

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

TRANSCRIPT OF PROCEEDINGS, taken at  
9174 Sky Park Court, San Diego, California,  
commencing at 9:04 a.m. on Wednesday,  
November 16, 2011, heard before the  
SAN DIEGO REGIONAL WATER QUALITY CONTROL  
BOARD, reported by ERIN WINN, CSR No. 13579,  
a Certified Shorthand Reporter in and for  
the State of California.

APPEARANCES:

CHAIRPERSON: Grant Destache

VICE CHAIR: Eric Anderson

BOARD MEMBERS: Gary Strawn

EXECUTIVE OFFICER: David Gibson

Also present:  
James Smith  
David Barker  
Julie Chan  
John Odermatt  
Deborah Jayne  
Frank Melbourn  
Chehreh Komeylyan  
Vicente Rodriguez  
Tom Alo  
Craig Carlisle  
Cynthia Gorham  
Jeremy Hass  
Eric Becker  
Alan Monji  
Rachel O'Donovan  
Sean McClain  
Amy Mecklenberg  
Catherine Hagan  
Jessica Newman  
Cris Carrigan  
Lori Okun

1 absolutely right.

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

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

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

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

# Attachment F

1 SAN DIEGO UNIFIED PORT DISTRICT  
2 CELIA A. BREWER, ESQ.  
3 ELLEN GROSS, ESQ.  
4 3165 Pacific Highway  
5 P. O. Box 120488  
6 San Diego CA 92112  
7 Phone: (619) 686-6219  
8 Fax: (619) 686-6444

9 WILLIAM D. BROWN, ESQ.  
10 SCOTT PATTERSON, ESQ.  
11 BROWN & WINTERS, LLP  
12 120 Birmingham Drive, Suite 110  
13 Cardiff-by-the-Sea, CA 92007  
14 Phone: (760) 633-4485  
15 Fax: (760) 633-4427

16 Attorneys for  
17 SAN DIEGO UNIFIED PORT DISTRICT

18 STATE OF CALIFORNIA

19 STATE WATER RESOURCES CONTROL BOARD

20 In the Matter of the Petition of

21 SAN DIEGO UNIFIED PORT DISTRICT

22 For Review of Order No. R9-2012-0024

23 California Regional Water Quality Control  
24 Board, San Diego

) PETITION NO. \_\_\_\_\_

) PETITION FOR REVIEW

) Water Code § 13320

25 Pursuant to California Water Code Section 13320 of California Water Code and  
26 California Code of Regulations, Title 23, Section 2050, the San Diego Unified Port District  
27 (Port) petitions the State Water Resources Control Board (State Board) to review and modify the  
28 final decision of the California Regional Water Quality Control Board, San Diego Region  
(Regional Board) in adopting Cleanup and Abatement Order No. R9-2012-0024 (CAO or Order),  
with its supporting Technical Report (TR). The CAO and TR improperly identify the Port as a

1 primarily liable discharger. A copy of the adopted CAO and relevant portions of the TR are  
2 attached as Attachments A and B respectively.

3 A review of the record confirms that this decision was motivated entirely by improper  
4 considerations, an incorrect application of the proper legal standard and an absence of evidence  
5 to support critical factual findings. While the Port strongly supports the remedial efforts  
6 reflected in the CAO and remains committed to providing appropriate support, the Regional  
7 Board's decision to name the Port as a primary discharger is untenable. The Port requests the  
8 opportunity to submit additional briefing or evidence in reply to the Regional Board's or other  
9 interested parties' responses to this petition. <sup>1</sup>

9 I.

10 **NAMES AND CONTACT INFORMATION OF PETITIONER**

11 The name and address of the Port is:

12 San Diego Unified Port District  
13 Celia Brewer, Port Attorney  
14 Ellen Gross, Deputy Port Attorney  
15 P.O. Box 120488  
16 San Diego, CA 92112-0488

17 The Port can be contacted through its legal counsel:

18 Brown & Winters  
19 William D. Brown  
20 120 Birmingham Drive, Suite 110  
21 Cardiff, CA. 92007  
22 Telephone: (760) 633-4485  
23 E-mail: [bbrown@brownandwinters.com](mailto:bbrown@brownandwinters.com)

24 II.

25 **SPECIFIC ACTION OF THE REGIONAL BOARD TO BE REVIEWED**

26 The Port requests that the State Board review the Regional Board's determination in  
27 Regional Board Order No. R9-2012-0024 that the Port should be named 1) a primarily liable  
28 discharger as a non-discharging public entity landlord for contamination attributable to its

---

26 <sup>1</sup> The full administrative record in this matter is voluminous. To assist the State Board's  
27 review of the most pertinent evidence and information, the Port is submitting excerpts from  
28 this administrative record as attachments to its petition. This is without prejudice to the  
Port's reliance upon or citation to other documents in the administrative record as and when  
appropriate.

1 tenants' discharges within the Shipyard Sediment Site; and 2) a discharger as the owner and  
2 operator of the municipal separate storm sewer system (MS4) that discharges to the Shipyard  
3 Sediment Site at outfalls SW4 and SW9. The Port requests the State Board determine that both  
4 findings are improper as an abuse of the Regional Board's discretion and without any supporting  
5 substantial evidence.<sup>2</sup>

6 **III.**

7 **DATE ON WHICH THE REGIONAL BOARD ACTED**

8 The Regional Board adopted CAO No. R9-2012-0024 on March 14, 2012.

9 **IV.**

10 **STATEMENT OF REASONS WHY THE REGIONAL BOARD'S ACTIONS**  
11 **WERE INAPPROPRIATE OR IMPROPER**

12 The Port is a non-discharging public entity landlord entitled to secondary, rather than  
13 primary, liability. The process leading to the CAO and TR spanned several years. Through most  
14 of that time, multiple drafts of the CAO and related TR<sup>3</sup> acknowledged that under the law and  
15 facts of this matter, the Port should not be designated a primary discharger because the Port was  
16 a non-discharging landlord and the primary dischargers were cooperating and able to perform the  
17 cleanup.<sup>4</sup> Late in this process, with no change in facts or law, the Cleanup Team<sup>5</sup> (CUT)  
18 abruptly switched the Port to a primary discharger. At this same time, again with no change in  
19

20 <sup>2</sup> The adopted CAO also removed Star & Crescent Boat Company as a named primary  
21 discharger. In the event any interested party files a petition challenging this aspect of the  
22 CAO, the Port notes that it would join in such a petition.

23 <sup>3</sup> Mirroring the terms used through this process, the petition will refer to prior CAO drafts with  
24 the acronym "TCAO [Tentative Cleanup and Abatement Order] and prior TR drafts with the  
25 acronym "DTR" [Draft Technical Report].

26 <sup>4</sup> There have been numerous prior iterations of the TCAO which can be located in the  
27 Shipyard Administrative Record [SAR] or on the Regional Board's website. The previous  
28 iterations include: 1) April 29, 2005 (SAR 156322-156355; 2) August 24, 2007  
([http://www.waterboards.ca.gov/sandiego/water\\_issues/programs/shipyards\\_sediment/2005\\_0126cut.shtml](http://www.waterboards.ca.gov/sandiego/water_issues/programs/shipyards_sediment/2005_0126cut.shtml)); 3) April 4, 2008 (SAR 375752-375779); 4) December 22, 2009 (SAR 378622-378660/Attachment C); 5) September 15, 2010 (SAR 382474-382519/Attachment D); and 6) September 15, 2011 TCAO.

<sup>5</sup> CUT served as the advocate for the Regional Board position and had responsibility for  
presenting evidence to the Regional Board and developing the various versions of the  
TCAOs and corresponding DTRs.

1 any facts or law, CUT added a new justification for Port liability -- discharges from the MS4 at  
2 two outfalls within the Shipyard Sediment Site. These revisions by CUT were ultimately  
3 approved by the Regional Board in the adopted CAO and TR.

4 When asked to explain the inexplicable about face, CUT claimed the Port was non-  
5 cooperative and withdrew from a voluntary mediation process the Port had initiated. The Port  
6 rebutted these claims of non-cooperation with compelling evidence prior to and during the  
7 administrative trial that demonstrated the Port's cooperation and support. Faced with this  
8 evidence and lacking any actual evidence to support its position, CUT then changed its story and  
9 claimed that the primary motivation for the change was prior counsel's misunderstanding of the  
10 law. CUT's decision to name the Port as a primary discharger was motivated and justified by  
11 improper considerations. The Regional Board ultimately adopted and ratified this improper  
12 decision in approving the CAO and TR. These decisions were an arbitrary and capricious  
13 exercise of CUT and the Regional Board's power and were an abuse of its discretion.

14 Furthermore, the newly offered justification for the change is equally unpersuasive and  
15 without support in the record. Neither CUT nor the Regional Board ever articulated how the  
16 detailed factual and legal analysis regarding the Port's secondary liability in the prior TCAOs  
17 and DTRs was erroneous. Rather, the CAO's approach is contrary to numerous State Board  
18 Orders and the Regional Board's own practices in which a non-discharging landlord is  
19 responsible for conducting a cleanup when the primary dischargers fail to comply with the CAO.  
20 Here, the record confirms that the primary dischargers have been cooperative and have pledged  
21 continued cooperation. Placing the Port in a position of primary liability prior to actual  
22 noncompliance violates the legal authorities and reserves the Port's secondary liability for an  
23 undisclosed time in the future when it will serve no meaningful purpose. This approach to the  
24 well-established principles of secondary liability is both arbitrary and capricious and  
25 unsupported by any substantial evidence in the record.

26 Finally, the CAO incorrectly imposes liability upon the Port as an owner and operator of  
27 MS4 facilities. This basis of liability was newly added for the first time in conjunction with the  
28 arbitrary decision to reclassify the Port's liability and is thus tainted by the same improper  
motivations. Further, the undisputed evidence in the record is that the City of San Diego (City)

1 owns and operates the MS4 in question, directly contrary to the CAO findings. Finally, neither  
2 CUT nor the Regional Board ever tested at the point of discharge to support the conclusion that  
3 the MS4 discharges are in violation of the permit, contrary to directly applicable law.

4 These reasons and the legal authority supporting the Port's position shall be discussed in  
5 greater detail in Section VII, below.

#### 6 V.

#### 7 MANNER IN WHICH PORT IS AGGRIEVED

8 If the CAO's arbitrary and capricious findings of Port primary liability as a non-  
9 discharging public entity landlord are not reversed, the Port will be subjected to significant costs  
10 of compliance and regulatory oversight that should properly be borne by the primary dischargers.  
11 If the CAO's arbitrary and capricious findings of Port liability for the MS4 discharges are not  
12 reversed, the Port will be subjected to significant costs of maintaining, upgrading and monitoring  
13 systems the Port does not own, operate or control. Additionally, absent reversal of these  
14 findings, there is an increased risk the Port will be repeatedly subjected to similar error in the  
15 future at other sites.

#### 16 VI.

#### 17 REQUESTED STATE BOARD ACTION

18 Pursuant to Water Code section 13320(c), the Port requests that the State Board find CUT  
19 and the Regional Board abused its discretion and acted arbitrarily and capriciously by naming the  
20 Port as a primary discharger and by naming the Port as a discharger with respect to the MS4  
21 discharges. The Port requests on this basis that the State Board amend the CAO and TR as  
22 follows: (1) to delete the determination of Port primary liability in section 11 of the CAO and  
23 TR; (2) to designate the Port as secondarily liable with responsibility for compliance with the  
24 CAO only upon notice to the Port by the Regional Board that the primary dischargers have failed  
25 to comply with the CAO obligations; (3) to delete the determination in section 11 of the CAO  
26 and TR finding that the Port is a discharger based on MS4 discharges; and (4) to delete any  
27 associated requirements in the CAO Directives A.3-A.5 that require the Port to conduct the MS4  
28 investigation, monitoring and reporting.

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

VII.

**STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF LEGAL ISSUES**

The TR acknowledges that “[t]here is no evidence in the record that the Port of San Diego initiated or contributed to the actual discharge of waste to the Shipyard Sediment Site.”

(Attachment B [TR] at p. 11-4.) Yet, the CAO improperly imposes primary liability upon the Port on two stated bases. Specifically, the CAO concludes:

The San Diego Water Board has the discretion to name the Port District in its capacity as the State’s trustee as a “discharger” and does so in the Shipyard Sediment site CAO. The Port District asserts that its status as a lessor and State’s trustee as well as other factors should only give rise to secondary and not primary liability as a discharger under this Order. Allocation of responsibility has not been determined and there is insufficient evidence to establish that present and former Port District tenants at the Site each have sufficient financial resources to perform all of the remedial activities required by this Order. In addition, cleanup is not underway at this time. Under these circumstances, it is not appropriate to accord the Port District secondary liability status it seeks.

The Port District also owns and operates a municipal separate storm sewer system (MS4) through which it discharges waste commonly found in urban runoff to San Diego Bay subject to the terms and conditions of an NPDES Storm Water Permit. The San Diego Water Board finds that the Port District has discharged urban storm waste containing waste directly or indirectly to San Diego Bay at the Shipyard Sediment Site. ...

The urban storm water containing waste that has discharged from the on-site and off-site MS4 has contributed to the accumulation of pollutants in the marine sediments at the Shipyard Sediment Site to levels, that cause, and threaten to cause, conditions of pollution, contamination and nuisance by exceeding applicable water quality objectives for toxic pollutants in San Diego Bay. Based on these considerations the San Diego Unified Port District is referred to as “Discharger(s)” in this CAO.

(Attachment A [CAO] at pp.7-8.)

As set forth fully below, the Regional Board’s adoption of the CAO and these findings was an arbitrary and capricious decision. The evidence developed through the administrative process confirms irrefutably that the decision to name the Port a primarily liable, rather than secondarily liable, discharger was not grounded in any proper factual basis but animated solely by improper bias. Further, the justification offered in the CAO for the Port’s primary liability is

1 also unsupported by the facts and law, and also constitutes an arbitrary and capricious decision.  
2 Finally, the determination of Port liability for the MS4 discharges is unsupported by any  
3 substantial evidence. (*Petition of ExxonMobil*, WQ 85-7 [substantial evidence requires credible  
4 and reasonable evidence which indicates the named party has responsibility].)

5  
6 **A. The Regional Board Abused its Discretion in Naming the Port as a Primarily  
7 Responsible Discharger**

8 The adopted CAO was the culmination of a process in which CUT prepared numerous  
9 TCAOs and DTRs. From April 2005 to December 2009, CUT issued four draft CAOs and draft  
10 TRs (see, footnote 4, *supra*), each of which conducted a thorough analysis of the law and facts  
11 pertinent to the issue of the Port's liability. Specifically, the DTR cited the following facts  
12 relevant to secondary liability:

- 13 1) The absence of "evidence in the record that the Port ... initiated or contributed to the  
14 actual discharge of waste" (*Petition of Prudential Insurance Company*, Order WQ 87-6,  
15 p. 3 [noting petitioner "did not in any way initiate or contribute to the actual discharge of  
16 waste"]; *Petition of Wenwest*, WQ 92-13, p. 6 [party had "nothing to do with the activity"  
17 that resulted in discharges]; *Petition of ALCOA*, WQ 93-9, p. 12 fn. 8 [discussing  
18 secondary liability authority and noting application to non-discharging landlords]);
- 19 2) The absence of evidence in the record that the Port's tenants had "insufficient financial  
20 resources" to clean up the site (*Petition of Wenwest*, WQ 92-13, p. 9 [concluding non-  
21 discharging landlords "should be required to perform the cleanup only in the event of  
22 default by [the primary dischargers]" when primary dischargers are "capable of ...  
23 undertak[ing] the cleanup);
- 24 3) The fact "[t]he major [site] investigation to determine the extent of pollution at the [site]  
25 were satisfactorily completed" by the primarily responsible parties (*Petition of Prudential  
26 Insurance Company*, WQ 87-6, p. 3 [noting site investigation and cleanup "proceeding  
27 well"]; *Petition of Wenwest*, WQ 92-13, p. 9 [concluding non-discharging landlords  
28 "should be required to perform the cleanup only in the event of default by [the primary  
dischargers]" when primary dischargers are "willing to undertake the cleanup"]);
- 4) The fact the Port is a "responsible public agency that is well equipped under its lease  
agreements to coordinate or require compliance of its tenants with the cleanup and  
abatement orders issued by the Regional Board" (*Petition of Forest Service*, WQ 87-5, p.  
5 [decreeing that "it would be unwise to seek enforcement of the waste discharge  
requirements against the Forest Service until it becomes clear that [the primary  
discharger] will not comply" because Forest Service was a "responsible public agency  
which is well equipped to require compliance of the [primary discharger]]; and

1 5) The fact that naming the Port as a primarily responsible party “may create an additional  
2 adversarial situation and hinder cooperation with the Regional Board in a cleanup that is  
3 already highly contested by other dischargers” (*Petition of Forest Service*, WQ 87-5, p. 4  
4 [noting as valid consideration that naming a non-discharging public entity landlord “may  
5 regrettably create an adversarial situation and hinder cooperation”].)  
6 (Attachment C [2009 DTR] at p. 10-4.)

7 Based on these legally pertinent facts, CUT consistently concluded that the Regional  
8 Board should not name the Port as a primary discharger since “at this time *it would be*  
9 *inconsistent with previous State Water Board orders* which direct naming non-operating public  
10 agencies in cleanup and abatement orders *only in the event* there are no other viable responsible  
11 parties.” (Attachment C [2009 DTR] at p. 10-3 [emphasis added].) Rather, the TCAO and DTR  
12 recommended the Port be secondarily liable, responsible for performing the tasks in the CAO  
13 only in the event of the primary discharger’s noncompliance. (*Id.*; Attachment AA [2009 TCAO]  
14 at pp. 6-7.)

15 **1. CUT’s Decision to Move the Port from Secondary Liability to  
16 Primary Liability, and the Regional Board’s Approval of that  
17 Decision, was an Arbitrary and Capricious Decision Based on  
18 Improper Motivations and Bias**

19 Suddenly, in September 2010, CUT issued a TCAO and DTR that recited the same facts  
20 and legal analysis as the prior TCAOs and DTRs, but inexplicably reached the opposite  
21 conclusion by naming the Port as primarily responsible. (Attachment D [2010 TCAO] at pp. 6-7  
22 and Attachment E [2010 TR] at pp. 11-1 -11-3.) In response to this unexplained and  
23 unsupported change in position, the Port questioned CUT through administrative discovery about  
24 the reason for this sudden change. CUT’s response was that the Port’s liability position changed  
25 because the Port had been non-cooperative, a fact not mentioned in the September 2010 draft  
26 CAO and DTR.

27 For example, David Gibson and Craig Carlisle both testified at their deposition that the  
28 Port’s decision to withdraw from the mediation process was a basis for naming the Port primarily  
liable. (Attachment R [Gibson Deposition] at 33:9-22; Attachment P [Carlisle Deposition] at  
110:20-23.) Mr. Gibson and David Barker also testified that the Port was not cooperating in  
providing technical assistance to the Regional Board, was not supportive of the remedial

1 footprint and refused to work with the Regional Board to identify areas for dewatering dredged  
2 sediments. (Attachment Q [Barker Deposition] at 520:7-21, 521:23-522:24; Attachment R  
3 [Gibson Deposition] at 33:9-22.) CUT's responses to the Port's written discovery demanding an  
4 explanation for the change in the Port's liability position likewise cited these allegations.  
5 (Attachment W [CUT's Responses to Discovery] at pp. 29-30.) Finally, at trial Mr. Gibson  
6 testified that he had cited the Port's decision to withdraw from the mediation process as a  
7 motivation for the change in the Port's liability position. (Attachment G [11/14/11 Hearing] at  
8 75:8-76:7.)

9 The Port presented detailed written comments and supporting evidence to rebut these  
10 unfounded assertions. (Attachment K [Port 5/11 Comments].) The Port cited its lengthy history  
11 of working cooperatively with the Regional Board on a number of sites throughout the San  
12 Diego Bay. (Attachment K [Port 5/11 Comments] at pp. 4-7.) The Port also confirmed that its  
13 experts supported the remedial approach and that the Port was in fact working cooperatively with  
14 the Regional Board to resolve issues at the Shipyard Sediment Site. (Attachment M [Johns  
15 Declaration] at paras. 8 and 9.) The Port presented similar evidence at the administrative trial,  
16 confirming its history of cooperation and testifying strongly in support of the remedial approach  
17 proposed by the TCAO and DTR. (Attachment F [11/9/11 Hearing] at 95:21-96:12, 98:8-99:1;  
18 Attachment H [11/15/11 Hearing] at 124:11-125:24, 134:20-142:17.) In fact, at the conclusion  
19 of the administrative trial, Mr. Gibson concurred with the Port's assertion that it was the  
20 Regional Board's "best, and sometimes only, friend." (Attachment I [11/16/11 Hearing] at  
21 155:24-25.) The Port continues to support the remedial effort and will necessarily continue to be  
22 involved and providing appropriate support, even in a position of secondary liability.  
(Attachment F [11/9/11 Hearing] at 100:5-25; Attachment CC [3/14/12 Hearing] at 52:53:11.)

23 Tellingly, no one – CUT, the Regional Board or any of the other interested parties – has  
24 challenged the Port's evidence forcefully rebutting the explanation CUT provided for altering the  
25 Port's liability position in the September 2010 TCAO and DTR. This confirms the absence of  
26  
27  
28

1 any substantial evidence supporting this change in the Port's liability position.<sup>6</sup> Further, the  
2 explanation CUT offered is not a relevant consideration in assessing a non-discharging public  
3 entity landlord's liability position. In short, the Port's liability was not assessed on legally  
4 pertinent facts, but personal bias and animus reflecting an abuse of discretion. By adopting a  
5 CAO finding born of these improper considerations, the Regional Board ratified and perpetuated  
6 the error.

7 It matters not that CUT later offered a different explanation for its actions. While the  
8 newly minted explanation amounts to an abuse of discretion given its inconsistency with the  
9 facts and the law, it is unquestionably unfair and contrary to basic due process for the Port to be  
10 placed in a position of secondary liability in numerous TCAOs and DTRs based on a proper and  
11 thorough assessment of the facts and legal authorities, have this decision change without  
12 explanation, have CUT provide an improper justification for the change in this position, and then  
13 have that impermissible justification – but not the associated change in position -- abandoned  
14 after forceful factual rebuttal of this unfounded charge. The Port is entitled to a far more  
15 transparent process.

16 In sum, CUT was given an opportunity to explain the September 2010 TCAO and DTR's  
17 inexplicable change. CUT and its witnesses repeatedly recited the true reason and justification  
18 for placing the Port in a position of primary liability – an alleged lack of Port cooperation and its  
19 withdrawal from a voluntary mediation process. The consistency of these accusations belies any  
20 present argument that the decision to name the Port as primarily liable discharger had any other  
21 basis or justification. Neither CUT nor the Regional Board can sanitize this improper use of its  
22 authority by now offering a different justification that it deems more legally and factually  
23 palatable.

24 ///

25 ///

26  
27 <sup>6</sup> In fact, at the administrative trial Mr. Gibson candidly testified that he had "personal  
28 misgivings about naming the Port as a primary responsible party." (Attachment I [11/16/11  
Hearing] at 155:12-18.)

1                   2.     **CUT's Decision to Move the Port from Secondary Liability to**  
2                                   **Primary Liability, and the Regional Board's Approval of that**  
3                                   **Decision, is an Abuse of Discretion Because it is Without Evidentiary**  
4                                   **Support and Contrary to the Established Legal Authorities**  
5                                   **Governing the Application of Secondary Liability to a Non-**  
6                                   **Discharging Public Entity Landlord**

7                   As noted, after CUT claimed that the Port should be primarily liable because of its non-  
8                   cooperation, the Port produced compelling and undisputed evidence to the contrary, culminating  
9                   in Mr. Gibson's acknowledgement that the Port was the Regional Board's best, and sometimes  
10                  only, friend. (Attachment I [11/16/11 Hearing] at 155:22-25.) Rather than defend this admission  
11                  as a factually or legally tenable basis for its actions, CUT again reversed field. For example, in  
12                  its response to the Port's pre-hearing comments on the September 2010 TCAO and DTR, CUT  
13                  for the first time<sup>7</sup> offered the following explanation:

14                                Because some former Port District Tenants may not have sufficient financial  
15                                resources to account for their fair shares of cleanup costs, and because the cleanup  
16                                is not progressing and a number of named dischargers are contesting the TCAO,  
17                                the Port District should remain a primarily – not a secondarily – responsible party.

18                                (Attachment N [CUT's 8/11 Response to Comments] at p. 11-30.)

19                  Similarly, during the administrative trial, CUT's counsel stated that the "bottom line" as  
20                  to why the Port was not named as a primary discharger before was because "the previous legal  
21                  analysis was flawed. (Attachment G [11/14/11 Hearing] at 75:6-19.) The adopted CAO also  
22                  states that the Port should be considered a primarily liable discharger because "[a]llocation of  
23                  responsibility has not been determined and there is insufficient evidence to establish that present  
24                  and former Port District tenants at the Site each have sufficient financial resources to perform all  
25                  of the remedial activities required by this Order." (Attachment A [CAO] at p. 8.)

26                  These justifications fail any principled review of the law and facts. In fact, the CAO cites  
27                  no new evidence on which CUT or the Regional Board could rationally support a change of  
28                  view. The prior TCAOs and DTRs expressly note that there was in fact no evidence on which to  
29                  conclude that the named dischargers were unable to perform the tasks in the CAO. (Attachment  
30                  C [2009 TR] at p. 10-4.) Likewise, these TCAOs and DTRs confirmed that the named

<sup>7</sup> This explanation was not provided in the administrative discovery responses when the Port asked CUT to explain its new position.

1 dischargers were conducting the investigation required of them. (*Id.*; Attachment Q [Barker  
2 Deposition] at 489:20-490:14.) The CAO cites no evidence that the named dischargers are  
3 presently unable or unwilling to perform the tasks in the CAO or that the named primary  
4 dischargers' resources changed in the interim. Indeed, to the extent any evidence on this point  
5 was presented, it supported the conclusion that the current primary dischargers are willing and  
6 able to perform the CAO tasks. (Attachment I [11/16/11 Hearing] at 45:19-46:9 and 166:7-  
7 168:11 [NASSCO comments of support], 75:11-14 [BAE comments of support], 82:21-83:19  
8 [Navy comments of support]; Attachment F [11/9/11 Hearing] at 83:15-84:24.)

9 Similarly, despite CUT counsel's assertion that prior counsel simply got the law wrong,  
10 neither CUT nor the Regional Board ever cited any new or different legal authority to support  
11 their directly contrary conclusion. (Attachment G [11/14/11 Hearing] at 75:6-19.) In fact, the  
12 CAO has the law wrong. The unmistakably clear lesson of numerous State Board Orders  
13 regarding primary and secondary liability is that a non-discharging public entity landlord should  
14 not be placed in a position of primary liability unless and until the named primary dischargers  
15 have failed to comply with the tasks in the CAO, as stated in prior TCAOs and DTRs. Indeed,  
16 the Regional Board's own prior recent dealings with the Port on issues of tenant compliance  
17 confirm that the Regional Board understands this to be the correct approach.

18 *a. Under State Board Orders and Regional Board Practice, a Non-*  
19 *discharging Public Entity Landlord Should only Be Primarily Liable At*  
20 *Such Time when the Named Dischargers have Failed to Comply with*  
21 *the Tasks in the CAO*

22 The CAO's analysis of the Port's primary liability is directly contrary to the State Board  
23 orders discussing secondary liability. The long established policy of the State Board is that non-  
24 discharging landlords should be secondarily liable and responsible for compliance only *after* the  
25 dischargers fail or default on their compliance:

- 26 • Non-discharging landlords "should be required to perform the cleanup *only in the*  
27 *event of default by [dischargers]*" (*Petition of Wenwest*, WQ 92-13, p. 9  
28 [emphasis added]);

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- Order placed “primary cleanup and abatement responsibility on [discharger’s] shoulders and specifically requires [non-discharging landlords] to assume the burden *only upon [discharger’s] failure to perform*” (*Petition of Schmidl*, WQ 89-1, p. 4 [emphasis added]);
  - Regional Board instructed to “only look to the [non-discharging landlord] regarding enforcement should [discharger] fail to comply” (*Petition of Forest Service*, WQ 87-5, p. 5: [emphasis added]<sup>8</sup>);
  - Regional Board ordered to modify order to provide that non-discharging landlord required to comply with order only upon “determination and actual notice to [the non-discharging landlord] that [the dischargers] *ha[ve] failed to comply*” (*Petition of Prudential Insurance Company*, WQ 87-6, p. 5 [emphasis added]);
  - Non-discharging landlord responsible for cleanup “only if the other named dischargers did not timely complete these tasks” (*Petition of Spitzer*, WQ 89-8, p. 6).

15 No State Board order approves the approach taken by the CAO and TR – deferring  
16 secondary liability of a non-discharging landlord to a later date after discharger compliance is  
17 demonstrated. In fact, the CAO’s approach renders secondary liability illusory. Proof of  
18 compliance will only be achieved at the completion of the tasks in the CAO, at which point  
19 redesignating the Port’s liability would be meaningless. Thus, the correct approach is the one  
20 followed by the prior TCAOs and DTRs – the Port should be designated secondarily liable under  
21 the CAO now and become primarily liable only in the event of noncompliance. (Attachment C  
22 [2009 TR] at §10.2 and Attachment AA [2009 TCAO] at p. 7 (“may do so in the future if the  
23 Port’s former and/or current tenants fail to comply with the Order”).)

24 The Regional Board’s prior practices dealing with the Port and some of these same  
25 tenants stand in stark contrast to the position taken in the CAO. Specifically, a dispute arose

26

27 <sup>8</sup> While *Petition of Forest Service* involved waste discharge requirements rather than a cleanup  
28 and abatement order, the secondary liability analysis is the same in both contexts. (*Petition of Schmidl*, WQ 89-1, p. 4 [citing *Petition of Forest Service* as instructive on secondary liability analysis].)

1 regarding the Port's position of responsibility as discharger under waste discharge requirements  
2 for six boat and shipyards, including NASSCO's facility. The matter came before the State  
3 Board. (*Petition of San Diego Unified Port District*, WQ 90-3.) The State Board concluded that  
4 the Regional Board intended the Port to be in a position of secondary liability and remanded to  
5 have this clarified in the WDRs. Thereafter, the Port and the Regional Board reached an  
6 agreement regarding the language to be used in the WDR:

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

17       (Attachment J [Port's 2004 Correspondence to Regional Board] at p. 8,  
18 SAR158816.)<sup>9</sup>

19       This language was then inserted in WDR permits issued to BAE's predecessor  
20 and NASSCO. (See Attachment S [Southwest Marine 2002 WDR] at p. 3; Attachment T  
21 [NASSCO 2003 WDR] at p. 4; Attachment CC [3/14/12 Hearing] at 50:4-51:23  
22 (discussing history of prior agreement and inconsistency with CAO findings).)

23       Accordingly, the Regional Board cannot credibly claim that its approach to the  
24 naming of the Port in the CAO is consistent with the clear legal direction of the State  
25 Board Orders or its own prior conduct.

26                   ***b. The CAO's Secondary Liability Analysis Requires a Liability Allocation  
27 Out of Place in this Context***

28       In an effort to evade the plain direction of the legal authorities, the Regional Board found  
that Port should not be secondarily liable because "allocation of responsibility has not been  
determined" and because "there is insufficient evidence to establish that present and former Port

---

<sup>9</sup> The Port presented this evidence directly to the Regional Board during the final hearing

1 District tenants *each* have sufficient financial resources to perform all of the remedial activities  
2 required by this Order.” (See Attachment A [CAO] at pp. 7-8; Attachment N [CUT’s 8/11  
3 Response to Comments] at pp. 11-30 – 11-32.) Similarly, CUT previously claimed concerns  
4 over “potential gaps” in the primary dischargers’ financial resources and concerns that some  
5 prior Port tenants may not have the financial resources “to satisfy their respective fair shares of  
6 responsibility.” (*Id.*) These justifications for naming the Port primarily liable are contrary to the  
7 law and the facts.

8 The absence of a liability allocation is not relevant to, much less an obstacle to,  
9 secondary liability. This is because no State Board legal authority contemplates or even  
10 authorizes a regional board to impose liability on the basis of “fair shares.” Rather, the authority  
11 is unanimously to the contrary – dischargers are jointly and severally liable to the regional board  
12 for the entire cleanup. (*Petition of Union Oil Company of California*, WQ 90-2; *Petition of*  
13 *Ultramar, Inc.*, WQ 09-001-UST, p. 7 fn. 12.) If the named dischargers are concerned about fair  
14 shares of liability, this issue must be taken up among those parties in a court of law. (*Id.*)

15 Tellingly, neither the Regional Board nor CUT has ever offered any legal authority  
16 supporting their view on this point. In its briefing, CUT cited *Petition of Aluminum Company of*  
17 *America* to support the proposition apparently accepted by the Regional Board that a non-  
18 discharging landlord is primarily liable for “orphaned liability” attributable to an absent tenant  
19 discharger. (Attachment N [CUT’s 8/11 Response to Comments] at p. 11-31.) Yet, *Petition of*  
20 *Aluminum Company of America* does not refer to “orphaned liability,” much less establish that  
21 such liability can be the basis for imposing primary liability on a non-discharging landlord. In  
22 short, because the primary dischargers are jointly and severally liable for the entire remediation  
23 required under a CAO, secondary liability is not contingent upon a regional board first taking a  
roll call of all potential primary dischargers to make sure they are all present.

24 *c. The CAO’s Secondary Liability Analysis Imposes an Improper*  
25 *Evidentiary Burden on the Non-Discharging Landlord Regarding the*  
26 *Primary Dischargers’ Ability to Perform*

27 None of the State Board orders cited in the CAO or TR requires a non-discharging  
28 landlord to produce detailed factual evidence of the dischargers’ financial assets. *Petition of*

1 *Wenwest*, the only cited authority that even references this factor, limits its analysis on this point  
2 to a comment that the dischargers in that case were “capable” of undertaking the cleanup.  
3 (*Petition of Wenwest*, WQ 92-13, p. 9.) Here, the primary dischargers are capable of performing  
4 any cleanup required by the order. These dischargers include NASSCO, BAE Systems, SDG&E  
5 and the United States Navy, financially robust parties with significant resources who have never  
6 asserted that they lack the resources to perform the tasks in the CAO. (See, e.g., Attachment Y  
7 [BAE Stipulation]; Attachment Z [NASSCO Stipulation].) Because each primary discharger is  
8 legally liable under a CAO for the entire remedial obligations, no greater showing of ability is  
9 required.

10 Likewise, there is no credible evidence that the primary dischargers will not comply with  
11 the CAO. While the TR states that “no cleanup is taking place” (Attachment B [TR] at p. 11-1),  
12 the obvious response is that no cleanup was required prior to the adoption of the CAO. The far  
13 more relevant observation is the one made in the prior draft CAOs and TRs -- that “the major site  
14 investigation to determine the extent of pollution” at the site had been “satisfactorily completed”  
15 by the primary dischargers. (Attachment C [2009 TR] at p. 10-4.) Mr. Gibson similarly testified  
16 under oath that the process has been “proceeding cooperatively.” (Attachment H [11/15/11  
17 Hearing] at 489:20-490:14.) In closing, Mr. Gibson echoed his pleasure with the primary  
18 dischargers’ willingness to undertake the remediation. (Attachment I) Consequently, until the  
19 primary dischargers have “defaulted,” “failed to comply” or “failed to perform” (*Petition of*  
20 *Wenwest*, WQ 92-13, p. 9; *Petition of Schmidl*, WQ 89-1, p. 4; *Petition of Forest Service*, WQ  
21 87-5, p. 5; *Petition of Prudential Insurance Company*, WQ 87-6, p. 5; *Petition of Spitzer*, WQ  
22 89-8, p. 6), there is no legitimate or necessary basis to name the Port, a non-discharging public  
entity landlord, as a primary discharger in the CAO.

23 **B. The Regional Board’s Finding that the Port is a Discharger Based on MS4**  
24 **Discharges is Arbitrary and Capricious and an Abuse of Discretion**

25 As noted above, the September 2010 draft CAO and TR for the first time contained a  
26 finding that the Port should be liable as a discharger because of the MS4 facilities that discharge  
27 to outfalls SW4 and SW9 within the Shipyard Sediment Site. This recently-constructed basis for  
28 Port liability constitutes an arbitrary and capricious decision for three reasons. First, it arose at

1 the same time as the shift in Port liability from primary to secondary and was motivated by the  
2 same improper animus. Second, there is no substantial evidence in the record to support the  
3 conclusion that the Port is the owner or operator of the MS4 facilities that discharge to the  
4 Shipyard Sediment Site – instead, the evidence confirms the contrary conclusion. Third, the  
5 CAO and TR lack the necessary testing data indispensable to a finding of liability.

6  
7 **1. *The Port's Alleged MS4 Liability is Not Based in Fact or Law but  
Motivated by Improper Considerations***

8 As discussed above, there were a number of draft CAOs and TRs preceding the  
9 September 2010. While these draft CAOs and TRs discussed the purported role of the MS4  
10 outfalls within the Shipyard Sediment Site, none of these draft documents assigned any liability  
11 to the Port for the MS4 facilities. (See Attachment C [2009 TR] at pp. 10-1 – 10-4.) In  
12 September 2010, the draft CAO and TR inexplicably concluded that the Port should be liable for  
13 these facilities. (Attachment D [2010 TCAO] at 7 and Attachment E [2010 TR] at §11.) As  
14 discussed in greater detail above, it became clear from CUT's explanation that the change of Port  
15 liability in the September 2010 draft CAO and TR was the result of CUT's displeasure with the  
16 Port's decision to withdraw from mediation process, not any legitimate legal or factual basis.  
17 Given the absence of any facts to support the Port's purported MS4 liability, discussed in greater  
18 detail directly below, it is equally clear that this improper consideration was the motivation  
19 behind the decision to assign the Port liability under the MS4 theory as well. For this reason  
20 alone, the finding in the CAO and TR that the Port is liable for MS4 discharges is arbitrary and  
21 capricious and an abuse of discretion.

22 **2. *There is no Evidence the Port Owns or Operates the MS4 that  
Discharges to the Shipyard Sediment Site***

23 There is another fundamental flaw in the CAO's conclusion that the Port is a discharger  
24 based upon the MS4 discharges. The CAO states that the Port "owns and operates" MS4  
25 "through which it discharges waste commonly found in urban runoff to San Diego Bay subject to  
26 the terms and conditions of an NPDES Storm Water Permit." (Attachment A [CAO] at p. 8.)  
27 Yet the record contains no evidence to support this statement.

28 This liability theory first emerged in the September 15, 2010 TCAO and DTR, which

1 simply assumed that the Port owned and operated the MS4 facilities that discharge to SW4 and  
2 SW9. (Attachment E [2010 DTR] at 11-5, §11.3 [referring to the Port's liability for pollutants  
3 allegedly discharged "through *its* SW4 ... and SW9 ... conduit pipes" (emphasis added)].)

4 However, CUT later acknowledged that these conduit pipes are owned and operated by the City.  
5 (Attachment W [CUT's Responses to Discovery] at pp. 94-100 and Attachment X [CUT's  
6 Responses to Requests for Admissions] at p. 10.)

7 The City has similarly acknowledged that it owns and operates these facilities.  
8 (Attachment BB [City's Complaint]<sup>10</sup> at 7:5-8; Attachment DD [2004 City Report] at SAR  
9 158791 [acknowledging that City "storm drain system enters the NASSCO leasehold at the foot  
10 to 28<sup>th</sup> Street and terminates at the southeasterly corner" where it "discharges into Chollas  
11 Creek" at the SW9 outfall"]) The Port further offered into evidence records confirming the  
12 City's ownership and operation of the relevant MS4 facilities. (Attachment U [City Easement  
13 [City's easement for the MS4 facilities that terminate at the SW4 outfall]; Attachment V  
14 [Conveyance] (City easements for "all water ... drainage facilities").) This evidence clearly  
15 demonstrates that the MS4 facilities are under the City's control.

16 At the administrative trial, again the Port presented evidence that the City, not the Port,  
17 maintains easements and owns and operates the MS4 facilities in the relevant outfalls, SW4 and  
18 SW9. (Attachment H [11/15/11 Hearing] at 150:23-151:19); Attachment EE [Depiction of SW4  
19 and SW9].) Although the City attempted to dispute its ownership of the subject MS4 facilities,  
20 the City's witness admitted she had not reviewed the easement documents presented by the Port  
21 which establish otherwise. (Attachment H [11/15/11 Hearing] at 198:8-20) Because the Port is  
22 not the owner or operator of the MS4 facilities that discharge to SW4 and SW9, the finding of  
23 Port liability lacks any substantial evidence.

24 Any contrary suggestion by the Regional Board that the Port is liable for MS4 discharges

25 <sup>10</sup> Water Code section 13320(b) provides that "[t]he evidence before the state board shall  
26 consist of the record before the regional board, *and any other relevant evidence* which, in the  
27 judgment of the state board, should be considered to effectuate and implement the policies of  
28 this division." (emphasis added.) These admissions by the City are plainly relevant evidence  
that should be considered by the State Board in connection with the Port's Petition. *See also*  
Cal. Evid. Code § 452(d), which permits judicial notice to be taken of records of any court of  
the state or United States.

1 simply by virtue of its position as a co-permittee under the NPDES permit is untenable. The  
2 CAO states that the Port's liability is premised on its ownership and operation of the MS4  
3 facilities, not a more general basis. Likewise, the CAO cites no provision in the NPDES permit  
4 to support a vague co-permittee liability theory. Finally, this approach is inconsistent with the  
5 federal regulations governing NPDES permits. The Clean Water Act defines "copermitee" as "a  
6 permittee to an NPDES permit that is only responsible for permit conditions relating to the  
7 discharge for which it is operator." (40 Code of Federal Regulations §122.6(b)(1) [emphasis  
8 added].) In short, absent any permit language to support Because CUT and the Regional Board  
9 have not cited any actual permit language to the contrary, the conclusion that the Port is liable for  
10 discharges from MS4 facilities that it does not own or operate lacks legal or factual support and  
11 cannot be upheld.<sup>11</sup>

12 **3. There is No Evidence of Testing at the Discharge Point Required to**  
13 **Impose Liability for Violation of an NPDES Permit**

14 Recently established law confirms that liability for MS4 facility discharges under a  
15 NPDES permit requires testing at the point of discharge. (*National Resources Defense Council*  
16 *v. County of Los Angeles Flood Control District* (9<sup>th</sup> Cir. 2011) 636 F.3d 1235 (*NRDC*.) Here,  
17 the CAO cites no evidence of testing at the outfall points SW4 or SW9. This alone defeats the  
18 inclusion of the Port as a discharger based upon alleged MS4 discharges.

19 In *NRDC*, the claimant alleged the co-permittees on an NPDES permit governing MS4  
20 facilities had discharged pollutants in violation of the permit. The claimant argued initially that  
21 the "measured exceedances in the Watershed Rivers *ipso facto* establish Permit violations by  
22 Defendants." (*NRDC, supra*, at 1251.) In response, the Ninth Circuit noted that "the Clean

23 <sup>11</sup> In fact, if CUT's view of MS4 permit liability is sound, all of the co-permittees would face  
24 the same liability. Other co-permittees such as City of Lemon Grove and City of La Mesa  
25 have facilities that connect to the MS4 facilities that discharge to SW4 as well. (Attachment  
26 O [2007 NPDES Permit] at p. 2; Attachment H [11/15/11 Hearing] at 153:17-154:25.)  
27 Neither CUT nor the Regional Board has ever offered any defensible explanation for why the  
28 Port alone should be the only co-permittee responsible for MS4 facilities that it does not own  
or operate. The decision to single out the Port in this fashion adds further support to the  
inescapable conclusion that the decision to assign the Port this liability is not the product of  
any principled exercise of discretion it may have, but an abuse of that discretion intended to  
punish the Port for improper reasons.

1 Water Act does not prohibit ‘undisputed’ exceedances.” (*Id.*) Rather, the Clean Water Act  
2 “prohibits ‘discharges’ that are *not* in compliance with the Act (which means in compliance with  
3 the NPDES).” (*Id.* [emphasis in original]) Consequently, the Ninth Circuit concluded,  
4 “responsibility for those exceedances requires proof that some entity discharged a pollutant.”  
5 (*Id.*)

6 Against this backdrop, the Ninth Circuit found that “the primary factual dispute between  
7 the parties is whether the evidence shows any *addition* of pollutants by Defendants” to the  
8 waterways. (*NRDC, supra*, at 1251 [emphasis in original].) The claimant asserted that because  
9 “the monitoring stations are downstream from hundreds of miles of storm drains which have  
10 generated the pollutants being detected” it was “irrelevant which of the thousands of storm drains  
11 were the source of polluted stormwater – as holders of the Permit, Defendants bear responsibility  
12 for the detected exceedances.” (*Id.*, at 1251-1252.) The Ninth Circuit found this view  
13 unsatisfactorily simplistic as it “did not enlighten the district court with sufficient evidence for  
14 certain claims and assumed it was obvious to anyone how stormwater makes its way from a  
15 parking lot in Pasadena into the MS4, through a mass-emissions station, and then to a Watershed  
16 River.” (*Id.*, at 1252.)

17 Ultimately, the Ninth Circuit found adequate evidence of discharges for two of the rivers,  
18 where mass emissions stations detecting the exceedances were located in a portion of the MS4  
19 “owned and operated” by the defendant in question. (*Id.*, at 1253-1254.) In contrast with that  
20 conclusion, the Ninth Circuit found that “it is not possible to mete out responsibility for  
21 exceedances detected” in other waterways where it was “unable to identify the relationship  
22 between the MS4 and these mass-emissions stations” and where it “appear[ed] that both  
23 monitoring stations are located within the rivers themselves.” (*Id.* at 1253.) As to these  
24 waterways, the Ninth Circuit concluded that “[i]t is highly likely, but on this record nothing more  
25 than assumption, that polluted stormwater exits the MS4 controlled by the [defendants], and  
26 flows downstream in these rivers past the mass-emissions stations.” (*Id.*) However, the Ninth  
27 Circuit found this assumption inadequate because the claimant was “obligated to spell out this  
28 process for the district court’s consideration and to spotlight how the flow of water from an ms4  
‘contributed’ to a water-quality exceedance detected at the Monitoring Stations.” (*Id.*, at 1254.)

1           The clear message of NRDC is that liability for violation of an NPDES permit such as an  
2 MS4 permit requires evidence the co-permittee “discharged” pollutants from an MS4 facility that  
3 the co-permittee owns or operates. Testing or monitoring taken from the affected waterway,  
4 rather than from the MS4 system, is not adequate. This is so regardless of how “probable” or  
5 “likely” the assumption is that the defendant may have discharged pollutants. Here, the CAO  
6 and TR contain no testing of the actual MS4 discharges to SW4 or SW9. In fact, the TR  
7 acknowledges that “no monitoring data is available” for either SW4 or SW9. (Attachment B  
8 [TR] at p. 11-13 [SW4], p. 11-15 [SW9].) In lieu of actual monitoring results, the TR simply  
9 concludes that “it is highly probable that historical and current discharges from th[ese] outfalls  
10 have discharged” various contaminants. (*Id.*) This approach cannot be reconciled with *NRDC*.

11           In an effort to evade the plain meaning of *NRDC* and the obligation to provide discharge  
12 sampling, CUT argued that *NRDC* imposed specific testing requirements because the NPDES  
13 permits in that case contained specific numeric discharge limits. (Attachment [CUT’s 8/11  
14 Comments]N at p. 11-34.) From this premise, CUT concluded that *NRDC* would not apply in  
15 the present case because the Port is not being held liable for an NPDES violation but for a  
16 narrative standard that prohibits discharges that “cause or contribute to the condition of pollution  
17 or nuisance at the Site.” (*Id.*) CUT’s analysis is wrong. The *NRDC* permits contained a  
18 narrative standard under which the co-permittees were bound to “neither cause nor contribute to  
19 the exceedance of water quality standards and objectives *nor create conditions of nuisance in*  
20 *the receiving waters.*” (*NRDC, supra*, 636 F.3d at 1241. [emphasis added].) In fact, the Ninth  
21 Circuit expressly noted:

22                   [T]he Permit prohibits MS4 discharges into receiving waters that exceed the  
23                   Water Quality Standards established in the Basin Plan and elsewhere.  
24                   Specifically, Section 2.1 provides: “[D]ischarges from the MS4 that cause or  
25                   contribute to the violation of Water Quality Standards or water quality objective  
26                   are prohibited.” *Section 2.2. of the Permit reads: “Discharges from the MS4 of*  
27                   *storm water, or non-storm water, for which a Permittee is responsible for, shall*  
28                   *not cause or contribute to a condition of nuisance.”*

          (*NRDC, supra*, 636 F.3d at 1244 [emphasis added].) In short, the alleged *NRDC* permit violation  
was indistinguishable from the narrative standard CUT cites as the basis for Port MS4 liability.

CUT’s claim that Port MS4 liability can rest entirely on circumstantial evidence fails for

1 another reason. The Port presented evidence that it has been complying with its MS4 permit  
2 obligations. (Attachment L at para. 9 and Attachment H at 149:2-150:19.) The Port conducts  
3 the inspections required under the MS4 permit and sweeps the associated areas as well. (See  
4 Attachment L at para. 8(g).) The Port has prepared the JURMP document required by the MS4  
5 permit and operates in MS4 facilities in compliance with that document. (*Id.* at para. 8(h).) The  
6 Port's compliance program is being implemented to the "maximum extent practicable" and in  
7 many cases has proactively implemented compliance at a higher level. (Attachment L [Collacott  
8 Declaration] pp. 4-5, paras. 8(g)-(h), 9; Attachment H at 150:15-19.) In sum, there is an absence  
9 of substantial and legally necessary evidence to support a finding of Port liability based on MS4  
10 discharges.

### 11 C. Conclusion

12 The Port should not be named as a primary discharger in the CAO. The Regional Board  
13 fell prey to CUT's improper motivation and the incorrect and improper legal standard CUT  
14 offered to support naming the Port as a primary discharger. As a non-discharging public entity  
15 landlord, the Port should be secondarily liable and responsible for CAO compliance only in the  
16 event the primary dischargers fail to comply with the CAO. Likewise, there is no substantial  
17 evidence to support the CAO's conclusion that the Port is liable as a discharger based upon MS4  
18 discharges, because the Port is not the owner or operator of the MS4 facilities at issue.  
19 Furthermore, there is no substantial evidence of the type required by law to establish liability for  
20 MS4 discharges.

21 The Port has worked well and cooperatively with the Regional Board at this and  
22 numerous other sites. The Port supports the remedial approach at the Shipyard Sediment Site  
23 and will continue to provide appropriate support. Placing the Port in its proper position as a  
24 secondarily liable party will not alter the Port's support for the process and the proposed  
25 remediation. However, for the reasons discussed throughout this petition, the Regional Board's  
26 findings of Port primary liability are arbitrary and capricious and constitute an abuse of its  
27 discretion. The CAO should therefore be amended as requested in Section VI, *supra*.

28 ///

///

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

VIII.

**THE PETITION HAS BEEN SENT TO THE REGIONAL BOARD AND TO NAMED  
DISCHARGERS**

True and correct copies of this Petition, were sent electronically to:

Jeannette L. Bashaw, Legal Analyst  
State Water Resources Control Board  
Office of Chief Counsel  
[jbashaw@waterboards.ca.gov](mailto:jbashaw@waterboards.ca.gov)

David Gibson, Executive Officer  
San Diego Regional Water Quality Control Board  
[dgibson@waterboards.ca.gov](mailto:dgibson@waterboards.ca.gov)

This Petition was also sent electronically to the individuals/parties identified in the attached proof of electronic service.

IX.

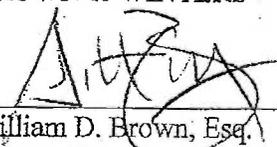
**SUBSTANTIVE ISSUES AND OBJECTIONS RAISED IN THE PETITION WERE  
RAISED BEFORE THE REGIONAL BOARD**

Port certifies that the issues set forth above were presented in writing or orally to the Regional Board in advance of the March 14, 2012 decision on this matter.

Dated: April 13, 2012

BROWN & WINTERS

By:

  
\_\_\_\_\_  
William D. Brown, Esq.  
Scott E. Patterson, Esq.  
Attorneys for Designated Party  
SAN DIEGO UNIFIED PORT  
DISTRICT

Attachments

- 1
- 2     **A**     Cleanup and Abatement Order No. R9-2012-0024, dated March 14, 2012
- 3     **B**     Excerpts from Technical Report for Cleanup and Abatement Order No. R9-2012-
- 4             0024, dated March 14, 2012
- 5     **C**     Excerpts from the Draft Technical Report for Cleanup and Abatement Order R9-
- 6             2010-0002, dated December 22, 2009
- 7     **D**     Excerpts from the Tentative Cleanup and Abatement Order R9-2011-0001, dated
- 8             September 15, 2010
- 9     **E**     Excerpts from the Draft Technical Report for Cleanup and Abatement Order R9-
- 10            2011-0001, dated September 15, 2010
- 11    **F**     Excerpts from the Transcript of the California Regional Water Quality Control Board
- 12            Public Meeting/Hearing, dated November 9, 2011
- 13    **G**     Excerpts from the Transcripts of the California Regional Water Quality Control
- 14            Board Public Meeting/Hearing, dated November 14, 2011
- 15    **H**     Excerpts from the Transcripts of the California Regional Water Quality Control
- 16            Board Public Meeting/Hearing, dated November 15, 2011
- 17    **I**     Excerpts from the Transcripts of the California Regional Water Quality Control
- 18            Board Public Meeting/Hearing, dated November 16, 2011
- 19    **J**     Correspondence from the Port to the California Regional Water Quality Control
- 20            Board dated July 15, 2004, exhibits excluded (SAR158809-SAR158824)
- 21    **K**     Port District's Submission of Comments, Evidence and Legal Argument, dated May
- 22            26, 2011 (resubmitted on August 15, 2011 redacting certain sections) exhibits
- 23            excluded
- 24    **L**     Declaration of Expert Robert Collacott in Support of the San Diego Unified Port
- 25            District's Submission of Comments, Evidence and Legal Argument, dated May 24,
- 26            2011 (Exhibit "20" to Port's May 26, 2011 Comments)
- 27    **M**     Declaration of Expert Michaels Johns, Ph.D. in Support of the San Diego Unified
- 28            Port District's Submission of Comments, Evidence and Legal Argument, dated May
- 24, 2011 (Exhibit "3" to Port's May 26, 2011 Comments)
- 29    **N**     Excerpts from California Regional Water Quality Control Board's Response to
- Comments Report, dated August 23, 2011
- 30    **O**     Excerpts from California Regional Water Quality Control Order No. R9-2007-0001,
- NPDES No. CAS0108758, Waste Discharge Requirements for Discharges of Urban
- Runoff from MS4s Draining the Watersheds of San Diego County, the Incorporated
- Cities of San Diego County, the San Diego Unified Port District and the San Diego
- County Regional Airport Authority, dated January 24, 2007
- 31    **P**     Excerpts from the Deposition of California Regional Water Quality Control Board
- Cleanup Team Member, Craig Carlisle, dated February 9, 2011 (Exhibit "6" to Port's
- May 26, 2011 Comments )

- 1 Q Excerpts from the Deposition of California Regional Water Quality Control Board  
2 Cleanup Team Member, David Barker, Vol. III, dated March 3, 2011 (Exhibit "5" to  
3 Port's May 26, 2011 Comments )
- 4 R Excerpts from the Deposition of California Regional Water Quality Control Board  
5 Cleanup Team Member, David Gibson, dated March 11, 2011 (Exhibit "1" to Port's  
6 May 26, 2011 Comments)
- 7 S Excerpts from California Regional Water Quality Control Order No. R9-2002-0161  
8 NPDES Permit No. CA0109151, Waste Discharge Requirements for Southwest  
9 Marine, Inc., dated November 13, 2002
- 10 T Excerpts from California Regional Water Quality Control Order No. R9-2003-0005  
11 NPDES Permit No. CA0109134, Waste Discharge Requirements for National Steel  
12 Shipbuilding Company, dated February 5, 2003
- 13 U Drainage Easement between the City of San Diego and the San Diego Unified Port  
14 District, dated April 24, 1985 (Exhibit "18" to Port's May 26, 2011 Comments)
- 15 V Conveyance between the City of San Diego and the San Diego Unified Port District,  
16 dated February 15, 1963 (Exhibit "19" to Port's May 26, 2012 Comments )
- 17 W Excerpts from California Regional Water Quality Control Board Cleanup Team's  
18 Responses to Special Interrogatories propounded by Port District, dated January 5,  
19 2010 [sic] (correct date should be January 5, 2011)
- 20 X Excerpts from California Regional Water Quality Control Board Cleanup Team's  
21 Responses to Request for Admissions propounded by Port District, dated January 5,  
22 2010 [sic] (correct date should be January 5, 2011)
- 23 Y BAE Stipulation Regarding Resolution of Discovery Dispute, dated March 9, 2011  
24 (Exhibit "9" to Port's May 26, 2011 Comments)
- 25 Z NASSCO Stipulation Regarding Resolution of Discovery Dispute, dated March 3,  
26 2011 (Exhibit "11" to Port's May 26, 2011 Comments)
- 27 AA Excerpts from the Cleanup and Abatement Order R9-2010-0002, dated December 22,  
28 2009
- BB Excerpts from City of San Diego's Complaint in *City of San Diego v. National Steel  
and Shipbuilding Company, et al.*, U.S. District Court, Southern District, Case No.  
09-CV-2275 W CAB
- CC Excerpts from the Transcript of the California Regional Water Quality Control Board  
Public Meeting/Hearing, dated November March 14, 2012
- DD City of San Diego's Report for the Investigation of Exceedances of the Sediment  
Quality Objectives at National Steel and Ship Building Company, dated July 15,  
2004
- EE Excerpt from Presentation of San Diego Unified Port District's Expert, Robert  
Collacott, MBA, M.S., during the California Regional Water Quality Control Board  
Public Meeting/Hearing,

Attorney or party without attorney (Name and Address): BROWN & WINTERS WILLIAM D. BROWN, ESQ. (SBN 125468) SCOTT E. PATTERSON, ESQ. (SBN 174979) 120 Birmingham Drive, Suite 110 Cardiff-by-the-Sea, CA 92007  ATTORNEY FOR (Name): SAN DIEGO UNIFIED PORT DISTRICT	TELEPHONE NO: 760-633-4485
STATE OF CALIFORNIA STATE WATER RESOURCES CONTROL BOARD	
IN THE MATTER OF THE PETITION OF SAN DIEGO UNIFIED PORT DISTRICT, FOR REVIEW OF ORDER NO. R9-2012-0024	
DECLARATION OF PROOF OF ELECTRONIC SERVICE	
Petition No. _____	

At the time of this service, the undersigned was over the age of 18 years and not a party to the case; I am employed in, or am a resident of, the County of San Diego, California where the mailing occurs; and my business/residence address is: 120 Birmingham Drive, Suite 110, Cardiff-by-the-Sea, CA 92007

On the date set forth below, from my business address, I served the document(s) described as:

**PETITION FOR REVIEW**

Service Address: SEE ATTACHMENT

Service was accomplished: 4/13/12

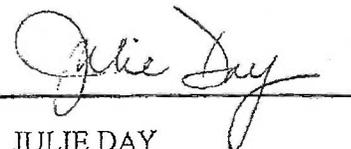
Approximate Time: 4:00 p.m.

(By Electronic Service) I caused the described document(s) to be transmitted from my electronic-mail address, [jday@brownandwinters.com](mailto:jday@brownandwinters.com) to the Service Address(es) noted herein. The transmission was reported as complete without error by transmission report issued by the electronic mail upon which the transmission was made. (CCP § 1010.6(BL)(6).)

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

Executed on April 13, 2012

Signature: \_\_\_\_\_

  
 JULIE DAY

SHORT TITLE: In the Matter of the Petition of SAN DIEGO UNIFIED PORT DISTRICT For Review of Order No. R9-2012-0024	CASE NUMBER: _____
---	--------------------

**ATTACHMENT TO PROOF OF ELECTRONIC SERVICE (PERSONS SERVED)**

*(This attachment is for use with form POS-050/EFS-050.)*

**NAMES, ADDRESSES, AND OTHER APPLICABLE INFORMATION ABOUT PERSONS SERVED:**

<b>Name of Person Served</b>  <i>(If the person served is an attorney, the party or parties represented should also be stated.)</i>	<b>Electronic Service Address</b>	<b>Date and Time of Electronic Service</b>
Christian Carrigan Attorney for State Water Resources Control Board	ccarrigan@waterboards.ca.gov	Date: _____ Time: _____
Raymond Parra Attorney for BAE Systems Ship Repair	Raymond.parra@baesystems.com	Date: _____ Time: _____
Michael McDonough Attorney for BP West Coast Products LLC	Michael.mcdonough@bingham.com	Date: _____ Time: _____
Christopher McNevin Attorney for Chevron USA, Inc.	chrismcnevin@pillsburylaw.com	Date: _____ Time: _____
Brian Ledger Attorney for City of San Diego	bledger@gordonrees.com	Date: _____ Time: _____
Nate Cushman Attorney for United States Navy	nate.cushman@navy.mil	Date: _____ Time: _____
Marco Gonzalez, Attorney for Environmental Health Coalition & SD Coastkeeper	marco@coastlawgroup.com	Date: _____ Time: _____
James Handmacher, Attorney for Marine Construction & Design; Campbell Industries	jvhandmacher@bvmm.com	Date: _____ Time: _____
Matthew Dart Attorney for BAE Systems	matthew.dart@dlapiper.com	Date: _____ Time: _____
Frank Melbourn California RWQCB	fmelbourn@waterboards.ca.gov	Date: _____ Time: _____
Catherine Hagan California RWQCB	chagan@waterboards.ca.gov	Date: _____ Time: _____
Laura Hunter Environmental Health Coalition	laurah@environmentalhealth.org	Date: _____ Time: _____

SHORT TITLE: In the Matter of the Petition of SAN DIEGO UNIFIED PORT DISTRICT For Review of Order No. R9-2012-0024	CASE NUMBER:
---	--------------

**ATTACHMENT TO PROOF OF ELECTRONIC SERVICE (PERSONS SERVED)**

*(This attachment is for use with form POS-050/EFS-050.)*

**NAMES, ADDRESSES, AND OTHER APPLICABLE INFORMATION ABOUT PERSONS SERVED:**

<u>Name of Person Served</u> <i>(If the person served is an attorney, the party or parties represented should also be stated.)</i>	<u>Electronic Service Address</u>	<u>Date and Time of Electronic Service</u>
Gabe Solmer Attorney for San Diego Coastkeeper	gabe@sdcoastkeeper.org	Date: _____ Time: _____
Tom Stahl Attorney for United States Navy	Thomas.stahl@usdoj.gov	Date: _____ Time: _____
Kelly E. Richardson Attorney for NASSCO	kelly.richardson@fw.com	Date: _____ Time: _____
Mike Tracy Attorney for BAE Systems	Mike.tracy@dlapiper.com	Date: _____ Time: _____
Sandi Nichols Attorney for San Diego Unified Port District	snichols@allenmatkins.com	Date: _____ Time: _____
James Dragna Attorney for BP West Coast Products LLC	jim.dragna@bingham.com	Date: _____ Time: _____
Steven Goldberg Attorney for BAE Systems Ship Repair	sgoldberg@downeybrand.com	Date: _____ Time: _____
Jennifer Lucchesi Attorney for CA State Lands Commission	jennifer.lucchesi@slc.ca.gov	Date: _____ Time: _____
Matthew Luxton Attorney for NASSCO	matthew.luxton@nassco.com	Date: _____ Time: _____
Scott Spear Attorney for United States Navy	Scott.spear@usdoj.gov	Date: _____ Time: _____
David Gibson, Executive Officer California Region Water Quality Control Board San Diego	dgibson@waterboards.ca.gov	Date: _____ Time: _____
Jeannette L. Bashaw Office of Chief Counsel, State Water Resources Control Board	jbashaw@waterboards.ca.gov	Date: _____ Time: _____

SHORT TITLE: In the Matter of the Petition of SAN DIEGO UNIFIED PORT DISTRICT For Review of Order No. R9-2012-0024	CASE NUMBER:
---	--------------

**ATTACHMENT TO PROOF OF ELECTRONIC SERVICE (PERSONS SERVED)**

*(This attachment is for use with form POS-050/EFS-050.)*

**NAMES, ADDRESSES, AND OTHER APPLICABLE INFORMATION ABOUT PERSONS SERVED:**

<u>Name of Person Served</u> <i>(If the person served is an attorney, the party or parties represented should also be stated.)</i>	<u>Electronic Service Address</u>	<u>Date and Time of Electronic Service</u>
Frederick Ortlieb Attorney for City of San Diego	fortlieb@sandiego.gov	Date: _____ Time: _____
Douglas Reinhart Attorney for BP West Coast Products LLC	douglas.reinhart@bp.com	Date: _____ Time: _____
Miles Scully Attorney for City of San Diego	mscully@gordonrees.com	Date: _____ Time: _____
David Silverstein Attorney for United States Navy	david.silverstein@navy.mil	Date: _____ Time: _____
Jill Tracy Attorney for Sempra Energy	jtracy@semprautilities.com	Date: _____ Time: _____
Roslyn Tobe Attorney for United States Navy	roslyn.tobe@navy.mil	Date: _____ Time: _____
Brian Wall Attorney for Chevron Products Co.	bwall@chevron.com	Date: _____ Time: _____
Jill Witkowski Attorney for San Diego Coastkeeper	jill@sdcoastkeeper.org	Date: _____ Time: _____
Sarah Brite Evans Attorney for Star & Crescent	sarah@SSHBClaw.com	Date: _____ Time: _____
Kristin Reyna Attorney for City of San Diego	kreyna@gordonrees.com	Date: _____ Time: _____
Sharon Cloward, Exec. Dir. San Diego Port Tenants Association	sharon@sdpta.com	Date: _____ Time: _____
Suzanne Varco Attorney for Star & Crescent	svarco@envirolawyer.com	Date: _____ Time: _____

# Attachment G



## PORT OF SAN DIEGO

OFFICE OF THE PORT ATTORNEY

June 24, 2013

BY EMAIL: [Eric.Becker@waterboards.ca.gov](mailto:Eric.Becker@waterboards.ca.gov)  
[Jody.Ebsen@waterboards.ca.gov](mailto:Jody.Ebsen@waterboards.ca.gov)

San Diego Regional Water Quality Control Board  
9174 Sky Park Court, Suite 100  
San Diego, CA 92123  
Attention: Eric Becker and Jody Ebsen

**Re: Comment – Tentative Order No. R9-2013-0093, Place ID: 794466:  
Tentative Waste Discharge Requirements for San Diego Bay Environmental  
Restoration Fund – North, the San Diego Bay Environmental Restoration  
Fund-South, San Diego Shipyard Sediment Remediation Project, San Diego  
Bay, San Diego, California**

Dear Mr. Becker and Ms. Ebsen:

The San Diego Unified Port District ("Port District") submits the following comments on Tentative Order No. R9-2013-0093, in which the San Diego Regional Water Quality Control Board ("Regional Board") proposes Tentative Waste Discharge Requirements ("WDRs") for the dredging and sand capping remediation project to be performed pursuant to Cleanup and Abatement Order No. R9-2012-0024 (the "CAO") in the area known as the "Shipyard Sediment Site."

In the Tentative WDRs, the Regional Board proposes to name as Dischargers the project applicants (the San Diego Bay Environmental Restoration Fund – North and the San Diego Bay Environmental Restoration Fund – South), which are two trusts created by BAE Systems San Diego Ship Repair, Inc. ("BAE Systems") and National Steel and Shipbuilding Company ("NASSCO"), respectively, BAE Systems and NASSCO, as the facility operators, the United States Navy and the Port District, as alleged owners of property on which the work is to be performed.<sup>1</sup>

<sup>1</sup> These are the expressed reasons for naming these respective parties in the WDRs. (WDRs, li.f.) The Regional Board acknowledges that there are other parties who are named dischargers "accountable for ensuring that the Project attains the target cleanup levels... of the CAO," who are not proposed to be named as dischargers in the WDRs, including the City of San Diego ("City"), San Diego Gas & Electric Company ("SDG&E"), and Campbell Industries ("Campbell"). (*Id.*) The Port District therefore assumes that the Regional Board is not proposing to name the Port District in the WDRs based upon its being named as a discharger in the CAO. Of course, if this assumption is incorrect, and the

Eric Becker  
Jody Ebsen  
June 24, 2013  
Page 2 of 7

The Port District hereby formally objects to the Regional Board's proposed inclusion of the Port District as a "Discharger" in the WDRs on the following grounds:

1. The Port District is not the party proposing to make the discharges for which the WDRs are being issued, nor is it the operator of any of the facilities on which the discharges are proposed to be made; it is merely the non-operating landlord and public trustee of the subject tidelands under the San Diego Unified Port District Act (Harb. & Nav. Code, App. 1).

2. Consistent with the 1990 agreement between the State Water Board, the Regional Board, and the Port District, the Regional Board's long-standing business practice has been not to name the Port District as primarily liable in WDRs issued for work to be performed by or on behalf of its tenants and there is no reason to depart from that practice in connection with these WDRs.

3. In no event can the Port District be liable for any proposed activities or WDRs issued with respect to the "S Lane," which is owned by the United States Navy, and over which the Port District has no jurisdictional authority.

Each of these objections is discussed in more detail below.

## II. THE PORT DISTRICT SHOULD NOT BE NAMED AS A DISCHARGER IN THE WDRs

### A. The Port District Is Not The Party Making Or Proposing To Make The Discharge For Which The WDRs Are Being Issued And Is Not The Operator Of the Facilities On Which The Discharges Will Occur

The Porter-Cologne Water Quality Control Act (Water Code §§ 13000, *et seq.*) requires that "*a person discharging waste, or proposing to discharge waste, within any region that could affect the quality of the waters of the state, other than into a community sewer system, shall file with the regional board a report of the discharge.*" (Water Code § 13260(a)(1) (emphasis added).) Section 13263(f) of the Water Code requires that the regional board must notify "*the person making or proposing the discharge... of the discharge requirements to be met. After receipt of that notice, the person so notified shall provide adequate means to meet the requirements.*" (emphasis added). Similarly, the federal permitting regulations likewise require that "any person who discharges or

---

Regional Board proposes to name the Port District on that basis, then the Port District asserts that it would be wrongly named for all of the reasons set forth in its pending petition to the State Water Board challenging the CAO, and further asserts that the Regional Board would likewise have to name the City, SDG&E, and Campbell in the WDRs too.

Eric Becker  
Jody Ebsen  
June 24, 2013  
Page 3 of 7

proposes to discharge" pollutants must obtain a permit to do so under the Clean Water Act. (See 40 C.F.R. § 122.21(a).)

Here, the WDRs acknowledge that the Reports of Waste Discharge were submitted by de maximis, inc., a trustee acting on behalf of the so-called San Diego Bay Environmental Restoration Fund – North (with the authorization of Shaun Halvax, Manager Environmental Programs for the Facility Operator, BAE Systems), and the so-called San Diego Bay Environmental Restoration Fund – South (with the authorization of T. Michael Chee, the Environmental Manager of the Facility Operator, NASSCO) (WDRs, Section II.C.). Those are the entities that plan to carry out the described Project through contractors that they engage on the facilities owned, controlled and operated by BAE Systems and NASSCO, respectively. Accordingly, each of these entities is appropriately named in the WDRs.<sup>2</sup>

On the other hand, the Port District is not an applicant for these WDRs and is not proposing to perform the Project or cause any discharges at the subject sites. Nor is it an owner or operator of the shipyard facilities: to the contrary, it has absolutely no authority, ability, desire, or financial wherewithal to control their day-to-day operations, including their implementation of the proposed Project. Rather, the federally-secured shipyard facilities are solely operated by BAE Systems and NASSCO, respectively, under long-term ground leases from the Port District.

The Porter-Cologne Act does not require that non-operating landlords, and in particular, state-mandated trustees of public tidelands,<sup>3</sup> be named as dischargers in permits and WDRs sought by or on behalf of their tenants.<sup>4</sup> Indeed, it would be impracticable, if not impossible, for the Port District, which has no right to unrestricted daily access to the secured shipyards, to perform the myriad activities necessary to comply with the WDRs. Those requirements include the implementation of numerous on-site best management practices ("BMPs") and sampling and monitoring activities. (See, e.g., WDRs, Sections V (Construction BMPs relating to, among many other things, the specifications and requirements for silt curtain deployment; the specific manner in which sediment dredging by the clamshell buckets is to be conducted and the manner in which dredged sediments are to be placed on barges; the placement of clean sand cover; the

<sup>2</sup> See also the "Instructions" issued by the State Water Resources Control Board for WDRs, which require that a facility owner be named in WDRs issued for work on its facility, attached hereto as Exhibit A.

<sup>3</sup> As recognized in the WDRs (Project Description, I.F., p. 7), the Port District holds title as the mere trustee of the tidelands for the State of California. (See also Port Act, §§ 5, 5.5, 14, 68, 87 (each noting the Port District holds such lands "in trust" subject to the terms of the Port Act).)

<sup>4</sup> The federal regulations implementing the Clean Water Act likewise make clear that "When a facility or activity is owned by one person but is operated by another person, it is the operator's duty to obtain a permit. (40 C.F.R. § 122.21(b).)

Eric Becker  
Jody Ebsen  
June 24, 2013  
Page 4 of 7

processing and management of dredged sediments, etc.), VII (Monitoring Requirements) and VIII (Reporting Requirements).)

Thus, the Port District is neither a person making or proposing to make the discharge, is not a facility owner or operator, and is not able to control the day-to-day activities and monitoring and sampling activities at the Project site. Consequently, the Port District is not within the scope of the parties required to apply for or be named in these WDRs under the Porter Cologne Act or the Clean Water Act and it should be removed as a proposed discharger in these WDRs.

**B. The Regional Board's Long-Standing Practice Has Been Not To Name The Port District As A Primarily Liable Discharger In WDRs Issued To Its Tenants And There Is No Reason To Depart From That Practice**

It has long been the policy of the State Water Resources Control Board that landowners "should not be held responsible for day-to-day compliance with waste discharge requirements" (see, e.g., *In the Matter of the Petition of San Diego Unified Port Dist.* ("Port Petition"), SWRCB Order No. WQ 90-3; *In re Petition of Southern California Edison Company*, SWRCB Order No. WQ 86-11) and that public agencies should be afforded the opportunity to obtain compliance from their tenants prior to any enforcement action against the agency. (See *Port Petition*, SWRCB Order No. WQ 90-3 at 12 ("[B]ecause the Port District is a public agency, it should...be afforded the opportunity to obtain compliance from the tenant prior to enforcement by the Regional Board against the Port District"); see also *In re Petition of U.S. Department of Agriculture, Forest Service*, SWRCB Order No. WQ 87-5 at 5 ("[t]he Forest Service deserves the opportunity to exercise its own authority before the Regional Board holds it responsible for any violations of the [permit] requirements."))<sup>5</sup>

In 1990, the State Water Board, this Regional Board and the Port District mutually agreed that these policies would expressly be applied to WDR/NPDES permits issued to Port District tenants. The agreement arose from the Port District's challenge to its being named by the Regional Board in amendments to WDR/NPDES permits issued to six of its boatyard and shipyard tenants.<sup>6</sup> (See July 2, 1990 letter from David B. Hopkins to Sheila K. Vassey and David T. Barker, attached hereto as Exhibit B.) The

<sup>5</sup> The same policy has been applied to non-operating landlords more generally. (See *In re Petition of Wenwest*, SWRCB Order No. WQ 92-13 at 9; *In re Petition of Spitzer*, SWRCB Order No. WQ 89-8 at 6; *In re Petition of Prudential Insurance*, SWRCB Order No. WQ 87-6 at 5; *In re Petition of Schmidl*, SWRCB Order No. WQ 89-1 at 4.)

<sup>6</sup> In consideration of this agreement, the Port District agreed not to file a writ petition to challenge the State Water Board's conclusion, in SWRCB Order No. WQ 90-3, that the Port District could be named in WDR/NPDES permits issued to its tenants, but would only be "secondarily liable" for the tenant's monitoring program and day-to-day operations. (See *Port Petition*, Order No. WQ 90-3 at 16.)

Eric Becker  
Jody Ebsen  
June 24, 2013  
Page 5 of 7

1990 agreement provided that the following language would be included in the tenant's permits:

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

(See Exhibit B, hereto.)

In recognition of this policy, it has been the Regional Board's long-standing business practice not to name the Port District as a primarily responsible party in WDR/NPDES permits issued to its tenants, including those issued to BAE Systems and NASSCO for their operations at the subject site. (See, e.g., SDRWQCB Order No. R9-2002-0161 (issued to Southwest Marine, Inc., which is now BAE Systems); SDRWQCB Order No. R9-2003-0005 (NASSCO).)<sup>7</sup>

In the most recent WDR/NPDES permits issued by the Regional Board to these shipyards, the Port District was not named as a discharger at all. (See SDRWQCB Order No. R9-2009-0080, as modified by Order No. R9-2010-0090 (BAE Systems); SDRWQCB Order No. R9-2009-0099 (NASSCO), the pertinent pages of which are attached hereto as Exhibit D and Exhibit E, respectively.)<sup>8</sup> Similarly, the Port District was not named as a Discharger in the permit recently issued to BAE Systems for its Pier 4 Replacement project and related dredging activities. (See Certification No. 11C-026 (Clean Water Act 401 Certification and acknowledgement of enrollment under

<sup>7</sup> Consistent with the 1990 Agreement, those permits each included the Port District within the definition of "discharger," but also included language to make clear that the Port District was "not primarily responsible for day-to-day operations at [the tenant's facility] or for compliance with the requirements of this Order (including monitoring and reporting requirements)," and that the Regional Board would notify the Port District of any non-compliance by its lessee and permit it to obtain such compliance before any enforcement action would be taken against it. (See SDRWQCB Order No. R9-2002-0161 at 3, ¶ 13.c.; SDRWQCB Order No. R9-2003-0005 at 4, ¶ 14.c.) The pertinent pages of those two Orders are collectively attached hereto as Exhibit C.

<sup>8</sup> The Regional Board has complete copies of these very lengthy permits in its files, but the Port District can provide additional copies if requested.

Eric Becker  
Jody Ebsen  
June 24, 2013  
Page 6 of 7

SWRCB Order No. 2003-017-DWG, the Statewide General Waste Discharge Requirements for Dredged or Fill Discharges, issued by the Regional Board to BAE Systems on December 28, 2012, as amended on May 31, 2013, attached hereto as Exhibit F (without attachments.)

There is no reason for the Regional Board to depart from this long-standing practice in connection with the WDRs to be issued for the subject Project. This is particularly true given that the Port District itself has been asked by these same project applicants to issue each of them a Coastal Development Permit ("CDP") for this Project, which will likewise include the mitigation and other requirements for compliance with the Regional Board's Environmental Impact Report for the Project. The CDPs are independently enforceable by the Port District. Accordingly, the Port District should not be named as a discharger in the WDRs for the proposed Project.

**III. UNDER NO CIRCUMSTANCES CAN THE PORT DISTRICT BE HELD RESPONSIBLE FOR WORK AT THE "S LANE," WHICH IS OWNED BY THE U.S. NAVY AND LEASED BY NASSCO**

There is no legal basis upon which the Port District can be held responsible for any activities conducted on property outside its jurisdiction, which includes the "S Lane" area proposed by NASSCO and the South Restoration Fund for use as a sediment dewatering area for sediments dredged at the NASSCO (South) site.

The WDRs define the "Project Site" as including "[t]he sediment remediation areas, combined with...2) the 2.5 acre S-Lane Parcel sediment staging and offloading area for the South Project Site, located on the NASSCO leasehold on the north side of Chollas Creek." (WDRs, II.H.) The WDRs further acknowledge that the "southern Project sediment staging and stockpile area is located on property owned by the United States (sic) Navy and leased to NASSCO." (*Id.*, II.F.) The Port District has no involvement, as trustee or otherwise, with the "S Lane."

Nevertheless, the WDRs seek to make all alleged Dischargers liable for all work to be performed under the WDRs wherever located. (See, e.g., WDRs, II.J. (prescribing BMPs for the "sediment management areas"); II.R. (requiring the Discharger to comply with all of the mitigation measures in the Mitigation and Monitoring Reporting Program contained in Attachment B of the Order); IX ("The Discharger must comply with all conditions of this Order....").)

The WDRs as proposed would therefore unlawfully require the Port District to undertake work, and/or assume responsibility for work being undertaken by third parties, on property over which it has no right to exercise any jurisdictional authority pursuant to the Port Act (Harb. & Nav. Code, App. 1). Consequently, there is no legal basis upon which

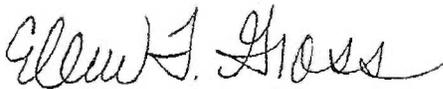
Eric Becker  
Jody Ebsen  
June 24, 2013  
Page 7 of 7

the Regional Board could impose any liability on the Port District in connection with any work required by the WDRs at the "S Lane."

#### IV. CONCLUSION

Based upon the foregoing, the Port District respectfully requests that it should not be named as a discharger—much less a primarily liable discharger—in the WDRs for the proposed Project. Instead, the Regional Board can rely upon the Port District to assist it, as and if necessary, in obtaining its tenants' compliance with the WDRs and know that it will also independently enforce compliance by all Project applicants with the CDPs issued to them by the Port District for the Project.

Very truly yours,



ELLEN F. GROSS  
Deputy Port Attorney

EFG/clb  
Attachments

# Exhibit A

## INTRODUCTION

This application package constitutes a Report of Waste Discharge (ROWD) pursuant to California Water Code Section 13260. Section 13260 states that persons discharging or proposing to discharge waste that could affect the quality of the waters of the State, other than into a community sewer system, shall file a ROWD containing information which may be required by the appropriate Regional Water Quality Control Board (RWQCB).

This package is to be used to start the application process for all waste discharge requirements (WDRs) and National Pollutant Discharge Elimination System (NPDES) permits\* issued by a RWQCB except:

- a) Those landfill facilities that must use a joint Solid Waste Facility Permit Application Form, California Integrated Waste Management Board Form E-1-77; and
- b) General WDRs or general NPDES permits that use a Notice of Intent to comply or specify the use of an alternative application form designed for that permit.

This application package contains:

1. Application/General Information Form for WDRs and NPDES Permits [Form 200 (10/97)].
2. Application/General Information Instructions.

### Instructions

Instructions are provided to assist you with completion of the application. If you are unable to find the answers to your questions or need assistance with the completion of the application package, please contact your RWQCB representative. *The RWQCBs strongly recommend that you make initial telephone or personal contact with RWQCB regulatory staff to discuss a proposed new discharge before submitting your application.* The RWQCB representative will be able to answer procedural and annual fee related questions that you may have. (See map and telephone numbers inside of application cover.)

All dischargers regulated under WDRs and NPDES permits must pay an annual fee, except dairies, which pay a filing fee only. The RWQCB will notify you of your annual fee based on an evaluation of your proposed discharge. Please do NOT submit a check for your first annual fee or filing fee until requested to do so by a RWQCB representative. Dischargers applying for reissuance (renewal) of an existing NPDES permit or update of an existing WDR will be billed through the annual fee billing system and are therefore requested NOT to submit a check with their application. Checks should be made payable to the State Water Resources Control Board.

### Additional Information Requirements

A RWQCB representative will notify you within 30 days of receipt of the application form and any supplemental documents whether your application is complete. If your application is incomplete, the RWQCB representative will send you a detailed list of discharge specific information necessary to complete the application process. The completion date of your application is normally the date when all required information, including the correct fee, is received by the RWQCB.

**\* NPDES PERMITS:** If you are applying for a permit to discharge to surface water, you will need an NPDES permit which is issued under both State and Federal law and may be required to complete one or more of the following Federal NPDES permit application forms: Short Form A, Standard Form A, Forms 1, 2B, 2C, 2D, 2E, and 2F. These forms may be obtained at a RWQCB office or can be ordered from the National Center for Environmental Publications and Information at (513) 891-6561.

CALIFORNIA ENVIRONMENTAL  
PROTECTION AGENCY



State of California  
Regional Water Quality Control Board  
APPLICATION/REPORT OF WASTE DISCHARGE  
GENERAL INFORMATION FORM FOR  
WASTE DISCHARGE REQUIREMENTS OR NPDES PERMIT



**INSTRUCTIONS**  
**FOR COMPLETING THE APPLICATION/REPORT OF WASTE DISCHARGE**  
**GENERAL INFORMATION FORM FOR:**  
**WASTE DISCHARGE REQUIREMENTS/NPDES PERMIT**

If you have any questions on the completion of any part of the application, please contact your RWQCB representative. A map of RWQCB locations, addresses, and telephone numbers is located on the reverse side of the application cover.

**I. FACILITY INFORMATION**

You must provide the factual information listed below for ALL owners, operators, and locations and, where appropriate, for ALL general partners and lease holders.

**A. FACILITY:**

Legal name, physical address including the county, person to contact, and phone number at the facility.  
(NO P.O. Box numbers! If no address exists, use street and nearest cross street.)

**B. FACILITY OWNER:**

Legal owner, address, person to contact, and phone number. Also include the owner's Federal Tax Identification Number.

**OWNER TYPE:**

Check the appropriate Owner Type. The legal owner will be named in the WDRs/NPDES permit.

**C. FACILITY OPERATOR (The agency or business, not the person):**

If applicable, the name, address, person to contact, and telephone number for the facility operator. Check the appropriate Operator Type. If identical to B, above, enter "same as owner".

**D. OWNER OF THE LAND:**

Legal owner of the land(s) where the facility is located, address, person to contact, and phone number. Check the appropriate Owner Type. If identical to B, above, enter "same as owner".

**E. ADDRESS WHERE LEGAL NOTICE MAY BE SERVED:**

Address where legal notice may be served, person to contact, and phone number. If identical to B, above, enter "same as owner".

**F. BILLING ADDRESS**

Address where annual fee invoices should be sent, person to contact, and phone number. If identical to B, above, enter "same as owner".

CALIFORNIA ENVIRONMENTAL  
PROTECTION AGENCY



State of California  
Regional Water Quality Control Board

APPLICATION/REPORT OF WASTE DISCHARGE  
GENERAL INFORMATION FORM FOR  
WASTE DISCHARGE REQUIREMENTS OR NPDES PERMIT



**II. TYPE OF DISCHARGE**

Check the appropriate box to describe whether the waste will be discharged to: A. Land, or B. Surface Water.

Check the appropriate box(es) which best describe the activities at your facility.

Hazardous Waste - If you check the Hazardous Waste box, STOP and contact a representative of the RWQCB for further instructions.

Landfills - A separate form, APPLICATION FOR SOLID WASTE FACILITY PERMIT/WASTE DISCHARGE REQUIREMENTS, California Integrated Waste Management Board Form E-1-77, may be required. Contact a RWQCB representative to help determine the appropriate form for your discharge.

**III. LOCATION OF THE FACILITY**

1. Enter the Assessor's Parcel Number(s) (APN), which is located on the property tax bill. The number can also be obtained from the County Assessor's Office. Indicate the APN for both the facility and the discharge point.
2. Enter the Latitude of the entrance to the proposed/existing facility and of the discharge point. Latitude and longitude information can be obtained from a U.S. Geological Survey quadrangle topographic map. Other maps may also contain this information.
3. Enter the Longitude of the entrance to the proposed/existing facility and of the discharge point.

**IV. REASON FOR FILING**

**NEW DISCHARGE OR FACILITY:**

A discharge or facility that is proposed but does not now exist, or that does not yet have WDRs or an NPDES permit.

**CHANGE IN DESIGN OR OPERATION:**

A material change in design or operation from existing discharge requirements. Final determination of whether the reported change is material will be made by the RWQCB.

**CHANGE IN QUANTITY/TYPE OF DISCHARGE:**

A material change in characteristics of the waste from existing discharge requirements. Final determination of whether the reported change would have a significant effect will be made by the RWQCB.

**CHANGE IN OWNERSHIP/OPERATOR:**

Change of legal owner of the facility. Complete Parts I, III, and IV only and contact the RWQCB to determine if additional information is required.

**WASTE DISCHARGE REQUIREMENTS UPDATE OR NPDES PERMIT REISSUANCE:**

WDRs must be updated periodically to reflect changing technology standards and conditions. A new application is required to reissue an NPDES permit which has expired.

**OTHER:**

If there is a reason other than the ones listed, please describe the reason on the space provided. (If more space is needed, attach a separate sheet.)



APPLICATION/REPORT OF WASTE DISCHARGE  
GENERAL INFORMATION FORM FOR  
WASTE DISCHARGE REQUIREMENTS OR NPDES PERMIT



V. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

It should be emphasized that communication with the appropriate RWQCB staff is vital before starting the CEQA documentation, and is recommended before completing this application. There are Basin Plan issues which may complicate the CEQA effort, and RWQCB staff may be able to help in providing the needed information to complete the CEQA documentation.

Name the Lead Agency responsible for completion of CEQA requirements for the project, i.e., completion and certification of CEQA documentation.

Check YES or NO. Has a public agency determined that the proposed project is exempt from CEQA? If the answer is YES, state the basis for the exemption and the name of the agency supplying the exemption on the space provided. (Remember that, if extra space is needed, use an extra sheet of paper, but be sure to indicate the attached sheet under Section VII. Other.)

Check YES or NO. Has the "Notice of Determination" been filed under CEQA? If YES, give the date the notice was filed and enclose a copy of the Notice of Determination and the Initial Study, Environmental Impact Report, or Negative Declaration. If NO, check the box of the expected type of CEQA document for this project, and include the expected date of completion using the timelines given under CEQA. The date of completion should be taken as the date that the Notice of Determination will be submitted. (If not known, write "Unknown")

VI. OTHER REQUIRED INFORMATION

To be approved, your application MUST include a COMPLETE characterization of the discharge. If the characterization is found to be incomplete, RWQCB staff will contact you and request that additional specific information be submitted.

This application MUST be accompanied by a site map. A USGS 7.5' Quadrangle map or a street map, if more appropriate, is sufficient for most applications.

VII. OTHER

If any of the answers on your application form need further explanation, attach a separate sheet. Please list any attachments with the titles and dates on the space provided.

VIII. CERTIFICATION

Certification by the owner of the facility or the operator of the facility, if the operator is different from the owner, is required. The appropriate person must sign the application form.

Acceptable signatures are:

1. for a corporation, a principal executive officer of at least the level of senior vice-president;
2. for a partnership or individual (sole proprietorship), a general partner or the proprietor;
3. for a governmental or public agency, either a principal executive officer or ranking elected/appointed official.

DISCHARGE SPECIFIC INFORMATION

In most cases, a request to supply additional discharge specific information will be sent to you by a representative of the RWQCB. If the RWQCB determines that additional discharge specific information is not needed to process your application, you will be so notified.

CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY



State of California  
Regional Water Quality Control Board  
APPLICATION/REPORT OF WASTE DISCHARGE  
GENERAL INFORMATION FORM FOR  
WASTE DISCHARGE REQUIREMENTS OR NPDES PERMIT



I. FACILITY INFORMATION

A. Facility:

Name:			
Address:			
City:	County:	State:	Zip Code:
Contact Person:		Telephone Number:	

B. Facility Owner:

Name:		Owner Type (Check One)	
Address:		1. <input type="checkbox"/> Individual	2. <input type="checkbox"/> Corporation
City:	State:	3. <input type="checkbox"/> Governmental Agency	4. <input type="checkbox"/> Partnership Agency
Zip Code:	5. <input type="checkbox"/> Other: _____		
Contact Person:		Telephone Number:	Federal Tax ID:

C. Facility Operator (The agency or business, not the person):

Name:		Operator Type (Check One)	
Address:		1. <input type="checkbox"/> Individual	2. <input type="checkbox"/> Corporation
City:	State:	3. <input type="checkbox"/> Governmental Agency	4. <input type="checkbox"/> Partnership Agency
Zip Code:	5. <input type="checkbox"/> Other: _____		
Contact Person:		Telephone Number:	

D. Owner of the Land:

Name:		Owner Type (Check One)	
Address:		1. <input type="checkbox"/> Individual	2. <input type="checkbox"/> Corporation
City:	State:	3. <input type="checkbox"/> Governmental Agency	4. <input type="checkbox"/> Partnership Agency
Zip Code:	5. <input type="checkbox"/> Other: _____		
Contact Person:		Telephone Number:	

E. Address Where Legal Notice May Be Served:

Address:		
City:	State:	Zip Code:
Contact Person:		Telephone Number:

F. Billing Address:

Address:		
City:	State:	Zip Code:
Contact Person:		Telephone Number:

CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY



State of California  
Regional Water Quality Control Board

APPLICATION/REPORT OF WASTE DISCHARGE  
GENERAL INFORMATION FORM FOR  
WASTE DISCHARGE REQUIREMENTS OR NPDES PERMIT



II. TYPE OF DISCHARGE

Check Type of Discharge(s) Described in this Application (A or B):

- A. WASTE DISCHARGE TO LAND       B. WASTE DISCHARGE TO SURFACE WATER

Check all that apply:

<input type="checkbox"/> Domestic/Municipal Wastewater Treatment and Disposal	<input type="checkbox"/> Animal Waste Solids	<input type="checkbox"/> Animal or Aquacultural Wastewater
<input type="checkbox"/> Cooling Water	<input type="checkbox"/> Land Treatment Unit	<input type="checkbox"/> Biosolids/Residual
<input type="checkbox"/> Mining	<input type="checkbox"/> Dredge Material Disposal	<input type="checkbox"/> Hazardous Waste (see instructions)
<input type="checkbox"/> Waste Pile	<input type="checkbox"/> Surface Impoundment	<input type="checkbox"/> Landfill (see instructions)
<input type="checkbox"/> Wastewater Reclamation	<input type="checkbox"/> Industrial Process Wastewater	<input type="checkbox"/> Storm Water
<input type="checkbox"/> Other, please describe: _____		

III. LOCATION OF THE FACILITY

Describe the physical location of the facility.

1. Assessor's Parcel Number(s) Facility: Discharge Point:	2. Latitude Facility: Discharge Point:	3. Longitude Facility: Discharge Point:
---	--	---

IV. REASON FOR FILING

New Discharge or Facility       Changes in Ownership/Operator (see instructions)

Change in Design or Operation       Waste Discharge Requirements Update or NPDES Permit Reissuance

Change in Quantity/Type of Discharge       Other: \_\_\_\_\_

V. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

Name of Lead Agency: \_\_\_\_\_

Has a public agency determined that the proposed project is exempt from CEQA?     Yes     No

If Yes, state the basis for the exemption and the name of the agency supplying the exemption on the line below.  
 Basis for Exemption/Agency: \_\_\_\_\_

Has a "Notice of Determination" been filed under CEQA?     Yes     No

If Yes, enclose a copy of the CEQA document, Environmental Impact Report, or Negative Declaration. If no, identify the expected type of CEQA document and expected date of completion.

Expected CEQA Documents:

EIR       Negative Declaration

Expected CEQA Completion Date: \_\_\_\_\_

CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY



State of California Regional Water Quality Control Board

APPLICATION/REPORT OF WASTE DISCHARGE GENERAL INFORMATION FORM FOR WASTE DISCHARGE REQUIREMENTS OR NPDES PERMIT



VI. OTHER REQUIRED INFORMATION

Please provide a COMPLETE characterization of your discharge. A complete characterization includes, but is not limited to, design and actual flows, a list of constituents and the discharge concentration of each constituent, a list of other appropriate waste discharge characteristics, a description and schematic drawing of all treatment processes, a description of any Best Management Practices (BMPs) used, and a description of disposal methods. Also include a site map showing the location of the facility and, if you are submitting this application for an NPDES permit, identify the surface water to which you propose to discharge. Please try to limit your maps to a scale of 1:24,000 (7.5' USGS Quadrangle) or a street map, if more appropriate.

VII. OTHER

Attach additional sheets to explain any responses which need clarification. List attachments with titles and dates below:

Two horizontal lines for listing attachments.

You will be notified by a representative of the RWQCB within 30 days of receipt of your application. The notice will state if your application is complete or if there is additional information you must submit to complete your Application/Report of Waste Discharge, pursuant to Division 7, Section 13260 of the California Water Code.

VIII. CERTIFICATION

"I certify under penalty of law that this document, including all attachments and supplemental information, were prepared under my direction and supervision in accordance with a system designed to assure that qualified personnel properly gathered and evaluated the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment."

Print Name: \_\_\_\_\_ Title: \_\_\_\_\_
Signature: \_\_\_\_\_ Date: \_\_\_\_\_

FOR OFFICE USE ONLY

Table with 4 columns: Date Form 200 Received, Letter to Discharger, Fee Amount Received, Check #.