Pursuant to the September 19, 2001 Notice of Public Hearing, and the Third Amended Order of Proceedings, dated June 8, 2011, and related procedural orders, with respect to Tentative Cleanup and Abatement Order No. R9-2011-0001 (“TCAO”) and its associated Draft Technical Report (“DTR”) for the San Diego Bay Shipyard Sediment Site, San Diego County (“Shipyard Sediment Site” or “Site”), Designated Party BAE Systems San Diego Ship Repair Inc. (“BAE Systems”) respectfully submits these written comments regarding (1) Revisions to the TCAO and DTR made by the Cleanup Team and released on September 15, 2011; and (2) Revisions to and/or responses to comments on the draft EIR made by the Cleanup Team and released on September 15, 2011.
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I. COMMENTS REGARDING REVISIONS TO THE TCAO AND DTR MADE BY THE CLEANUP TEAM AND RELEASED ON SEPTEMBER 15, 2011

BAE Systems appreciates and recognizes the significant task recently completed by the Cleanup Team of reviewing, analyzing and responding to a mountain of written comments by Designated Parties, and subsequently revising the TCAO and DTR as they deemed appropriate. BAE Systems provides certain comments regarding those revisions, which are set forth below.

BAE Systems expressly preserves, and does not waive, any and all objections to those technical issues, evidence or legal argument to which BAE Systems does not address herein, and further reserves the right to supplement, modify or withdraw its comments on any issue identified herein.

A. Revised DTR Pages 18-4 and 18-5

As noted in the revised DTR text, there are no tributyltin ("TBT") values that can be used in the SQGQ1 calculation. However, a site-specific toxicity-based threshold for TBT is available for the Shipyard Sediment Site, and can be applied to evaluate stations with only chemistry data. This threshold value is the Lowest Apparent Effects Threshold ("LAET"). The only two Site stations that exceed the LAET for TBT (see Table 12-3 of the shipyard sediment report [Exponent 2003]) are included within the cleanup footprint. An acknowledgement of the relevance of the LAET could be included in the revised DTR text as additional support for the approach that was taken by the Cleanup Team.

Furthermore, TBT was not related to any measure of toxicity or benthic community condition at the site (Table 9-8 of the shipyard sediment report), and also was not a risk driver for either the ecological risk assessment or the human health risk assessment. There is therefore ample site-specific data with which to draw conclusions about the possible impact of TBT, even without including it in the SQGQ1 calculation.

In addition, the appropriateness of the use of other chemicals as a surrogate for TBT can be further supported by reference to the chemical correlations presented in Table 9-2 of the shipyard sediment report. These correlation coefficients demonstrate that chemicals used in the SQGQ1 calculation are strongly correlated with TBT concentrations. In particular, the
correlation coefficients for TBT and copper, HPAH, and total PCB are 0.89, 0.80, and 0.80, respectively, which are among the highest correlations observed. Consequently, cleanup decisions based on SQGQ1 values will address areas with elevated TBT values.

B. Revised DTR Page 32-12

In the modified paragraph, the text "all wildlife receptors (excluding the sea lion)" puts an important piece of information into a parenthetical statement. An abbreviated quote from this sentence, that omits the parenthetical phrase, would be misleading. An alternative phrase that eliminates this potential problem is "wildlife receptors other than the sea lion."

C. Revised DTR Page 34-3

In the revised text, the phrase "post-remedial dredge area concentrations" is ambiguous. It could be taken to mean any of the following:

- The alternative cleanup level; or
- The estimated post-remedial SWAC; or
- The mean post-remedial concentration in all dredged areas.

This phrase should be clarified or replaced. By analogy with the previous version of this text, which referred to background concentrations, the revised text is assumed to refer to alternative cleanup levels. The second of the alternatives listed above is not appropriate because it would consist of comparing a point concentration with a SWAC. The third alternative listed above is not appropriate because 20% variation is within the range of variability of duplicate laboratory analyses of organic chemicals, and the criterion would therefore be likely to flag samples that are not meaningfully different from the overall mean concentration. Consistent with this interpretation, the phrase “post-remedial dredge area concentrations” should therefore be replaced with the phrase “alternative cleanup levels.”
II. COMMENTS REGARDING REVISIONS TO AND/OR RESPONSES TO COMMENTS ON THE “PROPOSED FINAL” EIR MADE BY THE CLEANUP TEAM AND RELEASED ON SEPTEMBER 15, 2011

BAE Systems submits the following comments regarding the proposed Final Environmental Impact Report (“FEIR”) released September 15, 2011. Specifically, BAE Systems’ comments relate to the Mitigation Monitoring and Reporting Program (“MMRP”), set forth in Section 7 of the FEIR.

BAE Systems expressly preserves, and does not waive, any and all objections to those technical issues, evidence or legal argument to which BAE Systems does not address herein, and further reserves the right to supplement, modify or withdraw its comments on any issue identified herein.

A. Mitigation That is Legally Infeasible May Not be Adopted.

CEQA mitigation may not be adopted unless it is “feasible,” or “capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors.” CEQA Guidelines § 15364. Legal infeasibility arises where the mitigation being considered is beyond the powers conferred by law on the agency, or prohibited by statutes governing the agency. *Kenneth Mebane Ranches v. Superior Court*, 10 Cal. App. 4th 276, 291 (1992); *Sequoyah Hills Homeowners Ass’n v. City of Oakland*, 23 Cal. App. 4th 704, 715-16 (1993).

1. Regional Board May Not Impose Mitigation Measures That Have Not Been Subjected to Economic Feasibility Analysis Under Resolution 92-49.

In connection with its authority to issue cleanup and abatement orders, the Regional Board must evaluate all cleanup levels for economic feasibility and cost effectiveness. *See* State Water Resources Control Board Resolution No. 92-49, at 6-8 (“The Regional Water Board shall . . . ensure that dischargers shall have the opportunity to select cost-effective methods for . . . cleaning up or abating the effects [of wastes discharged and] . . . require the discharger to consider the effectiveness, feasibility, and relative costs of applicable alternative methods for investigation, cleanup and abatement.”). *See also* Water Code § 13307 (requiring that policies include procedures for identifying and utilizing “the most cost-effective methods . . . for cleaning up or
abating the effects of contamination of pollution”); Water Code § 13267 (requiring that the
Regional Board engaged in cost-benefit analysis in adopting any “technical or monitoring
program reports”).

Certain of the mitigation measures that are identified in the FEIR (which are set forth
below) were not considered in the TCAO/DTR’s economic feasibility analysis, and have not
otherwise been subjected to the economic feasibility analysis required by Resolution 92-49. As
such, those measures are legally infeasible under CEQA, and they should be removed as
requirements from the FEIR.

Even if the Regional Board subjected these mitigation measures to the economic
feasibility analysis, such an analysis would reveal that these particular mitigation measures are
not economically feasible. These requirements are unnecessarily restrictive, and, if required,
would significantly increase construction costs without providing a commensurate increase in
environmental protection. Based on the evaluation of NASSCO’s expert Anchor QEA, these
mitigation measures could add approximately $12 million to the total project costs. (See Anchor
QEA Memorandum, attached to NASSCO’s October 19, 2011 Comments on the Final EIR
(hereinafter “Anchor Memorandum”), at 1.) Without a corresponding benefit to the environment,
such costs are economically infeasible under CEQA and cannot be required components of the
FEIR.

a. **Mitigation Measure 4.2.1: Automated Turbidity Monitoring**

As the FEIR currently reads, automatic systems must be used to monitor turbidity in the
vicinity of the dredge operation. Setting aside the fact that automated turbidity monitoring is not
the industry standard, such a requirement could actually adversely impact the project by imposing
unnecessary delays and additional costs. As more fully explained in the Anchor Memorandum,
averted turbidity monitoring, as opposed to manual turbidity monitoring, could lead to a high
proportion of false positive readings caused by ambient conditions and statistical “noise” created
by external factors, such as currents, weather, and vessel traffic. (Anchor Memo. at 2.) Manual
turbidity monitoring gives the contractor the ability to make adjustments for these external factors
as the project progresses in a more seamless manner, thereby preventing any unnecessary work
stoppage like that which is likely to result from automated turbidity monitoring. As noted in the Anchor Memorandum, dredging effectiveness is primarily driven by production rate. (Id.) Accordingly, measures that may result in unnecessary work stoppages, like automated turbidity monitoring, should be avoided, especially where environmental protectiveness is unlikely to be increased by the proposed measure.

b. Mitigation Measure 4.2.2: Dredging Best Management Practices

The current FEIR requires the contractor to exercise dredging best management practices (“BMPs”). In addition to not comporting with standard industry practice, the particular BMPs set forth below will slow down the rate of progress on the project, thereby increasing construction costs, without any increased benefit to the environment.

For example, the FEIR requires the use of a double silt curtain enclosure. As noted by Anchor, such a requirement would slow down the rate of progression on the project, while adding approximately $250,000 to $500,000 to its total cost. Such an expense is unnecessary when a single silt curtain enclosing the point of dredging, combined with implementation of other water quality management BMPs, would sufficiently ensure water quality standards are met. (Anchor Memo. at 3.)

The FEIR also requires the contractor to use specialized bucket additions and controls (e.g. closure switches and Clam Vision™). These requirements, however, would impose unnecessary implementation costs (approximately $250,000 to $500,000), as the contractor would have to purchase, install, maintain, calibrate and otherwise manage them. Moreover, use of such equipment and controls could add additional costs to the effort, as their use could result in ambiguous or misleading data that the contractor would have to address as the project progresses. As Anchor properly points out, the contractor can ensure compliance with the Section 401 Water Quality Certification, and still remain efficient, through use of other equipment that is not specifically identified in the FEIR. (Anchor Memo. at 3.)

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c. **Mitigation Measure 4.2.3: Complete Silt Curtain Enclosure**

   As discussed previously in 4.2.2 above, this measure repeats the overly restrictive approach by requiring redundant (inner and outer) silt curtains around the dredging area, imposing a significant, yet unnecessary additional cost. The use of an outer silt curtain is unnecessary and would have little to no resulting environmental benefit, especially considering the numerous other controls and monitoring already mandated during dredging.

d. **Mitigation Measure 4.2.7: Permanent Cap under Piers**

   The most troubling mitigation measure set forth in the FEIR is the apparent requirement that a permanent cap be placed below the piers. As described more fully in the Anchor Memorandum, the cap design requirement is exceedingly complex, and is likely to substantially increase the costs of construction by as much as $5 to $7 million. (Anchor Memo. at 4-5.) But not only is the contemplated cap expensive and complex, it could impose undue stresses on the foundations and soils that underlie the overwater marine structures. BAE Systems agrees with Anchor’s conclusion that a cover layer of sand or a sand-gravel mixture below the pier areas is a more appropriate mitigation measure. It would protect against unnecessary and unreasonable incidences of exposed contaminants, while facilitating the ongoing process of sedimentation. *(Id.)*

e. **Mitigation Measure 4.2.8: Hydraulic Placement of Sand**

   The FEIR contemplates that sand cover will be placed hydraulically. This measure, however, could impede otherwise qualified contractors who do not have such capabilities in the bidding process, when other methods of placing sand cover beneath overwater structures are available. This in turn would deprive the parties of the benefit of a competitive bidding process, resulting in a potential increase in costs of approximately $1.5 to $2 million. (Anchor Memo. at 5.) As such, this requirement should be removed. Any means which would provide for adequate distribution of sand under piers should be allowed.
2. **The Regional Board May Not Dictate Cleanup Methods.**

In addition to the fact that these mitigation measures have not been subjected to the economic feasibility analysis required by Resolution 92-49 and are not, in fact, economically feasible, these measures are also legally infeasible because they impermissibly dictate cleanup methods. The scope of the Regional Board’s authority is not unfettered. Water Code Section 13360 specifically states that “[n]o waste discharge requirement or other order of a regional board . . . shall specify the design, location, type of construction, or particular manner in which compliance may be had with that requirement, order, or decree, and the person so ordered shall be permitted to comply with the order in any lawful manner.” Put another way, the Regional Board has authority to issue orders that require particular results that it expects the cleanup to achieve (e.g., cleanup levels), but it is precluded from dictating the cleanup methods used to achieve those results. Despite the Regional Board’s lack of authority in this regard, it uses the FEIR to require the parties to undertake particular mitigation measures. Because the Regional Board cannot use CEQA mitigation to dictate cleanup measures, those measures are legally infeasible under CEQA and should be removed as requirements from the FEIR.

**B. Conclusion**

Because the mitigation measures imposed in the FEIR have not been subjected to the economic feasibility analysis under Resolution 92-49, and are not economically feasible, they are legally infeasible and should not be required elements of the FEIR. In addition, the mitigation measures are legally infeasible and should be removed from the FEIR because the Regional Board lacks authority to require the use of particular cleanup methods. For these reasons, BAE Systems respectfully requests that the Regional Board revise the FEIR and remove these mitigation measures as requirements.

Dated: October 19, 2011

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