BAE SYSTEMS San Diego Ship Repair Inc.’s Comments Regarding Revisions to TCAO and DTR Released by the Regional Board on February 13, 2012

Pursuant to the February 13, 2012 Notice of Public Hearing, and the relevant procedural orders, with respect to Tentative Cleanup and Abatement Order No. R9-2012-0024 (“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 the revisions to the TCAO and DTR released on February 13, 2012. According to the Notice of Public Hearing, these revisions to the TCAO and DTR are recommended by the panel of the Regional Water Quality Control Board, San Diego Region that conducted the evidentiary hearing of this matter in November, 2011.
I. COMMENTS REGARDING REVISIONS TO THE TCAO AND DTR MADE BY THE CLEANUP TEAM AND RELEASED ON FEBRUARY 13, 2012

BAE Systems provides certain comments regarding the revisions recommended by the panel that conducted the evidentiary hearing of this matter in November, 2011. The comments are organized to track the organization of topics set forth in the TCAO and DTR.

A. Revised Finding 5 - Removal of Star & Crescent Boat Co.

The revised TCAO "removes Star & Crescent Boat Company as a Discharger or Responsible Party pending a determination on the issue of successor liability in the federal district court litigation." (Notice of Public Hearing dated 2-13-12, at p. 2.) The revisions reflect the panel's recommendation that the Regional Board decline to decide the legal and factual questions necessary to determine whether Star & Crescent is the legal successor to San Diego Marine Construction Co., as asserted by several designated parties as well as the Cleanup Team. (TCAO, Finding 5; CUT 8/23/11 Response to Comments Report, Response 5.1.) The recommendation is expressly based in part on the panel's expectation that the Federal District Court will address that successor issue following issuance of a final order. (TCAO, Finding 5.)

This recommendation should be rejected for two reasons. First, it does not comport with the standard for naming responsible parties in cleanup and abatement orders. To be named a discharger, all that is required is "sufficient evidence" of responsibility. See The State Water Board Quality Enforcement Policy, No. 2002-0040 (Feb. 19, 2002.) "Generally speaking it is appropriate and responsible for a Regional Board to name all parties for which there is reasonable evidence of responsibility, even in cases of disputed responsibility." See, e.g., Exxon Co. USA et al, Order No. 85-7, at 11 (SWRCB, 1985). The "State Water Board requires that the Regional Boards name in a CAO all dischargers who contributed to a condition of pollution or nuisance to the maximum extent of the law." (CUT 8/23/11 Response to Comments Report, at 1-23). Here, several parties submitted extensive evidence and argument regarding the Star & Crescent successor issues, and the Cleanup Team after dutifully wading through all of it, concluded:

In light of the comments received by the Designated Parties, as set forth in detail below, the Cleanup Team continues to recommend that Star & Crescent be named as a discharger in the TCAO as the corporate successor of SDMCC and Invest Co.
BAE Systems submits that the Cleanup Team's judgment and recommendation in this regard should be followed by the Regional Board.

Second, as the Regional Board is well aware, the parties, including Star & Crescent are engaged in mediation with the aim of resolving all allocation issues and settling the matter in its entirety. Thus it is far from certain that the District Court will have the opportunity to, and in fact will, address the Star & Crescent successor issues. Under the current recommendation from the panel, without that finding the Regional Board will likely not have grounds to amend the order to add Star & Crescent as a discharger. To avoid these uncertainties, and protect the other named Dischargers from responsibility for Star & Crescent's share of liability, Star & Crescent should remain a named Discharger unless and until the District Court finds otherwise.

B. **Revised Finding 12; DTR Section 12.1**

TCAO Finding 12, and DTR Section 12.1, pertain to Clean Water Act, Section 303(d) Listing. The second sentence of TCAO Finding 12 has been revised to add the underscored portion of the following sentence:

> These pollutants are impairing the aquatic life, aquatic-dependent wildlife, and human health beneficial uses designated for San Diego Bay and are causing the Bay’s narrative water quality objective for toxicity to not be attained.

(TCAO Finding 12). Similarly, DTR § 12.1 has been revised to add the following new statement:

> These pollutants are impairing the aquatic life, aquatic-dependent wildlife, and human health beneficial uses designated for San Diego Bay, and are causing the Bay’s narrative water quality objective for toxicity to not be attained.

(DTR § 12.1.)

BAE Systems submits that these additions are inappropriate and not supported. The TCAO and DTR are based primarily upon the results of the detailed sediment investigation BAE and NASSCO conducted at the Site in 2001-2002 in accordance with guidelines established by the Regional Board. (See TCAO, Finding 13.) The results of this highly detailed and exhaustive investigation found that risks to human health and aquatic-dependent wildlife at the Site "are well within acceptable levels," that certain risks are attributable to pesticides rather than any of the primary COCs at issue, and concluded that active dredging would provide minimal incremental
benefit at a very high cost. (2003 Exponent Report, at 19-1, 19-13.) And yet the current TCAO and DTR continue to find impairment of aquatic life, aquatic-dependent wildlife, and human health beneficial uses, and provide for extensive active dredging as the primary remedy. To reach these conclusions, the TCAO and DTR rely upon overly protective and unsupportable assumptions. These issues have been thoroughly set forth by Designated Parties' expert reports, briefing and evidence, and largely have been acknowledged by the Cleanup Team. The expert testimony and evidence presented at the November evidentiary hearing by experts Dreas Nielsen, Scott Becker, Tom Ginn, and Brent Finley, further established and confirmed the lack of impairment.

Thus, BAE Systems submits it is inappropriate and unsupported to add further new language to the TCAO and DTR asserting impairment to the identified beneficial uses and the alleged causing of the Bay’s narrative water quality objective for toxicity to not be attained.

C. Revised TCAO Finding 32

The revised TCAO proposes to delete the sentence "Cleanup of the remedial footprint will restore any injury, destruction or loss of natural resources." BAE submits that the sentence was appropriate, supported, and should remain in the TCAO. It was included in several prior iterations of the TCAO going back several years. The parties submitted mountains of written comments and expert reports over the last two years, and among those comments and reports, only the Environmental Parties took issue with that statement. (See Cleanup Team's 8/23/11 Response to Comments Report, at 1-21.) BAE and NASSCO persuasively rebutted that alleged issue, arguing that Regional Board is empowered by the Water Code and relevant law to evaluate whether cleanup of the instant Remedial Footprint will improve environmental conditions such that natural resources will benefit from the cleanup. (Id.) Accordingly it is appropriate and reasonable for the Regional Board to consider whether the cleanup will restore any injury, destruction or loss of natural resources. (Id.)

The Cleanup Team, after assessing, analyzing and responding to all such comments and reports, issued its Response to Comments Report on August 23, 2011, which does not find support for the assertion of the Environmental Parties that the statement at issue should be removed from the TCAO.
The TCAO and the DTR discuss the general concept of restoration of natural resources in the context of the San Diego Water Board's duty under Resolution No. 92-49 to ensure that any alternative cleanup levels above background must not unreasonably impact, and must reasonably protect, beneficial uses. The Cleanup Team expresses no opinion with regard to EHC's and Coastkeeper's statement that the San Diego Water Board lacks the authority to "conduct natural resource damage assessments" since the TCAO and DTR do not undertake a natural resource damage assessment in this case.

(CUT 8/23/11 Response to Comments Report, at No. 1.4.)

The panel conducted an evidentiary hearing of this matter in November, 2011. However this issue was not raised, and no evidence regarding the natural resources issue was presented by any party.

On January 12, 2012, long after the deadline for submission of written comments, and two months after the evidentiary hearing took place, the Department of the Interior sent an untimely written comment letter to Senior Staff Counsel Catherine Hagan requesting that the instant sentence be deleted from the TCAO.

BAE reiterates its previous written arguments and contention that the instant sentence is appropriate and reasonable for inclusion in this TCAO in the context in which it was previously made – under Resolution 92-49. The statement existed in the prior versions of the TCAO, the Cleanup Team has not recommended or proposed removing that statement, and no evidence or argument was heard by the panel regarding this issue.

D. Revised DTR Page 33-2; TCAO Directive G

The hearing panel's recommended revisions to the TCAO and DTR would "(5) clarify that SW29 not proposed to be dredged may be addressed by a separate regulatory action by the San Diego Water Board." (Notice of Public Hearing dated 2-13-12, at p. 2.) The revised DTR states:

While polygon SW29 is considered part of the Shipyard Sediment Site for purposes of the CAO, only a portion of SW29 is included in the dredge area. The San Diego Water Board may address the undredged portion of SW29 in a separate regulatory proceeding based upon available information even if compliance with the CAO is achieved in the overall remedial footprint, as indicated in Provision G of this CAO.

(DTR, at 33-2.) Similarly, revised CAO Directive G states that "[t]he portion of polygon SW29
not in the dredge footprint may be addressed by the San Diego Water Board under a separate future regulatory action based upon available information." (TCAO, Directive G.)

BAE submits that if the remainder of SW29 meets the criteria established by the Regional Board for remediation, it should be included within the remedial footprint in the instant TCAO proceeding such that all of BAE’s leasehold would be subject to the same remedial standards.

The Board is in possession of substantial data regarding SW29 conditions and contaminant levels. If the data is insufficient to make that determination, additional data should be obtained. The instant order is near finalization and the dischargers will proceed with remediation thereafter. If the available information supports remediation of polygon SW29, it should be done contemporaneous with the cleanup of the currently-defined Remedial Footprint, rather than put off into the future only to be revisited by the Board and the parties in a separate regulatory proceeding. Proceeding in the manner currently contemplated would waste significant time and resources of the Board and the parties.

E. Revised Finding 41; Directive H-1

With respect to the cost recovery provisions, the Cleanup Team previously agreed that the parties' "request for documentation of the costs sought for reimbursement is reasonable." (CUT 11/2/11 Responses to Selected Written Comments, at 3.) The Cleanup Team has provided such documentation for certain past unreimbursed costs. BAE Systems requests that the TCAO be revised to reflect this agreement by the Cleanup Team, and order that such documentation must be provided for all costs for which reimbursement is sought.

F. Preservation of All Prior Objections, Argument and Evidence

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, as well as any and all argument and evidence submitted into the record in this matter.

Dated: February 24, 2012

By /s/ Michael S. Tracy

MICHAEL S. TRACY
Attorneys for BAE Systems San Diego Ship Repair Inc.
IN RE TENTATIVE CLEANUP AND ABATEMENT ORDER NO. R9-2012-0024 (formerly R9-2011-0001)

PROOF OF SERVICE

Presiding Officer: Grant Destache
I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is DLA Piper LLP (US), 401 B Street, Suite 1700, San Diego, California 92101-4297. On February 24, 2012, I served the within documents:

BAE SYSTEMS SAN DIEGO SHIP REPAIR INC.'S COMMENTS REGARDING REVISIONS TO TCAO AND DTR RELEASED BY THE REGIONAL BOARD ON FEBRUARY 13, 2012

☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

☐ by placing the document(s) listed above in a sealed Federal Express envelope for overnight delivery addressed as set forth below.

☐ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Diego, California addressed as set forth below.

☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

☒ by electronic mail service. I caused all of the pages of the above-entitled document(s) to be electronically served on the parties listed below.

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on February 24, 2012, at San Diego, California.

[Signature]

TAMMY KING
Service List
In re Shipyard Sediment Site Cleanup Project and
Tentative Cleanup & Abatement Order No. R9-2012-0024

Kelly E. Richardson, Esq.
Jeff Carlin, Esq.
Ryan Waterman, Esq.
Latham & Watkins LLP
600 W. Broadway, Suite 1800
San Diego, CA 92101-3375
kelly.richardson@lw.com
jeff.carlin@lw.com
ryan.waterman@lw.com
T: (619) 236-1234
F: (619) 696-7419
Counsel for NASSCO

Michael McDonough, Esq.
Jim Dragna, Esq.
Bingham McCutchen LLP
355 South Grand Avenue, Suite 4400
Los Angeles, CA 90071-3106
michael.mcdonough@bingham.com
jim.dragna@bingham.com
T: (213) 680-6600
F: (213) 680-6499
Counsel for BP West Coast Products LLC

Brian Ledger, Esq.
Kristen Reyna, Esq.
Gordon & Rees LLP
101 West Broadway, Suite 1600
San Diego, CA 92101
bledger@gordonrees.com
kreyna@gordonrees.com
T: (619) 230-7729
F: (619) 696-7124
Counsel for City of San Diego

Christopher McNevin, Esq.
Brian Wall, Esq.
Pillsbury Winthrop Shaw Pittman LLP
725 South Figueroa Street, Suite 2800
Los Angeles, CA 90017-5406
chrismcnevin@pillsburylaw.com
bwall@chevron.com
T: (213) 488-7507
F: (213) 629-1033
Counsel for Chevron USA, Inc.

Christian Carrigan, Esq.
Senior Staff Counsel
Office of Enforcement, State Water Resources
Control Board
P.O. Box 100
Sacramento, CA 95812-0100
ccarrigan@waterboards.ca.gov
T: (916) 322-3626
F: (916) 341-5896
Counsel for The Cleanup Team

Marco A. Gonzalez, Esq.
Coast Law Group LLP
1140 South Coast Highway 101
Encinitas, California 92024
T: (760) 942-8505 ext 102
F: (760) 942-8515
marco@coastlawgroup.com
Counsel for Environmental Health Coalition &
San Diego Coastkeeper

Jill Tracy, Esq.
David Barrett, Esq.
Senior Environmental Counsel
Sempra Energy
101 Ash Street
San Diego, CA 92101
jtracy@semprautilities.com
dbarrett@sempra.com
T: (619) 699-5112
F: (619) 699-5189
Counsel for San Diego Gas & Electric

Leslie Fitzgerald, Esq.
Deputy Port Attorney
San Diego Unified Port District
PO Box 120488
San Diego, CA 92112
lfitzgerald@portofsandiego.org
T: (619) 686-7224
F: (619) 686-6444
Counsel for San Diego Unified Port District
Service List

In re Shipyard Sediment Site Cleanup Project and
Tentative Cleanup & Abatement Order No. R9-2012-0024

Laura Hunter, Esq.
Environmental Health Coalition
401 Mile of Cars Way, Suite 310
National City, CA 91950
laurah@environmentalhealth.org
T: (619) 474-0220
F: (619) 474-1210
Counsel for Environmental Health Coalition

David E. Silverstein, Esq.
U.S. Navy
SW Div, Naval Facilities Engineering Command
1220 Pacific Hwy
San Diego, CA 92132-5189
David.silverstein@navy.mil
T: (619) 532-2265
F: (619) 532-1663
Counsel for US Navy

James Handmacher, Esq.
P.O. Box 1533
Tacoma, WA 98401
jvhandmacher@bvmm.com
T: (253) 627-8131
F: (253) 272-4338
Counsel for Marine Construction & Design Co. and Campbell Industries, Inc.

Sharon Cloward
Executive Director
San Diego Port Tenants Association
2390 Shelter Island Drive, Suite 210
San Diego, CA 92106
sharon@sdpta.com
T: (619) 226-6546
F: (619) 226-6557
Counsel for San Diego Port Tenants Association

Roslyn Tobe, Esq.
Senior Environmental Litigation Attorney
U.S. Navy
720 Kennon Street #36, Room 233
Washington Navy Yard, DC 20374-5013
roslyn.tobe@navy.mil
T: (202) 685-7026
F: (202) 685-7036
Counsel for U.S. Navy

Gabe Solmer, Esq.
San Diego Coastkeeper
2820 Roosevelt Street, Suite 200A
San Diego, CA 92106-6146
gabe@sdcoastkeeper.org
jill@sdcoastkeeper.org
T: (619) 758-7743, ext. 109
F: (619) 223-3676
Counsel for San Diego Coastkeeper

William D. Brown, Esq.
Wentzlee Botha, Esq.
Brown & Winters
120 Birmingham Drive, Suite 110
Cardiff By The Sea, CA 92007
bbrown@brownandwinters.com
wbotha@brownandwinters.com
T: (760) 633-4485
F: (760) 633-4427
Counsel for San Diego Unified Port District

Sandi Nichols, Esq.
Allen Matkins
3 Embarcadero Center, 12th Floor
San Francisco, CA 94111
snichols@allenmatkins.com
T: (415) 837-1515
F: (415) 837-1516
Counsel for San Diego Unified Port District
Service List
In re Shipyard Sediment Site Cleanup Project and
Tentative Cleanup & Abatement Order No. R9-2012-0024

C. Scott Spear, Esq.
U.S. Department of Justice,
Environmental Defense Section
P.O. Box 23986
Washington, DC 20026-3986
Scott.Spear@usdoj.gov
T: (202) 305-1593
F: (202) 514-8865
Counsel for US Navy

Sarah Brite Evans, Esq.
Schwartz Semerdjian Ballard & Cauley LLP
101 W Broadway, Suite 810
San Diego, CA 92101
sarah@ssbclaw.com
T: (619) 236-8821
F: (619) 236-8827
Counsel for Star & Crescent Boat Company

Catherine Hagan, Esq.
Senior Staff Counsel
California RWQCB, San Diego Region
9174 Sky Park Ct. Ste 100
San Diego CA 92123-4340
chagan@waterboards.ca.gov
T: (858) 467-2958
F: (858) 571-6972
Counsel for Regional Water Quality Control Board

Suzanne Varco, Esq.
Opper & Varco LLP
225 Broadway, Suite 1900
San Diego, CA 92101
svarco@envirolawyer.com
T: (619) 231-5858
F: (619) 231-5853
Counsel for Star & Crescent Boat Company

Frank T. Melbourn, P.E.
Water Resource Control Engineer
California RWQCB, San Diego Region
9174 Sky Park Ct., Ste. 100
San Diego CA 92123-4340
fmelbourn@waterboards.ca.gov
T: (858) 467-2973