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14 CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

15 SAN DIEGO REGION

16 IN RE TENTATIVE CLEANUP AND
17 ABATEMENT ORDER NO. R9-2012-
18 0024 (formerly R9-2011-0001)

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

24 Presiding Officer: Grant Destache

25 Pursuant to the February 13, 2012 Notice of Public Hearing, and the relevant procedural
26 orders, with respect to Tentative Cleanup and Abatement Order No. R9-2012-0024 (“TCAO”)
27 and its associated Draft Technical Report (“DTR”) for the San Diego Bay Shipyard Sediment
28 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.

1 **I. COMMENTS REGARDING REVISIONS TO THE TCAO AND DTR MADE BY**
2 **THE CLEANUP TEAM AND RELEASED ON FEBRUARY 13, 2012**

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

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

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

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

27 In light of the comments received by the Designated Parties, as set
28 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.

1 (*Id.* at 5-2.) BAE Systems submits that the Cleanup Team's judgment and recommendation in
2 this regard should be followed by the Regional Board.

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

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

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

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

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

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

22 (DTR § 12.1.)

23 BAE Systems submits that these additions are inappropriate and not supported. The
24 TCAO and DTR are based primarily upon the results of the detailed sediment investigation BAE
25 and NASSCO conducted at the Site in 2001-2002 in accordance with guidelines established by
26 the Regional Board. (*See* TCAO, Finding 13.) The results of this highly detailed and exhaustive
27 investigation found that risks to human health and aquatic-dependent wildlife at the Site "are well
28 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

1 benefit at a very high cost. (2003 Exponent Report, at 19-1, 19-13.) And yet the current TCAO
2 and DTR continue find impairment of aquatic life, aquatic-dependent wildlife, and human health
3 beneficial uses, and provide for extensive active dredging as the primary remedy. To reach these
4 conclusions, the TCAO and DTR rely upon overly protective and unsupportable assumptions.
5 These issues have been thoroughly set forth by Designated Parties' expert reports, briefing and
6 evidence, and largely have been acknowledged by the Cleanup Team. The expert testimony and
7 evidence presented at the November evidentiary hearing by experts Dreas Nielsen, Scott Becker,
8 Tom Ginn, and Brent Finley, further established and confirmed the lack of impairment.

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

12 **C. Revised TCAO Finding 32**

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

25 The Cleanup Team, after assessing, analyzing and responding to all such comments and
26 reports, issued its Response to Comments Report on August 23, 2011, which does not find
27 support for the assertion of the Environmental Parties that the statement at issue should be
28 removed from the TCAO:

1 The TCAO and the DTR discuss the general concept of restoration
2 of natural resources in the context of the San Diego Water Board's
3 duty under Resolution No. 92-49 to ensure that any alternative
4 cleanup levels above background must not unreasonably impact,
5 and must reasonably protect, beneficial uses. The Cleanup Team
6 expresses no opinion with regard to EHC's and Coastkeeper's
7 statement that the San Diego Water Board lacks the authority to
8 "conduct natural resource damage assessments" since the TCAO
9 and DTR do not undertake a natural resource damage assessment in
10 this case.

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

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

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

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

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

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

28 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 un-
dredged 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

1 not in the dredge footprint may be addressed by the San Diego Water Board under a separate
2 future regulatory action based upon available information." (TCAO, Directive G.)

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

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

14 **E. Revised Finding 41; Directive H-1**

15 With respect to the cost recovery provisions, the Cleanup Team previously agreed that the
16 parties' "request for documentation of the costs sought for reimbursement is reasonable." (CUT
17 11/2/11 Responses to Selected Written Comments, at 3.) The Cleanup Team has provided such
18 documentation for certain past unreimbursed costs. BAE Systems requests that the TCAO be
19 revised to reflect this agreement by the Cleanup Team, and order that such documentation must
20 be provided for all costs for which reimbursement is sought.

21 **F. Preservation of All Prior Objections, Argument and Evidence**

22 BAE Systems expressly preserves, and does not waive, any and all objections to those
23 technical issues, evidence or legal argument to which BAE Systems does not address herein, as
24 well as any and all argument and evidence submitted into the record in this matter.

25 Dated: February 24, 2012 DLA PIPER LLP (US)

26 By /s/ Michael S. Tracy

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12 IN RE TENTATIVE CLEANUP AND
13 ABATEMENT ORDER NO. R9-2012-
0024 (formerly R9-2011-0001)

PROOF OF SERVICE

14
15 Presiding Officer: Grant Destache
16

1 I am a resident of the State of California, over the age of eighteen years, and not a party to
2 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:

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

- 6 by transmitting via facsimile the document(s) listed above to the fax number(s) set
7 forth below on this date before 5:00 p.m.
- 8 by placing the document(s) listed above in a sealed Federal Express envelope for
9 overnight delivery addressed as set forth below.
- 10 by placing the document(s) listed above in a sealed envelope with postage thereon
11 fully prepaid, in the United States mail at San Diego, California addressed as set
12 forth below.
- 13 by personally delivering the document(s) listed above to the person(s) at the
14 address(es) set forth below.
- 15 by electronic mail service. I caused all of the pages of the above-entitled
16 document(s) to be electronically served on the parties listed below.

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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.


TAMMY KING

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