



EDMUND G. BROWN JR.  
GOVERNOR

MATTHEW RODRIGUEZ  
SECRETARY FOR  
ENVIRONMENTAL PROTECTION

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

**TO:** James G. Smith  
Assistant Executive Officer  
Shipyards Sediment Site Advisory Team  
**San Diego Water Board**

In reply refer to / attn:  
**T1000003580:VRodriguez**

**FROM:** David T. Barker  
Supervising WRC Engineer  
Shipyards Sediment Site Cleanup Team  
**San Diego Water Board**

**DATE:** November 21, 2012

**SUBJECT: SAN DIEGO SHIPYARD SEDIMENT SITE CLEANUP, CEQA NOTICE REGARDING REMEDIAL ACTION PLAN**

On March 14, 2012, the San Diego Water Board approved Cleanup and Abatement Order No. R9-2012-0024 (CAO) and certified a Final Program Environmental Impact Report (PEIR), pursuant to the California Environmental Quality Act, Public Resources Code section 21000, *et seq.* (CEQA). The San Diego Water Board also adopted CEQA Findings of Fact and a Mitigation and Monitoring Reporting Program.

Pursuant to the CAO, the named dischargers prepared and submitted a Remedial Action Plan (RAP) generally describing implementation of remedial activities at the Shipyards Sediment Site. On October 31, 2012, the Cleanup Team submitted a status report to the Advisory Team regarding the RAP and associated CEQA compliance requirements, indicating consensus on the RAP among all designated parties with one exception. On November 6, 2012, the Advisory Team responded with a request that the Cleanup Team "submit a report on the adequacy of the [PEIR] in addressing potential environmental impacts and mitigation identified" in the RAP.

This memorandum responds to the Advisory Team's November 6 request, and provides notice that the Cleanup Team has determined that the RAP is within the scope of the PEIR, and that the PEIR adequately describes the RAP for the purposes of CEQA. CEQA Guidelines § 15168(e). As detailed below, implementation of the RAP will not cause environmental effects that were not analyzed in the PEIR, or require any new mitigation measures. CEQA Guidelines § 15168(c). Accordingly, the San Diego Water Board should rely on the PEIR to provide CEQA compliance for approval of the RAP, and no further CEQA document or review is required at this time. *See id.*

This letter also provides substantial evidence supporting the Cleanup Team's conclusion that a supplemental or subsequent EIR (SEIR) or other CEQA document is not required for approval of the RAP. See CEQA Guidelines § 15164(e).

Please note that additional discretionary approvals will be required to implement the CAO. Each of these approvals will be reviewed by the San Diego Water Board for the purposes of CEQA compliance, and a separate determination will be made as to whether or not the potentially significant environmental impacts have been sufficiently identified, analyzed and mitigated, where feasible, under the PEIR.

#### **I. AFTER CERTIFICATION OF A PROGRAM EIR, FURTHER REVIEW IS NOT REQUIRED UNLESS NEW ENVIRONMENTAL IMPACTS WILL ARISE**

A program EIR may be used to provide CEQA clearance for subsequent discretionary approvals if (1) the activity is within the scope of the analysis in the program EIR, (2) no environmental effects not examined in the program EIR will occur, and (3) no new mitigation measures are required. CEQA Guidelines § 15168(c)(1)-(2). If these requirements are met, "the agency may approve the activity as being within the scope of the project covered by the program EIR, and no new environmental document would be required." CEQA Guidelines § 15168(c)(2).

In making this determination, the agency applies the standard that governs whether a SEIR must be prepared for discretionary approvals arising after certification of an EIR. CEQA Guidelines § 15168(c)(2). A SEIR is not required unless (a) substantial changes are proposed in the project which will require major revisions in the EIR, (b) substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions to the EIR, or (c) new information, which was not known and could not have been known at the time the EIR was certified, becomes available. CEQA Guidelines § 15162; see also Pub. Res. Code § 21666. Further, the "substantial changes" or "new information" must result in a new significant environmental impact or a substantial increase in the severity of a previously identified significant impact. CEQA Guidelines § 15162.

An agency's determination that an activity is within the scope of the analysis in a program EIR is reviewed under the deferential "substantial evidence" test. *Citizens for Responsible Equitable Environmental Development v. City of San Diego Redevelopment Agency*, 134 Cal. App. 4th 598, 610-11 (2005) ("The reviewing court upholds an agency's decision not to require a [SEIR] if the administrative record as a whole contains substantial evidence to support the determination that the changes in the project or its circumstances were not so substantial as to require major modifications of the EIR. This deferential standard is a reflection of the fact that in-depth review has already occurred.") (citations omitted). "To hold that a project-specific EIR must be prepared for all activities proposed after the certification of the program EIR, even where the subsequent activity is within the scope of the project described in the program EIR, would be directly contrary to one of the essential purposes of program EIR's, i.e., to streamline environmental review of projects within the scope of a previously completed program EIR." *Id.* at 615.

If a program EIR addresses the impacts of any subsequent approvals, the agency may simply provide notice that the approved activities are within the scope of the program EIR, and that

the program EIR adequately describes the activity for CEQA purposes. CEQA Guidelines § 15168(e).

## **II. THE RAP DOES NOT TRIGGER FURTHER CEQA REVIEW**

The PEIR explained that it “may be used as an environmental clearance baseline against which to evaluate future site-specific implementation approvals and permits for implementation of the [CAO],” and that any future approvals will be reviewed “to determine whether [the PEIR’s] analysis adequately addresses the environmental issues raised by the proposed approval.” Draft PEIR, at 2-5.

### **A. The RAP Does Not Identify Any Changes to the Project**

To determine whether further review is necessary, the Cleanup Team first compared the RAP against the PEIR to determine whether there is any new information in the RAP that differs from the Project Description in the PEIR, including whether the RAP proposed any changes to the remediation. The Cleanup Team concluded that the RAP is consistent with the PEIR, as well as the CAO and corresponding Technical Report, and the RAP does not identify any “changes” to the Project or its circumstances or any “new information” that could trigger the need for the SEIR.

The Cleanup Team also evaluated whether any of the following specific issues could necessitate further CEQA review: (1) the selection of a staging area for the remediation, (2) the lack of certainty regarding the PEIR’s assumption that 15 percent of the dredged sediment will be “hazardous,” (3) the potential for new eelgrass impacts from the dredging, and (4) potential impacts from dredging that takes place during the least tern nesting season. For the reasons detailed below, none of these issues requires supplemental CEQA review.

### **B. Selection of a Staging Area**

The PEIR evaluated five potential staging sites for the dewatering and treatment of the dredged sediment, recognizing that the specific site would not be chosen until later in the process: Staging Area 1 (10th Avenue Marine Terminal/Adjacent Parking), Staging Area 2 (Commercial Berthing Pier/Parking Lots Adjacent to Coronado Bridge), Staging Area 3 (SDG&E Leasehold/BAE Systems Leasehold/BAE/NASSCO parking lots), Staging Area 4 (NASSCO/NASSCO parking and parking lot north of Harbor Drive), and Staging Area 5 (24th Street Marine Terminal). See Draft PEIR Figures 3-2—3-8. Because the PEIR analyzed the environmental effects of each of these locations, and imposed mitigation measures to address identified impacts, the PEIR is sufficient for any one of the five proposed sites.

The RAP indicates that the “currently proposed” staging area is located immediately north of the North Shipyard Area, on Port Tidelands property that is under sublease by SDG&E. RAP, 20; Design Criteria Report, 19. This location is within Staging Area 3 analyzed in the PEIR. The RAP has not identified any “substantial changes” or “new information” with respect to the proposed staging area that would result in new environmental impacts or an increase in the severity of previously identified impacts. Hence, no further CEQA review is required.

### C. Lack of Certainty Regarding PEIR's Assumption That 15 Percent of the Sediment Will Be "Hazardous"

The PEIR assumed that up to 15 percent of the dredged sediment will require transport to a hazardous waste facility (most likely in Kings County, California, near Bakersfield), although it will not be known whether the sediment is hazardous until the sediment is dredged and tested. Draft PEIR, 4.1.12. The non-hazardous sediment will be transported to the Otay Landfill, approximately 15 miles southeast of the Shipyard Sediment Site.

At present, there is no "new information" or "substantial changes" to the Project affecting this assumption, the accuracy of which will not be determined until the necessary permits have been issued, dredging takes place, and the sediment is tested. Moreover, the San Diego Water Board "can make reasonable assumptions based on substantial evidence . . . without guaranteeing those assumptions will remain true." *Env't'l Council of Sacramento v. City of Sacramento*, 142 Cal. App. 4th 1018, 1036 (2006) (citing Pub. Res. Code § 21080(e)).

Regardless of this assumption, mitigation measures were adopted to address potential impacts from hazardous sediment. See, e.g., Mitigation Measures 4.3.1 (Secondary Containment), 4.3.2 (Dredging Management Plan), 4.3.3 (Contingency Plan), 4.3.4 (Health and Safety Plan), 4.3.5 (Communication Plan), 4.3.6 (Sediment Management Plan), 4.3.7 (Hazardous Materials Transportation Plan), and 4.3.8 (Traffic Control Plan). CEQA Findings of Fact, 24-30. The San Diego Water Board found that these measures will ensure that potential impacts from hazardous materials during dredge, transport and disposal activities are reduced to less than significant levels. *Id.* at 30. Accordingly, further review is not required.

### D. Potential For New Eelgrass Impacts

The PEIR analyzed potential impacts to eelgrass that could occur from sediment dredging, and several mitigation measures were imposed (Mitigation Measures 4.5.1, 4.5.3 and 4.5.4). CEQA Findings of Fact, 31-34. The San Diego Water Board found that these measures will ensure that eelgrass impacts will be reduced to less than significant levels. CEQA Findings of Fact, 34.

These mitigation measures require, among other things, a pre-construction eelgrass habitat mapping survey to take place within 120 days of the proposed start dates for the dredging in accordance with the Southern California Eelgrass Mitigation Policy ("SCEMP"), to document the amount of eelgrass likely to be affected by dredging, with the survey results integrated into a Final Eelgrass Mitigation Plan used to calculate the amount of eelgrass to be mitigated. The final Plan must be approved by the San Diego Water Board and National Marine Fisheries Service. Further, post-dredging eelgrass surveys must be completed within 30 days of each dredging episode in accordance with the SCEMP, and the mitigation includes detailed success criteria for the eelgrass mitigation site(s). Other measures require the Project's marine biologist to meet with construction crews prior to and during dredging, and include restrictions on Project-related barges and vessels to ensure eelgrass beds are not impacted through grounding, propeller damage or other activities that could disturb the seafloor.

Because the PEIR fully assessed eelgrass impacts and adopted mitigation measures regarding same, there is no basis for further CEQA review. No “substantial changes” to the manner of dredging identified in the CAO and studied in the PEIR (or the circumstances surrounding the dredging) have arisen, and there has not been any new information “that was not known and could not have been known” when the PEIR was certified. Pub. Res. Code § 21166(a)-(c); CEQA Guidelines § 15162.

#### **E. Potential Dredging During the California Least Tern Nesting Season**

The PEIR evaluated impacts to the California least tern under a scenario where dredging occurs only outside of the breeding season, as well as a second scenario with a continuous dredging cycle including during the nesting season. Draft PEIR, 4.5-51 and 52.

The San Diego Water Board found that potential impacts to the least tern would be less than significant if dredging does not take place during nesting season. CEQA Findings of Fact, 45. If dredging occurs during the nesting season, the San Diego Water Board found that impacts could potentially occur. However, the likelihood of impacts during nesting season would be minimized due to the fact that the Project site represents a very small area of San Diego Bay, and only small areas of the site are affected at any one time during the dredge schedule, leaving other open water areas in the Bay for foraging. *Id.* The site also presents a low abundance of prey species and limited foraging habitat. *Id.* The least tern may avoid the immediate construction area based on the lack of foraging habitat and the fact that no known nests have been recorded at the site. *Id.*

The San Diego Water Board also imposed Mitigation Measure 4.5.9, which requires (for either scenario) a qualified biologist familiar with the least tern and other special-status seabirds and waterfowl to be present on site to assess the roosting and foraging behavior of these species at the site and staging areas immediately prior to and during the initiation of dredging and clean sand cover placement activities. *Id.* at 47. The biologist must also thereafter monitor the activities at least once per week (or more often if required by resource agencies) to adequately assess whether substantial adverse impacts to these species are occurring. *Id.* If the monitor detects an imminent threat to the least tern or other special-status species, the monitor is authorized to redirect or halt construction activities if deemed necessary. *Id.* The San Diego Water Board found that Mitigation Measure 4.5.9 reduces potential impacts to species to less than significant levels. *Id.*

Because the PEIR studied potential impacts to the least tern if dredging occurs during the nesting season, and measures to mitigate potential impacts to a level of insignificance were imposed, no further review is required.

For the reasons detailed above, the Cleanup Team concluded that the PEIR provides CEQA clearance for the San Diego Water Board to approve the RAP.

In the subject line of any response, please include the reference number T1000000:VRodriguez. For questions or comments, please contact me by phone at 858-467-2989, or by email at [DBarker@waterboards.ca.gov](mailto:DBarker@waterboards.ca.gov).

cc via email:

National Steel and Shipbuilding Company  
c/o Kelly Richardson, Esq.  
[kelly.richardson@lw.com](mailto:kelly.richardson@lw.com)

BAE Systems San Diego Ship Repair, Inc.  
c/o Mike Tracy, Esq.  
[mike.tracy@dlapiper.com](mailto:mike.tracy@dlapiper.com)

San Diego Unified Port District  
c/o Ellen Gross  
[egross@portofsandiego.org](mailto:egross@portofsandiego.org)

City of San Diego  
c/o Brian Ledger, Esq.  
[bledger@gordonrees.com](mailto:bledger@gordonrees.com)

Campbell Industries  
c/o James Handmacher  
[jvhandmacher@bvm.com](mailto:jvhandmacher@bvm.com)

San Diego Gas and Electric  
Sempra Energy  
c/o Jill Tracy, Esq.  
[jtracy@semprautilities.com](mailto:jtracy@semprautilities.com)

United States Navy  
SW Div., Naval Facilities Engineering Command  
c/o David Silverstein, Esq.  
[david.silverstein@navy.mil](mailto:david.silverstein@navy.mil)

San Diego Coastkeeper  
c/o Jill Witkowski  
[jill@coastkeeper.org](mailto:jill@coastkeeper.org)

San Diego Water Board  
David Gibson, [dgibson@waterboards.ca.gov](mailto:dgibson@waterboards.ca.gov)  
Julie Chan, [jchan@waterboards.ca.gov](mailto:jchan@waterboards.ca.gov)  
Vicente Rodriguez, [vrodriguez@waterboards.ca.gov](mailto:vrodriguez@waterboards.ca.gov)

State Water Resources Control Board  
Christian Carrigan, Esq., [CCarrigan@waterboards.ca.gov](mailto:CCarrigan@waterboards.ca.gov)  
Catherine Hagan, Esq. [change@waterboards.ca.gov](mailto:change@waterboards.ca.gov)