

CERTIFICATION

STATE OF CALIFORNIA)
)
COUNTY OF SAN DIEGO)

I, the undersigned, declare:

That I am Senior Counsel for San Diego Gas & Electric Company, a Designated Party in the within action.

I hereby certify that true and accurate copies of the following documents were electronically submitted to all Designated Parties in this matter:

1. SAN DIEGO GAS & ELECTRIC COMPANY'S SUR-REPLY RE: BAE'S RESPONSE TO SDG&E'S REQUEST FOR RESCINDMENT OF DISCHARGER DESIGNATION AND COMMENTS ON TENTATIVE CLEANUP AND ABATEMENT ORDER NO. R9-2011-0001 AND DRAFT TECHNICAL REPORT;
2. SAN DIEGO GAS & ELECTRIC COMPANY'S OPPOSITION TO BAE SYSTEMS SAN DIEGO SHIP REPAIR INC.'S MOTION TO EXCLUDE ENVIRON INTERNATIONAL CORP.'S MAY 26, 2011 TECHNICAL COMMENTS REGARDING TENTATIVE CLEANUP AND ABATEMENT ORDER NO. R9-2011-001.

Executed on this 12th day of July 2011, at San Diego, California.



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CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION

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**SAN DIEGO GAS & ELECTRIC
COMPANY'S SUR-REPLY RE: BAE'S
RESPONSE TO SDG&E'S REQUEST FOR
RESCINDMENT OF DISCHARGER
DESIGNATION AND COMMENTS ON
TENTATIVE CLEANUP AND
ABATEMENT ORDER NO. R9-2011-0001
AND DRAFT TECHNICAL REPORT**

1 On behalf of San Diego Gas & Electric (“SDG&E”), we respectfully submit the following
2 additional comments in connection with San Diego Shipyard Sediment Site Tentative Cleanup and
3 Abatement Order No. R9-2011-0001 (“TCAO”) and Draft Technical Report (“DTR”), prepared by
4 the California Regional Water Quality Control Board, San Diego Region’s (“Regional Board”) Cleanup Team. SDG&E submits the following comments to address the response of BAE Systems
5 San Diego Ship Repair Inc. (“BAE Systems”)¹ to SDG&E’s Request for Rescindment of Discharger
6 Status and Comments on TCAO (“Request for Rescindment”), which was submitted to the Regional
7 Board on May 23, 2011.
8

9 **I. INTRODUCTION**

10 On May 23, 2011, SDG&E submitted its Request for Rescindment, premised largely on the
11 fact that the Regional Board’s Cleanup Team failed to identify any evidence of discharges from
12 SDG&E’s former Silver Gate Power Plant that caused or contributed to a condition of nuisance or
13 pollution at the Site, much less evidence that is credible, reasonable, and substantial. As noted in
14 SDG&E’s Request for Rescindment, the Regional Board generally alleges that SDG&E caused or
15 permitted waste discharges from the Silver Gate Power Plant into San Diego Bay and “created, or
16 threatened to create, a condition of pollution or nuisance.” DTR § 9, at 9-1. Based on these allega-
17 tions, which SDG&E denies in their entirety, the Regional Board designated SDG&E as a “Dis-
18 charger” in the TCAO. *Id.* However, as explained in detail in the Request for Rescindment, this
19 designation is based on wholly unsubstantiated and speculative allegations, and is entirely devoid of
20 reasonable, substantial, or credible evidence, as required by California Water Code section 13304.
21 Consequently, SDG&E should never have been, and cannot justifiably be, named as a “Discharger”
22 under the TCAO, and seeks rescission of its status as both a “person responsible” and Discharger
23 under the final Cleanup and Abatement Order for the Site.

24 On June 23, 2011, BAE Systems submitted its Response to SDG&E’s Request for Rescind-
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27 ¹ “BAE Systems” collectively refers to BAE Systems San Diego Ship Repair, Inc., and its predecessor,
28 Southwest Marine, Inc. (“Southwest Marine”). Beginning in or about 1914, entities that have engaged in operations at this leasehold include: San Diego Marine Construction Company; Campbell Industries, Inc. Star & Crescent Investment Co.; Southwest Marine, Inc.; and BAE Systems San Diego Ship Repair, Inc.

1 ment (the “BAE Systems Response”). In that response, BAE Systems claims that the Cleanup Team
2 did indeed rely upon substantial, reasonable, and credible evidence in naming SDG&E as a “person
3 responsible” and Discharger.² However, the BAE Systems Response is plagued with misstatements,
4 errors, and inaccuracies, is devoid of evidence, and makes assumptions and reaches conclusions that
5 can only be – but here are not – made by expert witnesses. Accordingly, the Regional Board should
6 afford the BAE Systems Response no evidentiary weight in its consideration of SDG&E’s Request
7 for Rescindment. Otherwise, any consideration of the baseless, unsubstantiated allegations in the
8 BAE Systems Response would only serve to further perpetuate the abuse of discretion that resulted
9 in SDG&E being improperly named as a Discharger in this proceeding.

10 **II. LEGAL ARGUMENT**

11 SDG&E does not dispute that the Regional Board generally has discretion to issue cleanup
12 and abatement orders. *See generally* California Water Code section 13304; State Board Resolution
13 No. 92-49. However, contrary to what BAE Systems argues, and as described in SDG&E’s Request
14 for Rescindment, the State Water Resources Control Board has made it clear that any decision to
15 name a party responsible under a cleanup and abatement order must be based on substantial evi-
16 dence, meaning “credible and reasonable evidence which indicates the named party has responsibil-
17 ity.” *In the Matter of the Petition of Exxon Company, USA, et al.*, WQO No. 85-7 at 12 (holding
18 liability determination must be “founded upon substantial evidence”) (emphasis added); *In the*
19 *Matter of the Petition of Stinnes-Western Chemical Corporation*, WQO No. 86-16 at 11-12. “Sub-
20 stantial evidence” is widely viewed in various contexts as excluding argument, speculation,
21 unsubstantiated opinion or narrative, and evidence which is clearly erroneous or inaccurate. *See*
22 *generally, In re Exxon Co., USA, et al., supra*, WQO No. 85-7 at 10-12. Moreover, evidence that is
23 not “substantial” should not be afforded the evidentiary weight of supported, substantiated evidence.
24 *See id.*; *see also Roehm Dist. Co. v. Burgermeister Brewing Co.*, 196 Cal. App. 2d 678, 682 (2d
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27 ² The BAE Systems Response also takes issue with SDG&E’s definition of “BAE Systems,” which is defined
28 and described in footnote 1, *supra*. However, this brief is focused on responding to BAE Systems’ arguments
suggesting that SDG&E was properly named as a Discharger, rather than BAE Systems’ contentions
regarding the propriety of SDG&E’s definition of BAE Systems and the evidence supporting BAE Systems’
liability for contamination of the Site.

1 Dist., 1961) (finding that several key pieces of evidence were afforded too much evidentiary weight
2 given the pure legal conclusions supporting them, and should have been excluded in their entirety);
3 *In re State Water Resources Control Board Cases*, 136 Cal. App. 4th 674 (3d Dist. 2006) (water
4 board abused its discretion where the agency’s findings were not supported by the weight of the evi-
5 dence).

6 As demonstrated in the Request for Rescindment and despite the assertions set forth in the
7 BAE Systems Response, none of the findings made by the Regional Board are substantiated by
8 evidence sufficient to support the naming of SDG&E as a responsible party under a cleanup and
9 abatement order. In the Request for Rescindment, SDG&E explains that the Cleanup Team acted
10 unreasonably, inappropriately, and erroneously by (1) basing its findings and conclusions in the
11 TCAO and DTR on pure speculation and conjecture, (2) failing to engage in meaningful evaluation
12 of extensive exculpatory evidence submitted by SDG&E, (3) failing to engage in any meaningful
13 valuation of the most likely sources of sediment impacts among the alleged Dischargers, and (4)
14 relying upon biased, unsubstantiated information provided by other responsible parties seeking to
15 implicate SDG&E as an additional discharger. *See* Request for Rescindment, pp. 4:22 - 5:6. Indeed,
16 in naming SDG&E as a Discharger, the Cleanup Team acted in large part in response to “pressure”
17 from other parties, primarily BAE Systems, to “bring other parties on board”. *See id.*, pp. 31:2 -
18 32:7. The BAE Systems Response does nothing to show otherwise.

19 Indeed, the BAE Systems Response should be discounted in its entirety, or, at the very least
20 regarded for what it is: a desperate attempt by BAE Systems to portray SDG&E as a liable party in
21 the face of overwhelming evidence of BAE Systems’ culpability. This is despite (i) a lack of any
22 evidence establishing that SDG&E contributed to a condition of pollution or nuisance in San Diego
23 Bay; (ii) substantial and compelling evidence demonstrating that SDG&E is not responsible for any
24 pollutant or sediment impacts to San Diego Bay. While BAE Systems seeks to establish why there
25 exists “substantial evidence” that SDG&E discharges to the Bay occurred sufficient to support the
26 naming of SDG&E as a Discharger, upon closer examination it is clear that the BAE Systems
27 Response is based on misinterpretations and erroneous statements, is not based on evidence, and
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1 makes assumptions and reaches conclusions that require expert testimony or opinion.³ As such,
2 BAE Systems' unsubstantiated claims amount to nothing more than conjecture and speculation,
3 which should be afforded no weight by the Regional Board.

4 Should the Regional Board give any consideration to the statements contained in the BAE
5 Systems Response, it will be perpetuating the problem that resulted in the inappropriate and errone-
6 ous naming of SDG&E as a Discharger in the first instance. Accordingly, the BAE Systems
7 Response should be disregarded in its entirety or, at the very least, given weight commensurate with
8 its lack of evidentiary value.

9 **A. BAE Systems' Comments Regarding Whether the Silver Gate Power Plant Was**
10 **A Source of Discharges to the Bay Are Plagued by Errors, Unsubstantiated by**
11 **Evidence, and Inappropriately Reach Conclusions That Must Be, But Are Not,**
12 **Supported by Expert Testimony.**

13 SDG&E has previously detailed facts and evidence demonstrating that the Silver Gate Power
14 Plant was not a source of discharges to the San Diego Bay. *See generally*, Request for Rescindment,
15 pp. 11:14-15:10, 24:17-21. In response, BAE Systems generally and specifically asserts that
16 SDG&E must have caused waste to be discharged to the San Diego Bay via the cooling water tun-
17 nels, oil/water separators, and tidelands waste ponds at the former Silver Gate Power Plant. *See,*
18 *e.g.*, BAE Systems Response, pp. 3:19-21, 19:1-2, 19:10-11; *see also generally*, BAE Systems
19 Response, pp. 18-26. However, these assertions are plagued by errors, are fully devoid of any evi-
20 dence, and amount to unadorned conjecture and speculation.

21 For example, BAE Systems claims the existence of a trench connected to the wastewater set-
22 tling pond at the tidelands, and that this trench enabled wastes from the pond to be discharged to San
23 Diego Bay. *See, e.g.*, BAE Systems Response, pp. 8:3-5, 22:23-25. However, this allegation is
24 unsupported by any evidence, let alone substantial evidence, of a direct pathway from the
25 wastewater settling pond to the Bay. While BAE Systems alleges that photographs from the 1950s

26 ³ Sections II.A, II.B, and II.C below provide examples of the types of errors and misstatements made by BAE
27 Systems, as well as examples of statements unsubstantiated by evidence and assumptions and conclusions that
28 should be, but are not, supported by expert opinion. However, this brief is not meant to provide an exhaustive
list of these issues, but rather is intended to provide insight into the types of issues that plague the BAE
Systems Response. Should the Regional Board prefer, SDG&E can provide more information to show
exactly how pervasive these errors are throughout the BAE Systems Response.

1 depict this trench and show that “wastes were discharged from the pond to the trench and into the
2 Bay likely from at least 1950 until 1952,” (BAE Systems Response, p. 22:23-25), the documents
3 referenced by BAE Systems do not, in fact, depict a pathway from a wastewater settling pond to San
4 Diego Bay, and there is no evidence that does so. *See* Request for Rescindment, pp. 7:13-20, 11:26 -
5 12:3, 13:16 - 15:10, 16:12-15 (discussing the lack of evidence of such a pathway). Moreover, BAE
6 Systems misstates the very evidence upon which it purports to rely to prove that this trench existed
7 and enabled “wastes from the ponds to be discharged directly to the Bay,” as the referenced letter
8 actually states that oil may be admitted to the Bay in case of an overflow, not that discharge to the
9 Bay has or would certainly occur. *See, e.g.*, SAR 193371 (emphasis added).

10 BAE Systems similarly contends that SDG&E disposed of COC-containing wastes to the
11 oil/water separators, and such wastes were released to the Bay. *See generally*, BAE Systems
12 Response, pp. 18-22. As with its allegations regarding discharges from ponds at the tidelands to the
13 Bay, BAE Systems has reached this conclusion without any evidentiary support. There simply is
14 no evidence in the record of an actual or threatened discharge from any settling pond or the oil/water
15 separators to the San Diego Bay. *See id.*; *see also* Request for Rescindment pp. 8:1-4, 24:19-21.
16 Indeed, there not only is no evidence of a discharge from the Silver Gate Power Plant to the Bay, but
17 there is no evidence of widespread use of PCB-containing materials at the Silver Gate Power plant or
18 leaks and spills of such materials into the soil or trenches, sumps, and other equipment at the plant.
19 *See generally*, BAE Systems Response, pp. 9-10; *see also, e.g.*, Request for Rescindment, p. 26:18-
20 22. Again, BAE Systems’ statements amount to nothing more than wholly unsubstantiated
21 allegations.

22 BAE Systems makes up illogical explanations for the absence of evidence supporting similar
23 claims regarding the purported discharge of wastes through the cooling water system at the former
24 SDG&E Silver Gate Power Plant to the Bay. *See* BAE Systems Response, pp. 10:7 - 12:7. For
25 example, BAE Systems states that “fine particles containing SDG&E wastes, including PCBs, cop-
26 per, and mercury, likely would not have settled in front of the cooling water outflow, but rather
27 would have been distributed over a large area across the Shipyard Sediment Site North of Pier 1.”
28 BAE Systems Response, p. 11:24-27. This statement is made without citation, and lacks any evi-

1 dentiary support. There simply is none.⁴

2 BAE Systems' claims regarding the sufficiency of evidence of discharges from the Silver
3 Gate Power Plant to the Bay not only are plagued by errors and unsupported by evidence, but also
4 rely on assumptions and conclusions that are properly the subject of expert testimony. Of course,
5 BAE Systems has failed to cite to and cannot provide any expert opinion or reports in support of its
6 positions. *See generally*, BAE Systems Response, pp. 24-26. For example, BAE Systems discusses
7 complex technical issues such as particle size fractions and organic matter composition of the
8 tideland soils and sediment, the sorptive phases, partitioning and degradation of PCBs, and
9 dispersion of water from the cooling water tunnels, opining that "PCBs do not sorb to coarser
10 grained soils found in upland areas as much as they do to fine particles found in sediment." *See*
11 *generally* BAE Systems Response, pp. 24-26. These issues are each properly the subject of expert
12 testimony. Rather than provide such expert testimony, BAE Systems in many instances cites to
13 generic, non-site specific, scientific reports that are entirely inapposite to the circumstances of this
14 Site. In most instances, BAE Systems provides no citation or evidence for its statements. The
15 Regional Board should afford no credence or weight to such unsupported assumptions and
16 conclusions.

17 As described in the Request for Rescindment, while sampling data shows releases of waste-
18 water from the Silver Gate Power Plant to ponds and oil/water separators on the Silver Gate Power
19 Plant tidelands, there is absolutely no evidence of any discharge or threatened discharge from the
20 ponds or oil/water separators to the San Diego Bay. Moreover, and as discussed further in Section
21 II.B. below, concentrations of COCs detected in soils at the tidelands are insufficient to show that
22 SDG&E sources could cause the levels of contamination observed in San Diego Bay sediment. The
23 BAE Systems Response provides no evidence to rebut any evidence or conclusions provided by
24 SDG&E in the Request for Rescindment. In its Request for Rescindment, SDG&E addresses in
25 detail the inadequacy and abuse of discretion caused by the Regional Board utilizing this strategy in
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28 ⁴ As discussed below, these statements are also notably appropriate subject of expert opinion, and are
unsupported by any evidence, let alone expert opinion. Counsel for BAE Systems is not qualified to reach
such conclusions.

1 formulating the DTR; the Regional Board should not further perpetuate this abuse of discretion by
2 doing so here.

3 **B. BAE Systems' Comments Regarding Sediment Data Similarly Are Plagued by**
4 **Errors, Unsubstantiated by Evidence, and Inappropriately Reach Conclusions**
5 **That Must Be, But Are Not, Supported by Expert Testimony.**

6 SDG&E has demonstrated in the Request for Rescindment that there is no evidentiary basis
7 to suggest that concentrations of contaminants, primarily PCBs, in tidelands soil could feasibly have
8 increased by orders of magnitude as they traveled from such soil to the Bay or that alleged sources
9 directly in contact with tidelands soils would somehow contaminate those soils to concentrations that
10 are orders of magnitude lower than concentrations in the Bay sediment. *See generally* Request for
11 Rescindment, pp. 10:8-11, 12:4-12, 14:7 - 15:10, 18:16 - 20:9. Ignoring the logic and substantial
12 evidentiary support for this argument, BAE Systems claims that "the lower concentrations of PCBs
13 found at the Silver Gate Power Plant and in tidelands soils are a source of the concentrations of
14 PCBs in Bay sediment." *See* BAE Systems Response, pp. 24:7 - 26:10. However, a review of BAE
15 Systems' argument indicates that it is again unsubstantiated by any direct, credible evidence and
16 unsupported by expert testimony or opinion.

17 For example, BAE Systems states that "because PCBs do not sorb to coarser grained soils
18 found in upland areas as much as they do to fine particles found in sediment, one would expect to
19 see lower concentrations of PCBs in the SDG&E upland sources of contamination ..." BAE Sys-
20 tems Response, p. 25:13-17. BAE Systems is again engaging in pure conjecture, as this statement is
21 unsupported by evidence, and is properly the subject of non-existent expert testimony. BAE Sys-
22 tems also claims that differences in measurement dates "may impact the results of sampling" due to
23 accelerated PCB degradation in tidelands soils due to "reductive dechlorination." BAE Systems
24 Response, pp. 25:18 - 26:5. According to BAE Systems, the conclusion that necessarily follows is
25 that "there would be lower concentrations of PCBs in the SDG&E soils that are a source of
26 contamination, and higher concentrations of PCBS in the sediments" BAE Systems Response, p.
27 26:6-10. Once again, BAE Systems reaches this highly technical conclusion without any evidence
28 or expert opinion.

The claims raised by BAE are highly technical and require appropriate evaluation by a quali-

1 fied expert. BAE Systems has embarked on clear and calculated attempt to obfuscate the issues
2 despite the lack of evidence contrary to that provided by SDG&E. The Regional Board should
3 properly disregard these attempts.

4 **C. BAE Systems' Comments Regarding Aroclor Signatures Similarly Are Plagued**
5 **by Errors, Unsubstantiated by Evidence, and Inappropriately Reach Conclu-**
6 **sions That Must Be, But Are Not, Supported by Expert Testimony.**

7 In the Request for Rescindment, SDG&E states that "in addition to the lack of a concentra-
8 tion gradient between tidelands soils and San Diego Bay sediment, the PCB Aroclor signature found
9 in the tidelands soils is substantially different than that of the adjacent sediment." Request for Res-
10 cindment, p. 20:23-25. As SDG&E demonstrates, this difference indicates that sources other than
11 SDG&E soils are responsible for increased PCB concentrations found in Pier 1 area sediments. *See*
12 Request for Rescindment, pp. 9:3-13, 21:1-10. Throughout the BAE Systems Response, BAE Sys-
13 tems attempts to refute these facts; however, the BAE Systems Response is again plagued by errors
14 and unsubstantiated by evidence and, accordingly, must be disregarded by the Regional Board. *See*
15 *generally*, BAE Systems Response, pp. 23-24.

16 For example, BAE Systems asserts that "hydraulic fluids and lubricants used in equipment at
17 Silver Gate likely contained PCB Aroclors 1254 and 1260." BAE Systems Response, 10:2-3. How-
18 ever, this statement is supported only by a citation to general, scientific articles regarding PCB
19 transport and emissions. Notably, BAE Systems does not refer to any facts regarding the actual flu-
20 ids and lubricants used at the Silver Gate Power Plant, despite BAE's opportunity to review tens of
21 thousands of historical Silvergate operational records produced by SDG&E in the ancillary district
22 court litigation. Thus, there is no evidence to support this statement, only unfounded speculation.
23 As noted in the Request for Rescindment, PCBs and other COCs were never used in open systems in
24 any appreciable quantities at Silver Gate facilities. *See, e.g.*, Request for Rescindment, pp. 4:2-8,
25 26:18-20.

26 BAE Systems follows these unsubstantiated statements with a grossly over-simplified analy-
27 sis of the ratio of Aroclor 1254 to Aroclor 1260 in cooling water tunnel sediment sampling, tidelands
28 soil sampling, and San Diego Bay sampling, which BAE Systems alleges "proves" that the cooling
water tunnels were a source of PCBs to the Bay. *See generally*, BAE Systems Response, pp. 10:7 -

1 12:7. This analysis is plagued by issues, as it (i) is unsupported by any actual evidence, and (ii) is
2 properly the subject of expert testimony, but is not substantiated by any expert opinion. Moreover,
3 Aroclor ratios are an inferior chemical fingerprinting method, as they ignore Aroclor 1248, which
4 comprises a significant portion of the sediment PCB signature in the sediments in the Pier 1 area, as
5 well as the PCB signature in sources in the former marine railways. *See* Request for Rescindment,
6 21:11 - 24:16. As previously noted by SDG&E, Aroclor 1248 is not associated with SDG&E
7 sources but, rather, implicates marine shipyard railways as the source of PCBs to San Diego Bay, in
8 particular the Pier 1 area of the BAE Systems Shipyard, samples from which again showed a high
9 proportion of Aroclor 1248. *See* Request for Rescindment, 21:11 - 24:16.

10 Thus, while BAE Systems purports to provide technical arguments and evidence to counter
11 SDG&E's Request for Rescindment, in reality, BAE Systems does nothing but attempt to obfuscate
12 the issues. BAE provides no actual evidence or expert opinion demonstrating that Aroclor finger-
13 printing proves that SDG&E did indeed discharge PCBs (or any other contaminants) to the San
14 Diego Bay. The Regional Board should base its findings on evidence and expert opinion conclu-
15 sively demonstrating that SDG&E did not discharge PCBs to the San Diego Bay, as detailed in the
16 Request for Rescindment.

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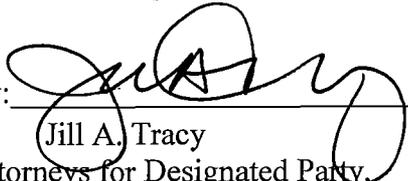
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1 **III. CONCLUSION**

2 For the foregoing reasons, SDG&E respectfully submits that the BAE Systems Response be
3 disregarded in its entirety or, alternatively, given no evidentiary weight in the Regional Board's
4 consideration of SDG&E's Request for Rescindment. Consideration of the baseless, unsubstantiated
5 allegations in the BAE Systems Response would only serve to further perpetuate the abuse of dis-
6 cretion that resulted in SDG&E being improperly named as a Discharger in this proceeding.

7
8 Dated: July 12, 2011

OFFICE OF THE GENERAL COUNSEL

9
10 By: 

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20 SAN DIEGO REGION

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**SAN DIEGO GAS & ELECTRIC
COMPANY'S OPPOSITION TO BAE
SYSTEMS SAN DIEGO SHIP REPAIR
INC.'S MOTION TO EXCLUDE
ENVIRON INTERNATIONAL CORP.'S
MAY 26, 2011 TECHNICAL COMMENTS
REGARDING TENTATIVE CLEANUP
AND ABATEMENT ORDER NO. R9-2011-
001**

1 **I. INTRODUCTION**

2 San Diego Gas & Electric Company (“SDG&E”) respectfully submits this opposition to BAE
3 Systems San Diego Ship Repair, Inc.’s (“BAE”) Motion to Exclude (“motion”) ENVIRON Interna-
4 tional Corp.’s (“ENVIRON”) May 26, 2011 Technical Comments Regarding Tentative Cleanup and
5 Abatement Order No. R9-2011-001.¹ For the reasons below, BAE’s motion should be denied.

6 First, the ENVIRON technical comments do not constitute an expert report. Rather, they were
7 properly submitted as technical comments for purposes of augmenting the existing administrative
8 record in this proceeding, and addressing issues directly relevant to the San Diego Regional Water
9 Quality Control Board’s (“Regional Board”) adoption of the Tentative Cleanup and Abatement Order
10 (“TCAO”). This is entirely consistent with the scope and purpose of the Designated Parties’ com-
11 ments that were due on May 26, 2011.

12 As BAE acknowledges, on March 11, 2011, Dr. Jason Conder of ENVIRON timely submitted
13 three expert reports on behalf of SDG&E, addressing in detail the following: (1) “Analysis of Causal-
14 ity Between Aquatic Life Beneficial Use Impairment and Site Primary COCs at the San Diego Ship-
15 yard Sediment Site”, (2) “Evaluation of the Regional Board’s Human Health Risk Assessment for the
16 San Diego Shipyard Sediment Site;” and (3) “Comparison of 2001-2002 and 2011 Chemical Condi-
17 tions in Surface Sediment at the San Diego Shipyard Sediment Site.” This followed Dr. Conder’s
18 timely designation as SDG&E’s expert witness in these proceedings on July 19, 2010. Notably, pur-
19 suant to SDG&E’s “Counterdesignations of Expert and Non-Expert Witnesses” filed on August 2,
20 2010, Dr. Conder was designated as both an expert and non-expert witness on behalf of SDG&E. As
21 such, ENVIRON’s May 26, 2011 technical comments were intended to further address issues relevant
22 to the Regional Board’s evaluation of the Draft Technical Report and TCAO and are properly before
23 the Regional Board. ENVIRON’s May 26th technical comments addressing benthic beneficial use
24 impairment, economic feasibility, human health beneficial use impairment, and assessment of aquatic
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26 ¹ Designated Party National Steel and Shipbuilding Company (“NASSCO”) filed a joinder in BAE’s motion on June 23,
27 2011. NASSCO also filed “Reply Comments” purportedly to SDG&E’s May 26, 2011 Technical Comments, which were
28 in fact an untimely and improper critique to ENVIRON’s March 11, 2011 expert reports relating to a site-specific toxic unit
approach concluding TBT as the primary remedial driver affecting benthic invertebrates at the Shipyard Site.

1 dependent wildlife beneficial use impairment reflect scientific analysis based, in part, upon opinion
2 previously addressed in the prior expert reports timely submitted in March, 2011, much like many of
3 the other designated parties' technical comments² and therefore it is well within the Regional Board's
4 discretion to consider such relevant technical comments in connection with adoption of any cleanup
5 and abatement order. This is particularly the case where, as here, SDG&E has fully complied with
6 applicable procedures governing expert disclosures and the timely submission of technical comments
7 in this proceeding, and there is no prejudice to any other parties.

8 Even if ENVIRON's May 26th technical comments could possibly be construed as a "new"
9 expert report, the comments should not be excluded. Any decision to exclude evidence must be care-
10 fully weighed against claims of prejudice. In this instance, BAE's claims of any prejudice resulting
11 from ENVIRON's technical comments are entirely baseless. ENVIRON's technical comments sub-
12 mitted on May 26th are substantially based on and derived from opinions previously set forth in ENVI-
13 RON's expert reports submitted on March 11, 2011. This afforded BAE more than adequate time to
14 respond to the opinions and comments proffered by Dr. Conder, up to and including June 23, 2011. In
15 fact, NASSCO filed a reply to Dr. Conder's technical comments on June 23, 2011,³ which further
16 underscores the lack of prejudice to BAE, NASSCO or any other party. Moreover, this substantive
17 and procedural due process safeguard was specifically contemplated by the Presiding Officer in estab-
18 lishing a rebuttal period following the May 26, 2011 deadline for submittal of comments by the Desig-
19 nated Parties. Of course, despite ample time to prepare a substantive, technical rebuttal to any of Dr.
20 Conder's prior opinions or comments, BAE did not do so. Thus, any purported prejudice to BAE is
21 entirely a result of its decision to forego any proper response.

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25 ² For example, NASSCO's May 26, 2011 Comments to the TCAO contains multiple expert opinions regarding risk to
26 aquatic life, aquatic-dependent wildlife and human health beneficial uses, economic feasibility, natural attenuation and
biological conditions of the Site.

27 ³ See "Nassco's Reply Comments on the San Diego Regional Water Quality Control Board Cleanup Team's September
28 15, 2010 Tentative Cleanup and Abatement Order No. R9-2011-0001, Draft Technical Report, and Shipyard
Administrative Record," § IV, pp. 55-66 ("NASSCO Reply Comments"), discussed in Section III(c) herein.

1 **II. FACTUAL BACKGROUND**

2 As noted above, in July 2010, SDG&E identified Jason Conder, Ph.D., as an expert witness in
3 this proceeding regarding “the evaluation of beneficial use impairments, ecological and human health
4 risks, alternative cleanup levels, sediment characterization and dominant fate and transport mechan-
5 isms of sediment associated chemicals at the Shipyard Sediment Site, as well as all other issues related
6 to the Tentative Cleanup and Abatement Order No. R9-2010-0002 and the accompanying Draft Tech-
7 nical Report, issued by the RWQCB on December 22, 2009.” *See* Designation of Expert Witnesses by
8 Designated Party San Diego Gas & Electric Company and Declaration of Jill A. Tracy in Support
9 Thereof (July 19, 2010). On August 2, 2010, SDG&E counter-designated Dr. Conder as a non-expert
10 witness to address the testimony to be provided by various parties’ witnesses. *See* Designated Party
11 San Diego Gas & Electric Company’s Counter-Designations of Expert and Non-Expert Witnesses
12 (August 2, 2010). On March 11, 2011, SDG&E timely produced to all parties the following expert
13 reports prepared by Dr. Conder: (1) “Analysis of Causality Between Aquatic Life Beneficial Use
14 Impairment and Site Primary COCs at the San Diego Shipyard Sediment Site;” (2) “Evaluation of the
15 Regional Board’s Human Health Risk Assessment for the San Diego Shipyard Sediment Site;” and (3)
16 “Comparison of 2001-2002 and 2011 Chemical Conditions in Surface Sediment at the San Diego
17 Shipyard Sediment Site.”

18 On May 26, 2011, Dr. Conder submitted additional technical comments regarding various
19 aspects of the DTR, including the Regional Board’s evaluation of Benthic Beneficial Use Impairment
20 (“BUI”), Human Health BUI, and Aquatic Dependent Wildlife BUI, as well as the economic feasibil-
21 ity analysis conducted by the Regional Board as set forth in the DTR. Of particular import is Dr. Con-
22 der’s application of a site-specific causal approach to determine benthic use impairment that was
23 originally proffered as part of Environ’s March 11, 2011 expert reports to formulate a revised remedial
24 footprint.

25 The May 26, 2011 technical comments provided by ENVIRON relating to beneficial use
26 impairment and economic feasibility all squarely fall within the scope of Dr. Conder’s expert opinions
27 regarding these same technical issues provided in March 2011. Moreover, ENVIRON’s technical
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1 comments constitute relevant evidence for purposes of augmenting or supplementing the administra-
2 tive record in this proceeding. The Regional Board is well within its discretion in deeming the com-
3 ments as relevant to its consideration of the DTR and TCAO; in fact, the burden is squarely on moving
4 party BAE to establish clear grounds for exclusion of evidence in an administrative proceeding, espe-
5 cially given the lack of prejudice to other parties. Since it cannot do so, BAE's motion should be
6 denied.

7 **III. ANALYSIS**

8 March 11, 2011 was the deadline for the parties to submit expert reports. As BAE concedes,
9 SDG&E complied with this deadline via submittal of three separate expert reports by Dr. Conder of
10 ENVIRON regarding beneficial use impairment and site conditions. Contrary to the arguments raised
11 by BAE in its motion, the technical comments submitted by ENVIRON on May 26th do not constitute
12 a separate or supplemental "expert report." Moreover, the comments provided therein do not preju-
13 dice BAE or any other Designated Party. Therefore, BAE's Motion to Exclude the ENVIRON Tech-
14 nical Comments accordingly should be denied.

15 **A. The ENVIRON Technical Comments Are Not An "Expert Report"**

16 Contrary to BAE's assertion, the ENVIRON May 26, 2011 technical comments do not consti-
17 tute an "expert report." As set forth above, SDG&E properly submitted the technical memorandum
18 prepared by Dr. Conder as technical comments, for purposes of supplementing the existing adminis-
19 trative record in this proceeding, and addressing issues directly relevant to the Regional Board's adop-
20 tion of the TCAO. This is consistent with the broad scope and purpose of the Designated Parties'
21 comments due on May 26, 2011. For instance, State Water Board Resolution No. 92-49 provides that
22 the Regional board "shall, in its decisions on who shall be held accountable for the cleanup and
23 abatement of waste, use any relevant evidence, whether direct or circumstantial. . . ." *Id.*; *see also*
24 TCAO § 1.3.2.

25 In addition, Technical Comments 1, 3, and 4 addressing the DTR's beneficial use impairment
26 analysis in ENVIRON's May 26, 2011 submission are derived from the opinions offered by
27 ENVIRON in March 2011. Thus, while Dr. Conder properly supplemented his March 11 expert
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1 conclusion regarding TBT as a primary remedy driver via a site-specific causal analysis to determine
2 benthic beneficial use impairment by subsequently offering a preferred remedial footprint based upon
3 this methodology, his subsequent statements in no way amounted to unfair surprise or prejudice to
4 BAE, or any other party. *Cf.* Code Civ. Proc. § 2034.300(c); *Boston v. Penny Lane Ctrs.* (2009) 170
5 Cal.App.4th 936, 952. With regard to Technical Comment 2, Dr. Conder suggests that the economic
6 feasibility analysis used to support the remedial footprint set forth in the DTR should properly
7 incorporate all three BUIs (Human Health, Aquatic-dependent Wildlife, and Aquatic Life (or Benthic)
8 BUI), where the DTR's approach may have failed to adequately consider costs associated with reme-
9 diating the site as a result of Aquatic Life BUI. Therefore, this technical comment is entirely consis-
10 tent with and, indeed, necessitated by the aforementioned Technical Comments 1, 3 and 4, which pro-
11 pose changes to each of the DTR's treatment of the 3 BUIs. The ENVIRON comments of May 26th
12 simply provide additional, technical information regarding the accuracy and adequacy of the DTR for
13 consideration by the Regional Board. This is the specific purpose for which technical comments were
14 submitted by the designated parties, and is entirely within the scope of the Third Order of Proceedings
15 for this matter. Therefore the May 26, 2011 Technical Comments are clearly permissible.

16 B. Even If the ENVIRON Technical Comments Could Be Construed as a "New" Expert
17 Report, BAE's Motion to Exclude Should Be Denied

18 Even assuming ENVIRON's technical comments submitted on May 26, 2011 could be con-
19 strued as a "new" expert report, the comments should not be excluded. This is especially true given
20 the relevance of the ENVIRON technical comments to the merits of this proceeding, the purpose and
21 scope of comments by Designated Parties on May 26th, and the lack of prejudice to other parties.

22 Nothing in the Regional Board's Final Discovery Plan or Order, let alone in Code of Civil Pro-
23 cedure section 2034.010, *et seq.*, prohibits a witness, especially one who has been designated to pro-
24 vide both affirmative and responsive expert and non-expert testimony, from continuing to hone his or
25 her analysis in response to the opinions of other experts. *See Boston, supra*, 170 Cal.App.4th at 951
26 ("Neither [CCP section 2034.270] nor any other [section] requires that expert witnesses refrain from
27 creating new or additional reports or writings after the specified date."). As described above, the
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1 ENVIRON Technical Comments address four separate aspects of the Regional Board’s DTR: the
2 evaluation of Benthic BUI, the evaluation of Human Health BUI, the evaluation of Aquatic Dependent
3 Wildlife BUI, and the economic feasibility analysis. Each of these four general comments is very
4 clearly based upon opinions provided by Dr. Conder in the ENVIRON expert reports provided in
5 March 2011.

6 Accordingly, the ENVIRON technical comments do not amount to any “new” expert opinions,
7 but rather are derived from previous expert opinions, taking into account new information provided by
8 other parties and the Regional Board. Technical comments developed in such a fashion are not prohi-
9 bited by the Code of Civil Procedure, the Order, the Third Order of Proceedings, the Final Discovery
10 Plan, or any applicable Regional Board decisions or orders. Therefore, BAE’s Motion to Exclude the
11 ENVIRON Technical Comments should be denied.

12 C. The ENVIRON Technical Comments Should Not Be Excluded Because They In No
13 Way Prejudice the Designated Parties.

14 Where a party seeks to exclude an expert report or writing, a court generally must evaluate
15 whether exclusion is necessary to prevent or respond to abuse of expert witness discovery procedures.
16 *See Boston, supra*, 170 Cal.App.4th at 952. Specifically, where a party intentionally manipulates the
17 discovery process, provides expert witness information that is late or incomplete, or where the moving
18 party has no reasonable means to remedy such failures prior to hearing, exclusion of expert opinions is
19 justified. *Id.*, at 952-53. As discussed above, SDG&E has not manipulated the discovery process in
20 any way; in fact, it has at all times acted in good faith and in compliance with all deadlines and other
21 procedural requirements governing these proceedings, including all expert deadlines. Moreover, BAE
22 cannot sustain any claim of prejudice if the Motion to Exclude is denied.

23 BAE provides five arguments ostensibly supporting exclusion of the ENVIRON technical
24 comments. First, BAE contends that the ENVIRON comments should be excluded because “there is
25 no reasonable explanation for why SDG&E did not submit the opinions provided in the ENVIRON
26 [Technical Comments] to all Designated Parties by the Regional Board ordered deadline.” See Motion
27 to Exclude, at 4:21-23. However, this argument ignores the substance of the comments, which address
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1 issues directly relevant to the Regional Board’s consideration of the TCAO and DTR, and further
2 responds to opinions and information provided by the Designated Parties’ experts in March 2011.

3 Second, BAE argues that the ENVIRON technical comments should be excluded because it is
4 “not a proper supplemental report.” However, as noted above, SDG&E disputes that ENVIRON’s
5 comments amount to a “new” expert report. Moreover, even if the ENVIRON Technical Comments
6 could possibly be considered a “new” expert report, it is not a “supplemental expert report,” but
7 instead refines prior opinions in this matter based on a review of additional information.

8 Third, BAE states that SDG&E should have sought relief “from its failure to provide complete
9 expert reports for more than two months.” However, the ENVIRON technical comments do not
10 render SDG&E’s March 2011 expert reports incomplete or inadequate in any way. Those reports were
11 complete based on the information known to Dr. Conder at the time they were prepared. The ENVI-
12 RON comments regarding beneficial use impairment and economic feasibility of May 26th are derived
13 upon the methodology expressed in the prior opinions and information provided by the March 11,
14 2011 expert reports. SDG&E in no way sought to thwart the parties’ efforts to challenge Dr. Conder’s
15 opinions. To the contrary, by providing the ENVIRON technical comments – which provide more
16 information and detail about Dr. Conder’s previously-provided opinions in response to comments and
17 opinions of the other Designated Parties’ experts – to the Designated Parties on May 26th, SDG&E
18 afforded the Designated Parties an additional opportunity to rebut the opinions proffered by Dr. Con-
19 der.⁴ As noted, BAE specifically declined to do so, while NASSCO exercised its right to file reply
20 comments. *See generally*, NASSCO Reply Comments, § IV, pp. 55-66. This, again, underscores the
21 lack of any prejudice and the parties’ technical comments, and any timely replies, are now part of the
22 administrative record and can be given appropriate evidentiary consideration by the Regional Board.

23 Fourth, BAE contends that “SDG&E’s untimely submission is prejudicial to BAE Systems
24 because Dr. Conder had “the benefit of reviewing and analyzing other parties’ submissions, and was
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⁴ The Designated Parties arguably had nearly one month – from May 26th to June 23rd – to seek to rebut the opinions
28 offered by Dr. Conder in the March 2011 ENVIRON expert reports and the May 2011 ENVIRON Technical Comments.
Rather than rebut the ENVIRON Technical Comments, BAE submitted the Motion to Exclude.

1 then able to refine his original opinions with that benefit.” As noted above, there is nothing improper
2 about SDG&E’s submission of technical comments on May 26th. Detailed technical comments from
3 experts are routinely submitted to regional boards in connection with adoption of cleanup orders.
4 Moreover, there is simply no prejudice to BAE other than prejudice of its own making. Additionally,
5 the basis for the May 26, 2011 technical comments are derived using many of the same approaches to
6 determine beneficial use impairment that is described at length in the previously-submitted expert
7 opinions; there has been no “refinement” or changes to the technical approach based on review of
8 other parties’ submissions.

9 Indeed, NASSCO, BAE’s shipyard counterpart in the south, filed “reply comments” to the
10 May 26, 2011 ENVIRON technical comments, in addition to joining BAE’s Motion to Exclude.
11 NASSCO’s Reply Comments provide a lengthy critique of Dr. Conder’s site-specific beneficial use
12 impairment methodology first proffered in the March 11, 2011 expert report, “*Analysis of Causality*
13 *Between Aquatic Life Beneficial Use Impairment and Site Primary COCs at the San Diego Shipyard*
14 *Sediment Site*” by Jason Conder (“Conder Expert Report” or “TBT Benthic Driver Expert Report”) on
15 behalf of SDG&E. This was the first response by NASSCO critiquing the Conder Expert Report, and
16 therefore is itself untimely because NASSCO failed to provide comments by the May 26, 2011 dead-
17 line for technical comments to expert reports.

18 NASSCO’s untimely response to the TBT Benthic Driver Expert Report includes the following
19 criticisms:

- 20 • NASSCO extensively criticizes the toxic unit approach (NASSCO Comment No. 357, 359,
21 360), noting “poor predictive performance of the toxic unit calculations themselves”, that the
22 approach “contradicts the fundamental assumptions of the equilibrium partitioning model upon
23 which the proposed toxic unit assessment approach for pore water is based”, and a “lack of
24 relevance and poor scientific justification for selection of these [toxic unit toxicity] thresholds
25 as sediment toxicity benchmarks”. NASSCO also notes “The toxic unit approach is not Site-
26 specific, and is therefore far less scientifically valid than the DTR approach”. The toxic unit
27 approach is the technical basis for the analysis of remedy driver causation, as detailed in the
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1 Conder Expert Report and used in a subsequent comment provided on May 26, 2011. Criti-
2 cism of this approach constitutes a direct challenge to the Conder Expert Report conclusions.

3 • NASSCO focuses much of the technical discussion on TBT (NASSCO Comment No. 357). In
4 the Conder Expert Report, TBT was identified as the primary chemical responsible for
5 CRWQCB's determination of Aquatic Life Beneficial Uses Impairment. Conder concluded
6 that among the four Site chemicals of concern, TBT was the primary remedial driver affecting
7 benthic invertebrates. NASSCO (NASSCO Comment No. 357) comments on this conclusion,
8 noting poor relationships between TBT presence in porewater and toxicity at the Site and the
9 selection of TBT benchmarks used in the Conder TBT Remedy Driver Expert Report toxic unit
10 approach (no such criticism is included regarding the selection of other benchmarks for the
11 other chemicals of concern). The focus on TBT by NASSCO is entirely self-serving because
12 the liability for this chemical falls almost solely on the present-day shipyard parties NASSCO
13 and BAE Systems.

14 • NASSCO also directly challenged the TBT Remedy Driver Expert Report's assertion that
15 LAET values are poor predictors of toxicity (NASSCO Comment No. 358). NASSCO states
16 LAETs are "a highly protective, site-specific benchmark of exposure", despite the numerous
17 shortcomings noted by Conder.

18 NASSCO's extensive reply comments to the May 26, 2011 ENVIRON comments, and in turn,
19 the March 11, 2011 ENVIRON expert reports demonstrate that the May 26, 2011 comments are
20 derived from the methodologies established by the expert opinions of Dr. Conder set forth in the
21 March 11, 2011 Environ report, and there is no prejudice to BAE, or any other party. What is clearly
22 improper is for BAE to waive its right to timely submit reply comments to the May 26, 2011 technical
23 comments and then move the Regional Board to exclude such comments from the administrative
24 record.

25 Fifth, BAE contends the Motion to Exclude should be granted because BAE promptly moved
26 for relief. Under the circumstances, this factor is irrelevant when weighed against the lack of preju-
27 dice to BAE and NASSCO, and the fact that BAE declined the opportunity to substantively respond to
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1 ENVIRON's technical comments. As stated above, ENVIRON's comments submitted on May 26th
2 are based upon expert opinions previously set forth in ENVIRON's expert reports timely submitted on
3 March 11, 2011 as evidenced by NASCCO's Reply Comments. This afforded BAE and all Designated
4 Parties, more than ample time to respond to the opinions and comments proffered by Dr. Conder,
5 up to and including June 23, 2011. Having failed to exercise this right, any purported prejudice to
6 BAE is entirely a result of its decision to forego any such response.

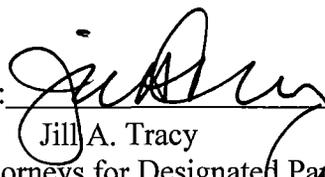
7 Finally, there is simply no basis to strike any portions of SDG&E's Request for Rescindment
8 and Comments. SDG&E's Request for Rescindment in no manner relies upon the May 26, 2011
9 Technical Comments of ENVIRON. BAE's Request does not specify what portions of SDG&E's
10 Request for Rescindment refer to and rely upon the May 26, 2011 ENVIRON Comments, so it is
11 impossible to discern what portion of SDG&E's Rescindment Request BAE seeks to exclude. A simple
12 reading of the Request for Rescindment demonstrates the relief sought by BAE is clearly in error.

13 **IV. CONCLUSION**

14 For the foregoing reasons, SDG&E respectfully submits that BAE's Motion to Exclude the
15 ENVIRON Report from consideration, and to disregard the portions of SDG&E's May 26, 2011 Rescindment
16 Request that refer to and rely upon the untimely expert opinions, be denied in its entirety.

17
18 Dated: June 23, 2011

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