

1 MICHAEL S. TRACY (Bar No. 101456)  
AMY G. NEFOUSE (Bar No. 159880)  
2 MATTHEW B. DART (Bar No. 216429)  
ERIN O. DOYLE (Bar No. 260646)  
3 **DLA PIPER LLP (US)**  
401 B Street, Suite 1700  
4 San Diego, CA 92101-4297  
Tel: 619.699.3620  
5 Fax: 619.699.2701

6 Attorneys for Designated Party  
BAE Systems San Diego Ship Repair, Inc.  
7

8 CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

9 SAN DIEGO REGION

10  
11 In re Tentative Cleanup and Abatement  
Order No. R9-2011-0001 (formerly R9-  
12 2010-0002)

**BAE SYSTEMS' RESPONSE TO PORT  
DISTRICT'S MOTION TO RE-OPEN AND  
EXTEND DISCOVERY DEADLINES**

13  
14 Acting Chair Destache

15 Discovery Referee Gallagher  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

DLA PIPER LLP (US) WEST\222626441.3  
SAN DIEGO

1 Designated Party BAE Systems San Diego Ship Repair, Inc. ("BAE") submits this  
2 response to the Port District's Motion to Re-Open and Extend Discovery Deadlines, filed and  
3 served electronically the evening of October 19, 2010.

4 **I. Introduction**

5 Procedurally, BAE submits that, consistent with prior governing orders and stipulations,  
6 as well as precedent in this matter, this discovery motion should be referred to the designated  
7 Discovery Referee for resolution.

8 With respect to scope, BAE does not object to the core of the Port District's motion –  
9 limited discovery against the Cleanup Team regarding changes made to the September 15, 2010  
10 CAO/DTR relative to the prior version, in particular the revisions relating to the Port District's  
11 liability. BAE has repeatedly expressed that position, with certain caveats, to the Port District  
12 and all parties. However, BAE respectfully disagrees with the Port District's contention that  
13 further discovery against designated parties other than the Cleanup Team is necessary,  
14 appropriate, or even relevant. In particular BAE objects to the proposed discovery of financial  
15 and insurance information of the Port District's tenants.

16 BAE also does not object to the timeline for further discovery proposed by the Port  
17 District, although BAE's preference is with the moderately shorter timeframe proposed by the  
18 Cleanup Team in response to the Port District's motion.

19 **II. The Discovery Referee (Tim Gallagher) Should Resolve the Motion**

20 As a preliminary matter, this motion should be before the Discovery Referee and not the  
21 Presiding Officer (or Acting Chair Destache). Mr. Gallagher was appointed Discovery Referee  
22 by Presiding Officer King in the Final Discovery Plan issued on February 18, 2010. That order  
23 empowered Mr. Gallagher to resolve all discovery disputes.

24 In August of 2010, the designated parties collectively negotiated a Stipulation Regarding  
25 Discovery Extension (the "Discovery Stipulation") to address the timing and scope of further  
26 discovery in these proceedings. The Discovery Stipulation, entered on August 9, 2010, expressly  
27 provides that "any discovery dispute" arising on or before October 26, 2010 would be resolved by  
28 Timothy Gallagher, the Discovery Referee. The Discovery Stipulation, signed by all parties,

WEST222626441.3

1 including the Port District, provides:

2 6. Timothy Gallagher, Esq., the appointed Discovery Referee in the  
3 Final Discovery Plan, is authorized to resolve any discovery  
4 disputes that may arise during the extended discovery period  
5 provided by this stipulation. Any decision by Mr. Gallagher  
6 regarding a discovery dispute may be appealed to the Presiding  
7 Officer, but Mr. Gallagher's decision will be final absent an appeal  
8 and final ruling by the Presiding Officer.

9 Because this dispute arose during the extended discovery period, the Discovery Referee is  
10 the authorized mechanism to resolve it.

11 Moreover, this same issue has arisen twice before, and in both instances the matter was  
12 referred to and resolved by the Discovery Referee. First, this issue was previously raised by the  
13 Presiding Officer, through counsel Ms. Hagan, via email to the parties on August 10, 2010,  
14 wherein the Presiding Officer expressed unwillingness to consider or resolve discovery disputes,  
15 and indicated that Tim Gallagher should be the final arbiter. As explained by counsel for  
16 NASSCO, Mr. Richardson, in a responding email on August 10, 2010:

17 Tim Gallagher's decision regarding potential discovery disputes, if  
18 any, would be final. I have spoken with a number of the parties  
19 (including Coastkeeper and **the Port District**), as well as Mr.  
20 Gallagher, and I believe that they have agreed with my  
21 interpretation. If any party disagrees, please raise it now and we can  
22 discuss a revision to Section 6 as soon as possible.

23 (emphasis added.)

24 As noted on the Regional Board's website, Mr. Richardson's email was "Not Objected to  
25 by Any Designated Party." Second, with regard to the noticed deposition of Mr. Beegan, a State  
26 Board employee, the State Board filed a motion to quash and for protective order on September  
27 15, 2010. That motion was made to the Presiding Officer. However, the Presiding Officer  
28 declined to rule on the State Board's motion, and ordered that it to be resolved by the Discovery  
Referee pursuant to the Discovery Stipulation.<sup>1</sup>

To be consistent with prior governing orders and stipulations, as well as precedent in this  
matter, BAE's position is that this discovery motion should be referred to the designated  
Discovery Referee for resolution.

<sup>1</sup> The Discovery Referee's ruling was to be subject to an appeal to the Presiding Officer.  
WEST22226441.3

1 **III. BAE Does Not Oppose the Timing Proposed by the Port District, but Prefers the**  
2 **Cleanup Team's Proposal**

3 The Port District's October 12, 2010 email and draft stipulation circulated to the parties  
4 included an indication that the Cleanup Team had agreed to the proposed timeframe for further  
5 discovery. The Cleanup Team's support of that timeframe was a significant factor in BAE's lack  
6 of opposition to that timeframe, as expressed by counsel for BAE in a "meet and confer"  
7 communication to all parties on October 14, 2008. While BAE does not expressly oppose the  
8 Port District's proposed timeframe as set forth in its motion, given that the Cleanup Team, in  
9 response to the Port District's motion, has expressed its desire for an alternative (and shorter)  
10 timeframe, BAE's preference lies with the Cleanup Team's proposal as set forth in Mr.  
11 Carrigan's email to Ms. Hagan on October 21, 2010.

12 **IV. BAE's Responses to the Scope of Discovery Proposed by the Port District.**

13 **A. BAE Does Not Oppose Limited Discovery Against the Cleanup Team Related**  
14 **to Revisions in the CAO/DTR.**

15 The Cleanup Team has made clear that it will permit the Port District to propound  
16 discovery against the Cleanup Team relative to the revisions made to the TCAO/DTR as  
17 compared to the prior version. BAE would not object to that discovery against the Cleanup Team  
18 only, so long as it is consistent with the parties' previously negotiated Discovery Stipulation of  
19 August 9th. That Discovery Stipulation extended the time in which discovery can be completed,  
20 and permitted new discovery against the Cleanup Team only, but limited such new discovery to  
21 that which "could not, in the exercise of reasonable diligence, have been served prior to the  
22 release of the revised CAO/DTR." BAE continues to believe that standard should be applicable.

23 BAE does not agree, however, that it is appropriate or permissible to re-open discovery  
24 for all parties, against any other party, even if limited in scope to the revisions made to the  
25 TCAO/DTR as compared to the prior version. The Discovery Stipulation previously agreed to by  
26 all parties contained the aforementioned limitations on further discovery. That stipulation  
27 recognized that the parties had had the right and ability to serve discovery regarding the prior  
28 December 2009 version of the CAO/DTR prior to the August 23, 2010 cut-off date. The

1 stipulation also accommodated parties who required more time to complete such pending  
2 discovery, and accommodated certain parties', including the Port District's, stated need to  
3 propound limited supplemental discovery as to the Cleanup Team only (as the party responsible  
4 for making any changes to the revised CAO/DTR). Thus the Port District's due process rights  
5 were protected by the prior Discovery Stipulation. The Port District's efforts now to broaden  
6 discovery as to any and all parties should be rejected as wholly inconsistent with the parties prior  
7 opportunities to serve such discovery and the terms of the August 9th agreement.

8 **B. BAE Does Not Oppose Extending the Time to Complete Existing Noticed**  
9 **Depositions**

10 With respect to depositions, BAE does not oppose an extension of time in which to  
11 complete the existing noticed depositions to allow for the completion of the Port District's written  
12 discovery to the Cleanup Team. An agreement on that issue would minimize the risk to the  
13 witnesses of being deposed twice, would address the personal hardship concerns expressed by  
14 counsel for the Cleanup Team related to the California budget issues, and is reasonable given the  
15 revised CAO/DTR was released several weeks later than expected when the initial Stipulation to  
16 extend discovery was finalized.

17 **C. BAE Opposes Discovery Related to Insurance and Financial Resources of**  
18 **Current Tenants Participating in these Proceedings**

19 For several reasons, BAE is firmly opposed to permitting new discovery against current,  
20 participating tenants with respect to insurance and financial resource issues.

21 First, the Port District has cited no authorities in support of its argument that financial  
22 resources of current, participating tenants are relevant to the discharger determination for  
23 landowners. On the contrary, such discovery as to BAE (and any other similarly situated party) is  
24 irrelevant. The basis for appropriately naming the Port District as a "discharger" in the revised  
25 CAO/DTR is not related to the financial resources of its tenants: "Based upon the three elements  
26 of ownership, knowledge of, and the ability to regulate the discharges which occurred during the  
27 lease terms, the San Diego Water Board can and hereby does conclude that the Port District  
28 caused or permitted waste to be discharged into San Diego Bay....[and accordingly] the Port

1 District is referred to as 'Discharger(s)' herein." September 15, 2010 DTR, page 11-3.

2 Second, the Port District is also named as a discharger with primary liability with regard  
3 to its ownership and operation of the MS4 system. (September 15, 2010 DTR, page 11-5.) No  
4 amount of discovery into tenant's finances and insurance assets will alter the Port District's MS4  
5 discharger liability. Thus the stated justification for such discovery is unwarranted.

6 Third, the Port District is putting the cart before the horse. The September 15, 2010  
7 CAO/DTR expressly states that the Port District's status may be modified in the future to  
8 secondarily responsible party status *only* if its past and current tenants "have sufficient financial  
9 resources to clean up the Shipyard Sediment Site and comply with the order." (*Id.* at 11-4, 5)  
10 (emphasis added.) Thus, even if permitted, the discovery sought by the Port District would not be  
11 conclusive on the primary/secondary responsibility issues unless and until a tenant fails to comply  
12 with the order. Until a final CAO is adopted and the Designated Parties become obligated to  
13 commence remediation, there cannot be a determination whether any Designated Party is unable  
14 to meet its financial obligations. However, permitting discovery now on the would be premature  
15 and unnecessary, particularly when there is zero evidence or even a mere suggestion that BAE is  
16 not complying with the Order or lacks now (or ever will lack) sufficient financial resources to  
17 comply with the Order. The Port District's argument, as stated in their motion, that the naming of  
18 the Port District in the revised CAO/DTR somehow "implicitly suggests, without any factual  
19 support, that those tenants no longer have the necessary financial resources to comply with the  
20 CAO" is pure conjecture (except for the Port District's admission that that notion is "without any  
21 factual support." (Motion, at 14:25-15:1.)

22 Fourth, with respect to insurance information, the Port District's motion fails to mention  
23 that BAE (and the other designated parties except the Environmental Groups) have already  
24 identified and produced their insurance agreements and information to all other parties, including  
25 the Port District, in the parallel federal action. No justifiable or logical reason exists to permit  
26 duplicative discovery on that issue in this proceeding.

27  
28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**D. BAE's Responses Regarding Expert Reports and Witness Designations**

With respect to expert reports, BAE concurs that it makes sense to extend the deadline for completion of expert reports to generally coincide with the conclusion of discovery.

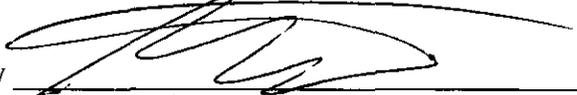
With respect to witness designations, BAE would agree to designation of additional witnesses and experts on "new issues" (strictly limited in scope to revisions made to the TCAO/DTR as compared to the prior version that could not, in the exercise of reasonable diligence, have been so designated prior to the release of the revised CAO/DTR).

**V. Conclusion**

BAE requests the motion be referred to the Discovery Referee for resolution. BAE further requests that the arbiter of this motion limit the proposed scope of the motion as set forth herein.

Dated: October 22, 2010

DLA PIPER LLP (US)

By 

MICHAEL S. TRACY  
AMY G. NEFOUSE  
MATTHEW B. DART  
ERIN O. DOYLE  
Attorneys for BAE Systems San Diego Ship  
Repair Inc.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**PROOF OF SERVICE**

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 October 22, 2010, I served the within documents:

**BAE SYSTEMS' RESPONSE TO PORT DISTRICT'S MOTION TO RE-OPEN AND EXTEND DISCOVERY DEADLINES**

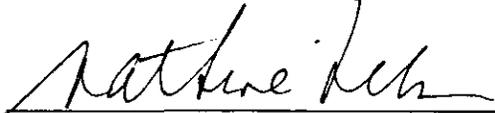
by transmitting via e-mail the document(s) listed above to the recipient(s) set forth below on this date

**SEE ATTACHED SERVICE LIST**

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on October 22, 2010, at San Diego, California.

  
\_\_\_\_\_  
NATHINE NELSON

**Service List**

*In re Shipyard Sediment Site Cleanup Project and  
Tentative Cleanup & Abatement Order No. R9-2010-0002*

Catherine Hagan, Esq.  
California RWQCB, San Diego Region  
9174 Sky Park Court, Suite 100  
San Diego, CA 92123-4340  
[chagan@waterboards.ca.gov](mailto:chagan@waterboards.ca.gov)  
T: (858) 467-2958  
F: (858) 571-6972

Kelly E. Richardson, Esq.  
David Mulliken, Esq.  
Karl Lytz, Esq.  
Latham & Watkins LLP  
600 W. Broadway, Suite 1800  
San Diego, CA 92101-3375  
[kelly.richardson@lw.com](mailto:kelly.richardson@lw.com)  
[david.mulliken@lw.com](mailto:david.mulliken@lw.com)  
[karl.lytz@lw.com](mailto:karl.lytz@lw.com)  
[matthew.luxton@nassco.com](mailto:matthew.luxton@nassco.com)  
T: (619) 236-1234  
F: (619) 696-7419  
*Counsel for National Steel & Shipbuilding  
Company (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](mailto:michael.mcdonough@bingham.com)  
[jim.dragna@bingham.com](mailto:jim.dragna@bingham.com)  
T: (213) 680-6600  
F: (213) 680-6499  
*Counsel for BP West Coast Products LLC*

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

Christopher McNevin, Esq.  
Pillsbury Winthrop Shaw Pittman LLP  
725 South Figueroa Street, Suite 2800  
Los Angeles, CA 90017-5406  
[chrismcnevin@pillsburylaw.com](mailto:chrismcnevin@pillsburylaw.com)  
[bwall@chevron.com](mailto: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](mailto:ccarrigan@waterboards.ca.gov)  
T: (916) 322-3626  
F: (916) 341-5896

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](mailto:marco@coastlawgroup.com)  
*Counsel for Environmental Health Coalition  
& San Diego Coastkeeper*

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

**Service List**

*In re Shipyard Sediment Site Cleanup Project and  
Tentative Cleanup & Abatement Order No. R9-2010-0002*

Leslie FitzGerald, Esq.  
Deputy Port Attorney  
San Diego Unified Port District  
PO Box 120488  
San Diego, CA 92112  
lfitzger@portofsandiego.org  
T: (619) 686-7224  
F: (619) 686-6444

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

Tom Stahl, Esq.  
AUSA Chief, Civil Division  
Office of the U.S. Attorney  
880 Front Street, Room 6293  
San Diego, CA 92101-8893  
thomas.stahl@usdoj.gov  
T: (619) 557-7140  
F: (619) 557-5004

James Handmacher, Esq.  
PO 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

Nate Cushman, Esq.  
Roslyn Tobe, Esq.  
C. Scott Spear, Esq.  
David Silverstein, Esq.  
Associate Counsel  
U.S. Navy  
SW Div, Naval Facilities Engineering  
Command  
1220 Pacific Hwy  
San Diego, CA 92132-5189  
[nate.cushman@navy.mil](mailto:nate.cushman@navy.mil)  
[roslyn.tobe@navy.mil](mailto:roslyn.tobe@navy.mil)  
[david.silverstein@navy.mil](mailto:david.silverstein@navy.mil)  
T: (619) 532-2511  
F: (619) 532-1663

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

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

Sandi Nichols, Esq.  
Kathryn Newsome, Esq.  
Allen Matkins  
3 Embarcadero Center, 12th Floor  
San Francisco, CA 94111  
[snichols@allenmatkins.com](mailto:snichols@allenmatkins.com)  
[knewsome@allenmatkins.com](mailto:knewsome@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. R9-2010-0002*

Raymond Parra  
Senior Counsel  
BAE Systems Ship Repair Inc.  
PO Box 13308  
San Diego, CA 92170-3308  
[raymond.parra@baesystems.com](mailto:raymond.parra@baesystems.com)  
T: (619) 238-1000+2030  
F: (619) 239-1751

Melanie Andrews, Esq.  
Special Assistant U.S. Attorney  
U.S. Department of Justice  
880 Front Street, Room 6293  
San Diego, CA 92101-8893  
[Melanie.andrews@usdoj.gov](mailto:Melanie.andrews@usdoj.gov)  
T: (619) 557-7460  
F: (619) 557-5004

S. Scott Spear, Esq.  
U.S. Department of Justice,  
Environmental Defense Section  
P.O. Box 23986  
Washington, D.C. 20026-3986  
[Scott.Spear@usdoj.gov](mailto:Scott.Spear@usdoj.gov)  
T: (202) 305-1593  
F: (202) 514-8865

[douglas.reinhart@bp.com](mailto:douglas.reinhart@bp.com)

[jennifer.lucchesi@slc.ca.gov](mailto:jennifer.lucchesi@slc.ca.gov)

[sarah@sshbvclaw.com](mailto:sarah@sshbvclaw.com)

[fortlieb@sandiego.gov](mailto:fortlieb@sandiego.gov)