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SAN DIEGO PORT TENANTS ASSOCIATION

September 19, 2005

California Regional Water Quality Control Board
San Diego Region
Attn: Frank Melbourn
9174 Sky Park Court
Suite 100
San Diego, CA 92123-4340
Fax: (858) 571-6972

RE: Designated Party Request - Cleanup and Abatement Order No. R9-2005-0126 for Discharges of Waste to Marine Sediment in San Diego Bay

Dear Mr. Melbourn,

San Diego Port Tenants Association (SDPTA) requests designated party status in the proceedings related to the above-referenced matter. We request the full rights available to designated parties under applicable law. This request is conditioned upon ratification of our full board at our monthly board meeting on September 21, 2005.¹

Founded in 1989, SDPTA is a coalition of businesses and industries on San Diego Bay and at Lindbergh Field dedicated to enhancing trade, commerce and tourism on San Diego's tidelands, while protecting the environment. SDPTA members include manufacturers, shipbuilders, shipping and trade companies,

¹ The Regional Board's Notice of Pre-Hearing Conference outlining the procedures for requesting designated party status and requiring a written request to be received by the Regional Board by September 20, 2005 was not released to the public until August 29, 2005. Because our full Board meets only on a monthly basis, it was impossible to secure the approval of the full board to make this request prior to the Regional Board's September 20th deadline, though SDPTA's executive committee did approve the request. Since the Regional Board did not respond to our separate request for additional time to submit the designated party request, this submittal is expressly conditioned upon the approval of our full board at its September 21, 2005 board meeting, and we reserve the right to rescind this request should our full board decide not to seek designated party status.

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marinas, commercial and sport fishermen, the cruise ship industry, yacht clubs, aerospace entities, the U.S. Navy, and the hospitality industry, including various hotels, restaurants, and retail merchants. Though our membership is diverse, we are united by the common goal of ensuring that the proper balance is drawn between protection of the environment, and the continued success of our operations on the tidelands.

Because of this common goal, SDPTA is alarmed by the approach the Regional Board has taken in the Draft Cleanup and Abatement Order ("Draft CAO"), which has the potential to significantly impact SDPTA and its members. As the name of our organization suggests, all of our members either own or operate businesses on the San Diego Bay tidelands. Our members' property and leaseholds would be directly impacted by any large-scale effort to cleanup marine sediments in San Diego Bay, and we are therefore deserving of designated party status in this matter. California jurisprudence regarding the notion of "standing" to challenge administrative actions directly supports this position. For example, in *Tustin Heights Assn. v. Bd. of Supervisors* (1959) 170 Cal.App.2d 619, 636-637, a neighborhood association was held to have standing to petition an administrative action where "petitioners [were] the owners of real property within the zoned area and as such they are restricted in the use of their property by the zoning ordinance. Each of such property owners has an interest in the enforcement of the ordinance which is peculiar to him. If the ordinance is violated, he suffers special damage that is distinguishable from that suffered by the public at large." See also, *Simons v. City of Los Angeles* (1979) 100 Cal. App. 3d 496, 501.

In addition to directly affecting our members who own property or operate facilities on property near the shipyard, the Draft CAO would directly and substantially affect the employees of our members who work in the port district, as well as the customers and tourists who visit our places of business on a daily basis. The Regional Board's proposal to require large-scale removal of San Diego Bay sediments will potentially expose our employees, customers, and the surrounding community to harmful pollutants during the removal of sediments, including diesel emissions and other harmful pollutants associated with the proposed remedy. There are also likely to be aesthetic impacts (impaired views due to bulky equipment and machinery and increased truck traffic) that would be particularly detrimental to our members in the hospitality industry, such as hotels and cruise ship lines. We do not believe that these types of environmental impacts are justified, especially given that the benefits from the proposed cleanup appear to be highly speculative.

Even assuming that the proposed approach is feasible from a technical standpoint, the sheer magnitude of the cleanup the Board is contemplating will result in adverse economic impacts to our members and to the community. The recent study "Economic & Fiscal Impact of the Port of San Diego," shows that the Port directly contributes more than 50,000 jobs to the region, 20,000 of which are physically located at the tidelands. Directly or indirectly, one in every twelve jobs in the region is supported by business activities on the tidelands. There will be an impact on the San Diego economy and job market if remedial activities physically interfere with economic activity at the port, or if the ongoing economic pursuits of the named parties are diminished

because they are forced to spend time and resources on a costly and unjustified cleanup project.² These economic impacts are in addition to the direct economic impact on the named parties subject to the Draft CAO. Under the Porter-Cologne Water Quality Control Act, the Regional Board is required to consider economic impacts, which are substantial in this case, when setting cleanup goals.

Our interests in the environmental and economic health of the Port are particular to our members. Our unique interests will not be adequately represented by the named parties to the Draft CAO. Though the named parties may share some of our concerns, their interests are distinct from ours. They will bear the responsibility, financial and otherwise, of implementing the conditions of an adopted CAO and their participation at the proceedings will focus on these issues. During these proceedings, they cannot be expected to adequately represent the particularized concerns of our members with respect to economic activity, tourism, employment, environmental impacts, and other potential concerns.³ Because of our unique concerns, we must be afforded the opportunity to fully challenge the Draft CAO as an impacted Party.

Our organization also fundamentally opposes the Regional Board's conclusion that due to the mere presence of certain chemicals in Bay sediments, a large-scale sediment removal project is necessary, irrespective of actual water quality. This is a dangerous precedent, and there would be substantial ramifications for our members if the Regional Board was to pursue the same approach at other locations on the Bay. Any Regional Board action that addresses marine sediments should be based upon sound science that takes into account the realistic potential effects on human health and marine populations where the sediments are located. The Regional Board appears to be proceeding without regard to sediment standards, which is not surprising since no such standards exist. It is inappropriate for the Regional Board to attempt to regulate sediments in this fashion, particularly absent the statutory authority from Porter-Cologne.

From a practical standpoint, the cost to our members of complying with these types of conditions would be exorbitant, without a corresponding benefit to human health or marine communities. Apart from the high cost, the measures that would have to be taken in order to comply with the Draft CAO would be extraordinarily complex from an engineering standpoint. Such measures would substantially affect our right and privilege to use and enjoy our property. They would likely also affect the rights and privileges of adjacent landowners and tenants, as well as tourists to the region, and would potentially create unnecessary adverse environmental impacts in the coastal zone (e.g., re-suspension of historical contaminants, diesel emissions from dredging

² There are also national security considerations associated with limiting economic activity at the shipyard, which provides innumerable services to our armed forces.

³ In this regard, we object to the Board's requirement in the Notice of Pre-Hearing Conference that we describe the evidence to be presented at the proceedings. Until we see the Draft Technical Report and revised Draft CAO, it is impossible for us to know what evidence we will put forth during the proceedings. Notwithstanding this objection, we would anticipate putting forth evidence showing how our members would be impacted by the CAO, and challenging whether the evidence in the record justifies the terms of the Draft CAO.

machines and trucks that would be required to carry out the measures of the Draft CAO, direct physical impacts to the existing marine environment and human activity, etc.).

The Regional Board's proposed action is also a matter of statewide importance. If conditions like those being contemplated by the San Diego Regional Board become an example for other Regional Boards' approaches to marine sediments in coastal areas throughout California, both California's economy and its environment will be adversely impacted. Many of our members, including cruise lines, hotel chains, and manufacturers, have operations at ports up and down the state. SDPTA therefore opposes the unsupported, non-scientific approach that the Regional Board is proposing to take with the Draft CAO, which could impact our members' operations throughout the state.

For the foregoing reasons, we respectfully request Designated Party status for the matter referenced above. Thank you for your careful consideration of this request.

Sincerely,



Sharon Cloward
Executive Director

cc: Mr Michael Chee
Mr. Sandor Halvax
Mr. David Merk
Mr. Brian Gordon
Mr. Scott Tulloch
Mr. Vincent Gonzalez
Mr. H. Allen Fernstrom
Mr. Christopher J. McNevin
Mr. Roy Thun
Ms. Laura Hunter
Mr. David Barker