California Regional Water Quality Control Board

San Diego Region

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Item No. 8 - Supporting Document 3b

NOTICE OF PUBLIC HEARING

November 9, 14, 15 and 16, 2011

Consideration of

Certification of Final Environmental Impact Report
and
Adoption of Tentative Cleanup and Abatement Order No. R9-2011-0001

In the Matter of
San Diego Bay Shipyard Sediment Site

The California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) will conduct a public hearing on November 9, 14, 15, and 16, 2011,[1] at the San Diego Water Board office to consider cleanup of contaminated marine sediment in portions of San Diego Bay. If a quorum of the San Diego Water Board is not present during the scheduled hearing dates for any reason, a panel of board members will conduct the hearing pursuant to Water Code section 13228.14.[2] The San Diego Water Board may continue the hearing in this matter from time to time.

The San Diego Water Board will take testimony regarding cleanup levels and related California Environmental Quality Act (CEQA) issues, and on liability/responsibility for the 56-acre water site along the eastern shore of central San Diego Bay (Shipyard Sediment Site). The San Diego Water Board is not considering allocation issues and will not engage in apportionment of responsibility among responsible parties but may designate one or more parties as secondarily liable.

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[1] These dates differ slightly from the hearing dates identified in the Third Amended Order of Proceedings but are consistent with the dates set forth in the July 12, 2011, hearing outline provided to the Designated Parties. The San Diego Water Board will only convene on November 16, 2011, if necessary, but has noticed this date to comply with legal requirements. Designated Parties, Interested Persons and the public will be notified as soon as possible if the San Diego Water Board will not meet on November 16, 2011. The San Diego Water Board may deliberate on any of the noticed hearing dates and expects to take final action on either November 16, 2011 or December 14, 2011, following the close of the hearing and deliberations. If deliberations and/or final action will occur on December 14, 2011, a further public notice will be issued.

[2] If the hearing is conducted by a panel of San Diego Water Board members, the panel will make a recommendation in the form of a proposed order for consideration by a quorum of the San Diego Water Board at a later date. As used in this document and unless otherwise noted, "San Diego Water Board" also refers to a hearing panel of San Diego Water Board members.

This Notice of Public Hearing (Notice) contains detailed requirements, many of which require action in advance of the hearing dates. Failure to adhere to the requirements in this Notice may affect your ability to participate in the hearing. The agenda for the hearing will be published at least ten days prior to the commencement of the hearing. The San Diego Water Board may conduct all or a portion of its deliberations in closed session as authorized by Government Code section 11126, subdivision (c)(3).

BACKGROUND

Since the 1990s, the San Diego Water Board has investigated sediment contamination at the Shipyard Sediment Site. On April 29, 2005, the San Diego Water Board's Cleanup Team issued tentative Order No. R9-2005-0126. Most recently, on September 15, 2010, the San Diego Water Board Cleanup Team issued Tentative Cleanup and Abatement Order (TCAO) No. R9-2011-0001 and the Draft Technical Report (DTR)[3] to the following named Responsible Parties:

1. BAE Systems San Diego Ship Repair, Inc;
2. Marine Construction and Design Company/Campbell Industries;
3. City of San Diego;
4. National Steel and Shipbuilding Company;
5. San Diego Gas & Electric Company, a subsidiary of Sempra Energy Company;
6. San Diego Unified Port District;
7. Star & Crescent Boat Company; and
8. United States Navy.

The Executive Officer is a member of the San Diego Water Board Cleanup Team (Cleanup Team), formed to enforce the Water Code with respect to this matter. The Cleanup Team also prepared and released a draft Environmental Impact Report (EIR) on June 16, 2011, to analyze the proposed cleanup's potential impacts on the environment, to examine cleanup alternatives, and to propose mitigation measures for identified potentially significant environmental impacts.

Beginning in 2005, successive Presiding Officers for Prehearing Proceedings have held numerous prehearing conferences, issued procedural rulings and orders to govern the process and permitted the Designated Parties to engage in extensive discovery. Information concerning the prehearing conferences, rulings and orders governing the

[3] The TCAO, DTR and other documents related to this matter can be found on the San Diego Water Board website at www.waterboards.ca.gov/sandiego/water_issues/programs/shipyards_sediment/index.shtml

proceeding and related background information are available on the San Diego Water Board website address shown in footnote 3.

After considering written public comment on the Tentative Cleanup and Abatement Order (TCAO) and Draft Technical Report (DTR) and in accordance with the June 8, 2011, Third Amended Order of Proceedings, the Cleanup Team prepared and released extensive responses to comments on August 23, 2011. Designated Parties, Interested Persons, state and local agencies and the public were invited to submit written comments on the draft EIR no later than August 1, 2011. On September 15, 2011, the Cleanup Team released revisions to the TCAO and DTR based upon responses to comments. On that same date, the Cleanup Team also released revisions to the draft EIR in the form of responses to comments and appendices. These documents are available at http://www.waterboards.ca.gov/sandiego.

HEARING PURPOSE

At the hearing, the San Diego Water Board will consider certification of the Final EIR and adoption of the TCAO to address discharges of metals and other pollutants to San Diego Bay sediment and waters at the Shipyard Sediment Site. From Designated Parties, the San Diego Water Board will receive relevant testimony and evidence and will hear legal argument and policy statements on the following issues: appropriate cleanup levels, including technical evidence justifying site cleanup, methods of remediation and other remediation requirements; related CEQA issues[4] and legal responsibility/liability for the directives in the TCAO. The San Diego Water Board will also hear non-evidentiary policy statements from Interested Persons. At the conclusion of the hearing, the San Diego Water Board will deliberate, and may certify the Final EIR, and may adopt, reject, or amend the TCAO.

HEARING PROCEDURES

The hearing will be conducted in accordance with this Notice. The general procedures governing adjudicatory hearings before the San Diego Water Board may be found at Title 23, California Code of Regulations (CCR) Division 3, Chapter 1.5, sections 648, et seq., chapter 4.5 of the Administrative Procedure Act (commencing with section 11400

[4] Under CEQA Guidelines, section 15089(b), "Lead agencies may provide an opportunity for review of the final EIR by the public or by commenting agencies before approving the project. The review of a final EIR should focus on responses to comments on the draft EIR." In this case, the Final EIR consists of revisions and written responses to comments on the Draft EIR. Written comments on the Final EIR are limited to the revisions released on September 15, 2011, and oral comments should focus on the revisions, but may address other aspects of the Final EIR.

of the Government Code), sections 801-805 of the Evidence Code, and section 11513 of the Government Code. Except as provided in Section 648 and herein, subdivision (b), Chapter 5 of the Administrative Procedures Act (commencing with Gov't Code § 11500) does not apply to this hearing. The Designated Parties are reminded that this proceeding is not and will not be conducted as a civil trial.

THE PROCEDURES AND DEADLINES HEREIN MAY BE AMENDED BY THE CHAIR IN HIS DISCRETION.

HEARING PARTICIPATION

Participants at the hearing are either "**Designated Parties**" or "**Interested Persons**."

Interested Persons

Interested Persons may present non-evidentiary policy statements. Policy statements may present legal and policy arguments, and statements concerning any of the issues that will be considered at the hearing. Policy statements may refer to evidence in the record, but cannot include any testimony or new evidence (e.g., photographs, eye witness testimony, monitoring data, etc.). Policy statements may not exceed five (5) pages in length and may be provided by e-mail or in hard copy to the San Diego Water Board (see below). Written policy statements must be submitted so that they are **received** by the San Diego Water Board Advisory Team no later than **5 p.m. on October 19, 2011,** or they will not be allowed into the record.[5]

Written policy statements must be submitted either in hard copy or by e-mail to the San Diego Water Board, c/o Frank Melbourn, at 9174 Sky Park Court, Suite 100, San Diego, CA 92123 or fmelbourn@waterboards.ca.gov. Interested Persons shall be permitted to comment orally at the hearing, whether or not they have submitted a written policy statement. Interested Persons are not subject to cross-examination and may not cross-examine other participants. Interested Persons may be asked to respond to clarifying questions from Members of the San Diego Water Board, Advisory Team staff or others, at the discretion of the Chair.

Designated Parties

Designated Parties to the hearing may present legal and policy arguments, testimony by witnesses and experts, and evidence. Except as specified below, no other written materials will be permitted and no new evidence is allowed. Designated Parties in this proceeding are:

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[5] Although the May 12, 2011, notice of opportunity to comment established an earlier comment period for interested persons, written submissions that do not repeat earlier submissions will be allowed as provided in this Notice to maximize the opportunity for public participation in this proceeding.

1. BAE Systems San Diego Ship Repair, Inc;
2. Marine Construction and Design Company/Campbell Industries;
3. City of San Diego;
4. National Steel and Shipbuilding Company;
5. San Diego Gas & Electric Company, a subsidiary of Sempra Energy Company;
6. San Diego Unified Port District;
7. Star & Crescent Boat Company;
8. United States Navy;
9. BP (the parent company of and successor to Atlantic Richfield Company [ARCO]);
10. Chevron, USA, a subsidiary of Chevron Texaco;
11. Environmental Health Coalition (EHC);
12. San Diego Coastkeeper;
13. San Diego Port Tenants Association; and
14. San Diego Water Board Cleanup Team.

Written testimony from persons who do not appear to affirm their testimony and are not subject to cross-examination will not be made part of the record unless the Chair allows the unaffirmed testimony into the record as hearsay evidence. Only deposition transcripts or excerpts that were included in prior written submittals are included in the record for this matter. Depositions will be accepted without the deponent's personal appearance, to the extent consistent with the California Evidence Code.

Narrative testimony rather than question and answer format testimony will be permitted and is encouraged to conserve scarce hearing time. Oral testimony by witnesses that goes beyond the scope of written submissions will be excluded. The Designated Parties' witnesses are subject to cross-examination by other Designated Parties. The scope of cross-examination is not limited to testimony presented during direct examination or the evidence and testimony presented by the Designated Party as long as it concerns a matter relevant to the issues. Designated Parties' witnesses may be asked to respond to clarifying questions from Members of the San Diego Water Board, Advisory Team staff or others, at the discretion of the Chair.

DESIGNATED PARTY WRITTEN SUBMISSIONS

In accordance with the May 12, 2011, Notice of Extended Comment Period and Revised Comment Format, written submissions including technical comments, evidence and legal argument were due **May 26, 2011 (initial) and June 23, 2011 (rebuttal)**. In accordance with the Third Amended Order of Proceedings affirmed June 8, 2011, Designated Parties are not permitted to submit further written materials except as

specified below. Each Designated Party shall adhere to the following instructions and deadlines:

September 30, 2011, not later than 5 p.m.
Designated Parties, including the Cleanup Team, shall submit a written summary of all continuing areas of disagreement (Third Amended Order of Proceedings, Phase V.A.). Designated Parties are encouraged to submit a joint written summary.

October 19, 2011, not later than 5 p.m.
Designated Parties may submit written comments on:
(1) Revisions to the TCAO and DTR made by the Cleanup Team and released on September 15, 2011; and
(2) Revisions to and/or responses to comments on the draft EIR made by the Cleanup Team and released on September 15, 2011.
Designated Parties may submit rebuttal evidence as part of their October 19, 2011 comments only to the extent the Cleanup Team's September 15, 2011, revisions to the TCAO, DTR and/or draft EIR include new evidence.

October 19, 2011, not later than 5 p.m.
Designated Parties may submit hearing briefs, not to exceed 15 pages. Hearing briefs are allowed for the purpose of summarizing previously submitted technical comments, evidence and argument only. Hearing briefs that go beyond the purpose for which they are allowed will be excluded from the record.

November 2, 2011, not later than 5 p.m.
San Diego Water Board Cleanup Team **only** may submit a written response to written comments, interested person policy statements and/or hearing briefs received on October 19, 2011, or may respond orally at the hearing. No new evidence is permitted.

Written submissions must be provided to the Advisory Team, c/o Catherine George Hagan via e-mail and simultaneously provided to all Designated Parties on or before the applicable deadline. In addition to electronic copy, Designated Parties must submit fifteen (15) hard copies of written submittals to the Advisory Team, c/o Catherine George Hagan at the San Diego Water Board office.

Power Point and other Computer Displays
Designated Parties may submit PowerPoint and other computer displays electronically for use on the San Diego Water Board's computer. Electronic submissions, including one exact color hard copy for inclusion in the record, must be received by **November 4, 2011, not later than 5 p.m.** by Frank Melbourn, fmelbourn@waterboards.ca.gov. These submissions will only be accepted if they summarize the information contained in

documents that were timely submitted in compliance with the deadlines and restrictions above and in prior governing notices and orders. They will not be accepted if they contain any new testimony, evidence or arguments. Electronic submissions must be sent so as to be received electronically by all other parties by the deadline. They must be in a format that is readable by the computers at the State Water Board such as Microsoft PowerPoint. Questions about whether a proposed electronic format is acceptable should be directed to Frank Melbourn at the e-mail address above or at 858-467-2973.

HEARING TIME LIMITS

Designated Parties

Designated Parties will have a block of time in which to make opening statements, complete presentation of their respective cases and conduct cross-examination of adverse witnesses. That block of time will include all issues: cleanup levels, including CEQA-related issues, and liability/responsibility issues. Each Designated Party is allotted two (2) hours, except the following three Designated Parties, each of which is allotted one (1) hour: BP, the parent company of and successor to ARCO, Chevron USA, a subsidiary of Chevron Texaco, and the San Diego Port Tenants Association. Each Designated Party will have an additional fifteen minutes beyond the its respective time block for closing remarks. A Designated Party may reserve a portion of its time block to expand its time for closing remarks. Designated Parties may not cede all or a portion of their time blocks to any other Designated Party without prior approval of the Chair. However, Designated Parties are encouraged to consolidate their presentations to save hearing time and/or avoid duplication. Designated Parties that do not expect to make presentations or expect to use only a portion of their time block are requested to notify the Advisory Team as soon as their plans are known to facilitate hearing management.

The San Diego Water Board Advisory Team will provide two time-keepers to keep track of each Designated Party's time usage during the hearing.

Interested Persons

Interested Persons will each be given three (3) minutes in which to present their policy statements. The amount of time may be limited depending on the number of speakers and is at the discretion of the Chair. The Chair, in his discretion, may allow a group of Interested Persons who are present to make a joint presentation.

In order to accommodate Interested Persons wishing to make policy statements, the San Diego Water Board will break from Designated Party presentations on November 9 at 3 p.m. to hear from Interested Persons. Interested Persons present prior to 3 p.m.,

may request to speak before 3 p.m. The Chair will decide at the hearing whether to grant those requests. Designated Party presentations will resume following Interested Persons presentations.

DESIGNATED PARTY HEARING PRESENTATIONS

Subject to the exceptions noted below, the general order of Designated Party presentations is expected to be as follows:

1. Opening Statements
2. Cleanup Levels, including CEQA-related Issues (testimony and cross examination)
3. Liability/Responsibility Issues (testimony and cross examination)
4. Closing Statements

Within each of the four categories listed above, the order will be as follows:

1. San Diego Water Board Cleanup Team
2. NASSCO
3. BAE Systems San Diego Ship Repair
4. Marine Construction and Design Company/Campbell industries, Inc.
5. U.S. Dept. of Navy
6. City of San Diego
7. San Diego Gas & Electric Company
8. San Diego Unified Port District
9. Star & Crescent Boat Company
10. BP
11. Chevron
12. Environmental Health Coalition
13. San Diego Coastkeeper
14. San Diego Port Tenants Association

With the exception of cross-examination of Environmental Health Coalition's and San Diego Coastkeeper's expert witness, Donald MacDonald, who will be taken out of order (see Exception (1), below), cross-examination of a Designated Party's witnesses will take place after all of that party's witnesses have testified. The party conducting cross-examination may either direct questions to a particular witness, or pose the question to the testifying party's witnesses as a panel and allow the testifying party to designate which witness should answer. The San Diego Water Board discourages taking witnesses out of order but will consider requests on a case-by-case basis.

Exceptions:
(1) Following opening statements by all Designated Parties on November 9, San Diego Coastkeeper and Environmental Health Coalition may call their expert witness, Mr. MacDonald, out of order to affirm and summarize his testimony. Designated Parties wishing to cross-examine Mr. MacDonald on any relevant matter shall do so at that time. The San Diego Water Board will hear the remainder of San Diego Coastkeeper's and Environmental Health Coalition's presentations in the order listed above.

(2) The Chair may allow the Cleanup Team to make its closing statement last, upon request, as is the San Diego Water Board's customary practice.

No documents will be accepted at the hearing whether they are new evidence or argument, summaries or compilations, or any other materials. The Presiding Officer will strictly enforce deadlines, page limits, and limits on oral presentations and written submissions described herein.

SEPARATION OF FUNCTIONS

To comply with the separation of functions and ex *parte* communication requirements of the Administrative Procedures Act, and the due process provisions of the United States and California constitutions,[6] it is necessary to separate the functions of staff members presenting evidence and argument for consideration by the San Diego Water Board from those of staff providing advice to the Chair and to other members of the San Diego Water Board. Assigning responsibility for advising the San Diego Water Board to staff other than those who will advocate for a particular decision will ensure the fairness and impartiality of these proceedings. Accordingly, the San Diego Water Board staff participating in these proceedings is separated into two groups, the Cleanup Team and the Advisory Team.

The Cleanup Team is a Designated Party to this proceeding, serves in an advocacy role for these proceedings and assumes responsibility for presenting evidence and argument to the San Diego Water Board on the issues described above. The Advisory Team will assist Members of the San Diego Water Board in matters such as evaluating requests, enforcing deadlines and other limitations on written and electronic submissions and exhibits, and preparing for and conducting these proceedings. The Advisory Team will also provide advice to members of the San Diego Water Board in their deliberations, in open or closed session, on the evidence presented in these proceedings.

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[6] See Government Code §§ 11430.10-11430.80, 11425.30.

PRIMARY CONTACTS

Advisory Team

1. Catherine George Hagan, Senior Staff Counsel
   Office of Chief Counsel
   State Water Resources Control Board
   9174 Sky Park Court, Suite 100
   San Diego, California 92123-4340
   (858) 467-2952, chagan@waterboards.ca.gov

2. Frank Melbourn, Water Resource Control Engineer
   California Regional Water Quality Control Board, San Diego Region
   9174 Sky Park Court, Suite 100
   San Diego, California 92123-4340
   (858) 467-2973, fmelbourn@waterboards.ca.gov

Cleanup Team

1. Christian Carrigan, Senior Staff Counsel
   Office of Enforcement
   State Water Resources Control Board
   P.O. Box 100
   Sacramento, California 95812-0100
   (916) 322-3626, ccarrigan@waterboards.ca.gov

2. David Barker, Water Resource Control Engineer
   9174 Sky Park Court, Suite 100
   San Diego, California 92123-4340
   (858) 467-2989, dbarker@waterboards.ca.gov

EX PARTE COMMUNICATIONS

Designated Parties and Interested Persons may not engage in ex parte communications regarding this matter with members of the Advisory Team or Members of the San Diego Water Board. An ex parte contact is any written or verbal communication pertaining to this matter between a member of a Designated Party or Interested Person on the one hand, and the Advisory Team or San Diego Water Board members on the other hand, unless the communication is copied to all other Designated Parties (if written) or made in a manner open to all other Designated Parties (if verbal). Communications regarding non-controversial procedural matters are not ex parte contacts, and are not restricted. Communications among one or more Designated Parties and Interested Persons themselves are not ex parte contacts.

As provided in the most recent Memorandum from the Executive Officer describing the separation of functions within the State Water Board and San Diego Water Board staff for this matter, members of the Advisory Team are:

San Diego Water Board

1. James Smith, Assistant Executive Officer
2. John Odermatt, Senior Engineering Geologist
3. Deborah Jayne, Senior Environmental Scientist
4. Frank Melbourn, Water Resource Control Engineer
5. Chehreh Komeylyan, Water Resource Control Engineer
6. Amanda Oliveira, Student Intern

State Water Resources Control Board's Office of Chief Counsel:

1. Lori T. Okun, Assistant Chief Counsel
2. Catherine George Hagan, Senior Staff Counsel
3. Jessica M. Newman, Staff Counsel

OBJECTIONS

Any objections to the procedures or provisions herein must be submitted in writing so that the objection is received by the Advisory Team, c/o Catherine George Hagan, not later than **5 p.m. on October 19, 2011**. Electronic submission is acceptable. Objections must simultaneously be provided electronically to all Designated Parties. Objections to the procedures that are not timely received are waived.

MOTIONS IN LIMINE

The Chair may rule on previously submitted motions in limine and objections in advance of the hearing. In order to be considered by the San Diego Water Board, written motions or objections must be submitted not later than **5 p.m. on October 19, 2011.** No written motions or objections will be accepted after **October 19, 2011**. Oral motions or objections at the hearing will only be permitted if the motion or objection could not, in the exercise of reasonable diligence, have been brought in writing within the written motion or objection period.

COURT REPORTER

The San Diego Water Board will provide a court reporter. Any party who wishes to bring its own court reporter may do so, but may be limited as to where the court reporter may sit due to limited space and access to electrical outlets.

SEATING DURING HEARING

Each Designated Party will be provided with several seats at the front table during its presentation. During the rest of the hearing, parties likely will be seated in the audience. Representatives of Designated Parties and witnesses who intend to speak or are likely to speak are asked to bring a name card with them for display during their presentation to assist the court reporter and board members.

ACCESSIBILITY

Language Assistance

Spanish language translation will only be provided on November 9. A Fact Sheet summarizing this Notice will be published in English and Spanish. Requests for additional language assistance, including Spanish language translation on other hearing days must be received by **5 p.m. on October 21, 2011**. Please contact Frank Melbourn of the San Diego Water Board at 858-467-2973 or via e-mail for assistance at fmelbourn@waterboards.ca.gov.

Other Assistance

This facility is accessible to people with disabilities. Individuals who have special accommodation needs, please contact Mr. Frank Melbourn at 858-467-2973 or fmelbourn@waterboards.ca.gov at least five (5) working days prior to the first hearing day.

QUESTIONS

Questions concerning this proceeding may be addressed to Catherine Hagan (858-467-2958 or chagan@waterboards.ca.gov) or to Frank Melbourn (858-467-2973 or fmelbourn@waterboards.ca.gov).

GRANT DESTACHE, CHAIR

9/16/2011
DATE