



BAE Systems San Diego Ship Repair Inc.
November 9, 14-16 2011



San Diego Unified Port District

- September 2010 TCAO: Finding 11
 - Port District named as **primarily liable party** on two independent bases:
 1. **The acts, omissions and operations of its tenants;** and
 - San Diego Marine Construction Co. (“SDMCCo.”) (1963-1972) (North)
 - Campbell Industries (1972-1979) (North)
 - Southwest Marine/BAE Systems (1979-present) (North)
 - SDG&E (1963-Present) (North)
 - NASSCO (1963-present) (South)
 2. **Its own storm water (MS4) discharges**
- Unchanged by Cleanup Team’s Sept. 2011 Revisions

Port District's Liability for the Acts, Omissions and Operations of its Tenants

- DTR names the Port District as a “Discharger” under § 13304.

- Why?
 1. Port is **responsible for the use and maintenance of the Site**
 2. Port had **knowledge** of the potential for material discharges from the leased properties to San Diego Bay; and
 3. Port had the ability to **control** its tenants’ activities and prevent discharges.

Summary: Secondary Liability Status is Not Appropriate



- The Port **does not dispute** it should be named a Discharger.
 - But asserts that it is entitled to **mere secondary** liability status.

- Port's position is incorrect:
 1. Misapplication of burden in the secondary liability inquiry.

 2. Falsely assumes that its past and present tenants have sufficient financial resources to cleanup the Site and comply with the CAO.

- Secondary Liability is not the default position.
- **Party advocating for secondary liability** must demonstrate that factors specified by State Board justify imposing different liability.
- Factors include:
 1. Whether or not the party initiated or **contributed** to the discharge, and
 2. Whether those parties who created or contributed to the discharge **are proceeding with the cleanup**.

- *Petition of Aluminum Company of America*, Order WQ 93-9, at p. 12 n.8

Port District Contributed to the Discharge



- Port District **contributed** to contamination by permitting SDMCCo. and Campbell to discharge unabated for years
 - Operated as lessor of Site at same time as SDMCCo. and Campbell
 - Exerted significant control over SDMCCo. and Campbell's activities
 - Knew of actual/potential discharges
 - Received significant financial benefit from discharger activities

Parties are not Proceeding with the Cleanup



- Case law: downgrading status is appropriate only where the parties are making progress toward cleanup.
 - *Petition of Spitzer*, Order No. 89-8, at 25.
 - Found it appropriate to give secondary liability status because the landowner “had no connection with the activities which initially caused the pollution, [and] the parties directly responsible for the . . . release have been identified and **are making progress toward the cleanup.**”
 - *Petition of Wenwest*, Order No. 92-13.
 - Because “**the cleanup [was] proceeding**” and the primarily liable parties were “**capable and willing to undertake the cleanup**”, the landowners, “who neither caused nor permitted the activity which led to the discharge” were named as secondarily liable. (p. 8.)

- Any change in the Port District's liability status would be **premature**
 - Costs of the cleanup have not been determined
 - Cleanup has not begun
 - Responsible parties from 1963-1979 not willing and participating
 - SDMCCo. not participating
 - Campbell and Star & Crescent not participating on par with extent they contributed

- **Cleanup Team's position:**
 - "The Port District's claim that its current and former tenants are cooperating with and implementing the CAO is false." (Cleanup Team's 8/23/11 Response to Comments, at 11-32.)

The Port District Incorrectly Assumes Sufficient Resources



- Port District has not shown tenants' sufficient financial resources to cleanup Site and comply with the CAO

- Why?
 1. The Port District fails to account for Orphan Shares.

 2. The Port District assumes the availability of “potential insurance assets” without establishing that those assets are actually available.

- BAE Systems (1979 – present)
 - Stipulated that it has financial assets to pay for cleanup costs associated with its post-1979 tenancy at the Leasehold.
 - BAE Systems is **not** the successor to any entity that operated pre-1979

- Campbell Industries (1972-1979)
 - Leased property from Port: 1972-1979
 - Contributed substantially to the contamination at the Site
 - Named in CAO and has appeared
 - But
 - out of business for years
 - financial ability to comply with CAO is questionable

- SDMCCo. (1914-1972)
 - Leased property from Port: 1963-1972
 - Contributed substantially to the contamination at the Site
 - Defunct entity and has not appeared
 - DTR finds Star & Crescent Boat Co. is the successor to SDMCCo.'s liabilities. Star & Crescent disputes that conclusion
 - Federal Court recently declined to grant summary judgment on successor issue because of triable issues of material fact

- Port has only shown historic policy limits potentially applicable to the Site cleanup efforts

- **Irrelevant** because:
 - No evidence that policies provide actual coverage
 - No evidence that insurers are solvent or still in existence
 - No evidence that policy amounts are still available
 - No evidence that insurers have accepted coverage for indemnity obligations
 - *Montrose Chemical Corp. v. Admiral Ins. Co.*, 10 Cal. 4th 645, 659 n.9 (1995) (noting that obligation to indemnify does not arise until liability is established)

- Granting Port District secondary liability status now would be an **impermissible allocation** of liability

- DTR leaves open potential future modification of status:
 - “In the event the Port District’s tenants, past and present, have sufficient financial resources to clean up the Shipyard Sediment Site and comply with the Order, then the San Diego Water Board **may** modify its status to secondarily responsible party **in the future.**” (DTR 11.2)

- The Board should leave the Port District’s status **unchanged**

Port District's MS4 Discharger Liability

- The Port District owns and operates a MS4 through which it discharges waste commonly found in urban runoff to San Diego Bay.
 - **MS4 Storm Drain SW4:** This storm drain receives runoff from Sicard, Belt, and Sampson streets and discharges to the Bay at the current BAE leasehold.
 - **MS4 Storm Drain SW9:** This storm drain collects flow from 28th Street, and stretches from the I-5 freeway to the bay including parts of Belt Street and Harbor Drive and discharges to the Bay at the current NASSCO leasehold.

DTR Figure 33-6: Watershed that Drains to MS4 Outfall SW4



- CAO/DTR:
 - Discharges from the Port District's MS4 have “contributed to the accumulation of pollutants in the marine sediments at the” Site

- CAO Finding 11: Port's wastes discharged include
 - “Metals (arsenic, cadmium, chromium, copper, lead, mercury, nickel, silver, and zinc),
 - total suspended solids,
 - sediment (due to anthropogenic activities), and
 - petroleum products, and
 - synthetic organics (pesticides, herbicides, and PCBs).”

Port District Disputes its MS4 Discharger Liability



- Port District argues:
 1. It is not responsible for the MS4 discharges because it does not own or operate any part of the MS4 system that discharges through storm outfalls SW4 and SW9, and that even if it did -
 2. There is no substantial evidence to support the CAO/DTR's conclusion that the Port District's discharges through its MS4 facilities have contributed to the condition of pollution or nuisance at the Site.

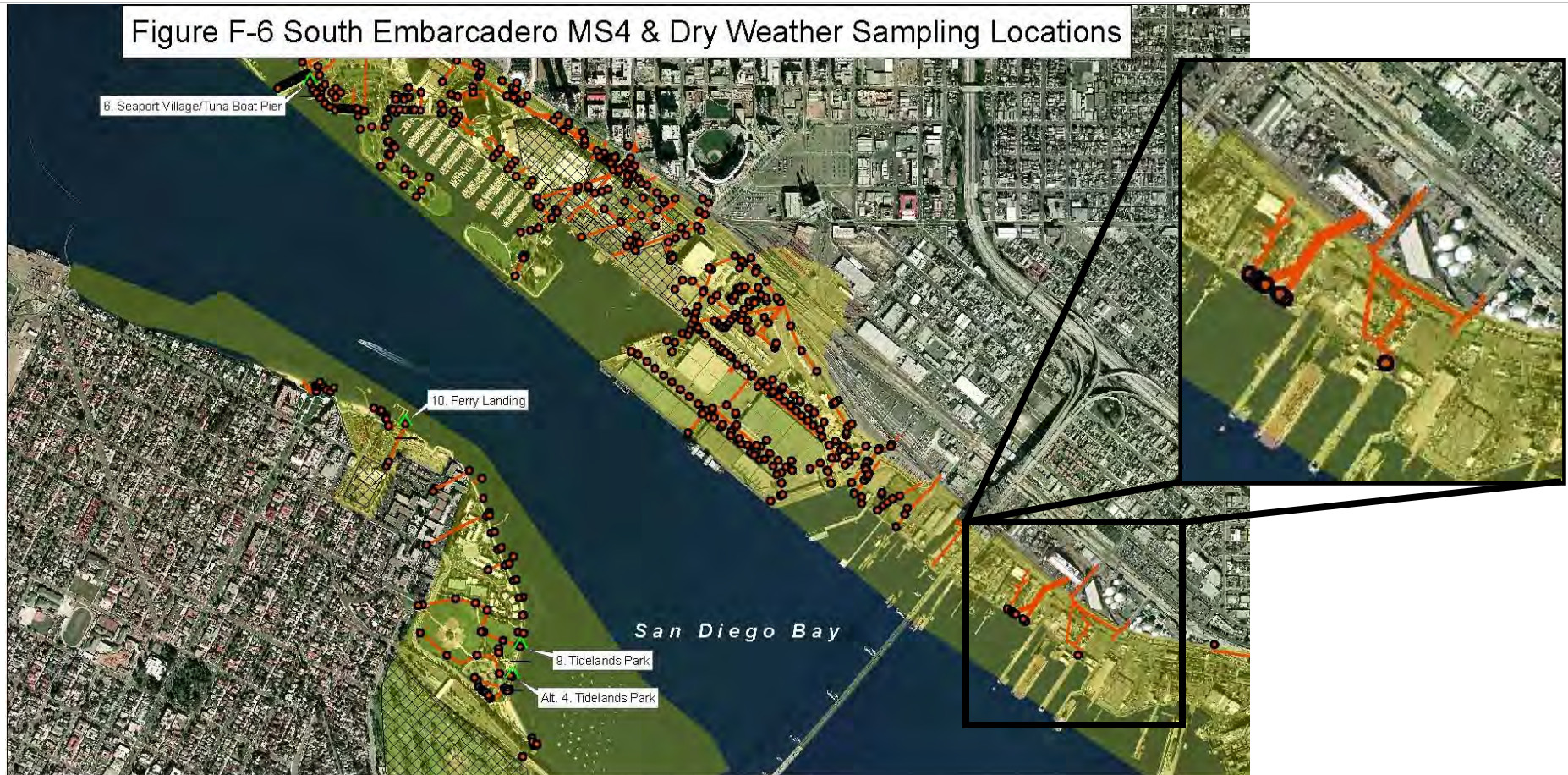
Cleanup Team Rejects the Port District's Arguments



- “The Port District is Wrong.”
- The Port District “fails to properly apply the substantial evidence standard with respect to facts in the record, reasonable assumptions based on those facts, and expert and staff opinions based on those facts regarding its responsibility for discharges of relevant COCs from its MS4 system.”
- “The TCAO does not allege that the Port District violated its [NPDES] permit. Rather, the inquiry is whether substantial evidence supports a finding that the Port District caused or contributed COCs” to the Site.
 - Source: 8/23/11 Response to Comments Report

Port District Owns or Operates MS4 Facilities

Figure F-6 South Embarcadero MS4 & Dry Weather Sampling Locations



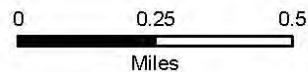
Legend

MS4

- Inlets/Outfalls
- Drain Lines
- ▲ Dry Weather Sampling Point

Jurisdictions

- Port Jurisdiction
- ⊠ Not Under Port Management



May 2008 JURMP, Figure F-6

The Port District Admits it Operates MS4 Facilities that Outfall to SW4



- 5/23/11 Robert Collacott Declaration
 - A “portion of the Port District that is not leased to tenants and is tributary to outfall SW4 is limited to portions of Belt Street (approx. 1 acre) consisting of an estimated one-half mile (1/2 mile street) of curb and gutter, four storm drain inlets, and an estimated 770 feet of underground storm drains 24-inches in diameter and smaller”

Evidence Supporting MS4 Discharger Liability



- The Port District's second argument that there is insufficient evidence to find it liable as a Discharger in connection with its MS4 System is not accurate.
- The Cleanup Team, City of San Diego, BAE Systems, NASSCO, and SDG&E all submitted briefs and evidence rebutting the Port District's arguments.

Evidence: 2001 SW4 Sampling Data



- 2001 SW4 Sampling Data collected from manhole on the BAE Systems Leasehold
 - November 29, 2001
 - Prior to any Site input
 - Presence of **TBT, copper** and **Mercury**
 - *Source:* BAE Systems' 6/23/11 Reply Submission

Evidence: 2005 SW4 Sampling Data



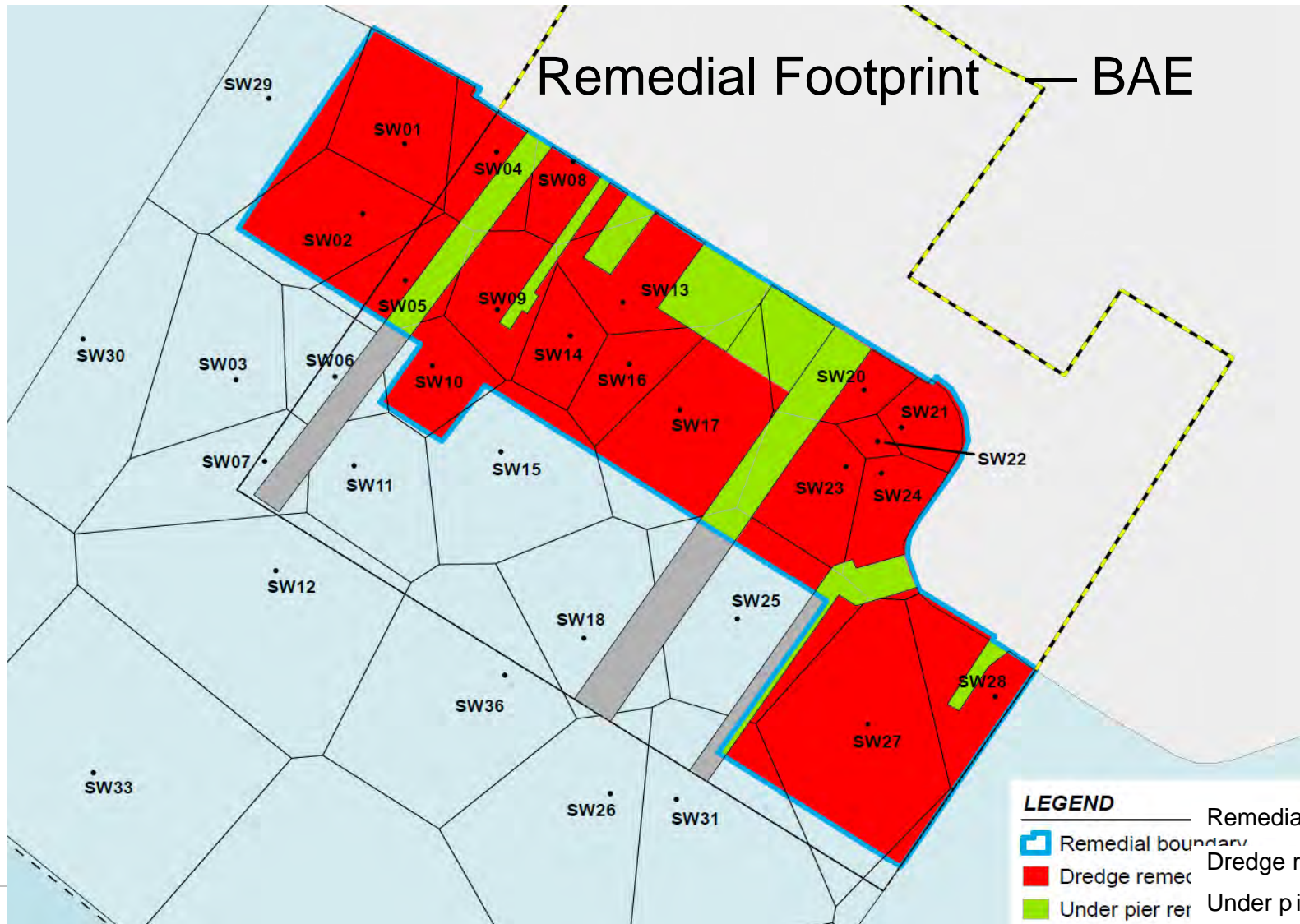
- 2005 SW4 Sampling Data from City of San Diego Investigation
 - October 3, 2005
 - Three samples
 - Presence of both **PCBs** and **PAHs** entering and exiting the municipal storm drain system catch basin.
 - *Source:* DTR, Table 4-4

Evidence: 2009 SW4 Sampling Data



- 2009 SW4 Sampling Data collected from manhole on the BAE Systems Leasehold
 - December 7, 2009
 - Prior to any Site input
 - Multiple congeners detected, and the highest concentrations were of **penta- and hexa-chlorinated biphenyls**, similar to **Aroclor 1254**.
 - **Copper**, **mercury**, and **TBT** also detected.
 - *Source:* BAE Systems' 6/23/11 Reply Submission

Evidence: Remedial Polygons Surrounding SW4 Outfall



Evidence: Port District's own JURMP Potential Pollutants Generated by MS4



Jurisdictional Urban Runoff Management Plan ("JURMP")

Table 6-2. Inventory Of Municipal Areas.

MUNICIPAL AREA	TOTAL INVENTORY	UNIT OF MEASURE	PRIORITY	POTENTIAL POLLUTANTS								
				POTENTIAL POLLUTANTS THAT MAY BE GENERATED BY THE FACILITY. A FACILITY CAN BE IDENTIFIED AS HAVING MORE THAN ONE POLLUTANT.								
				Bacteria	Gross Pollutants	Metals	Nutrients	Oil & Grease	Organics	Pesticides	Sediment	Trash
Roads and Streets	30	Miles	High	X	X	X		X			X	X
Parking lots	44	Each	High	X	X	X		X			X	X
MS4 (catch basins and inlets)*	852	Each	To be determined upon initial two years of inspections	X	X	X	X	X	X	X	X	X
MS4 (stormwater conveyance system)*	20	Miles	To be determined upon initial two years of inspections	X	X	X	X	X	X	X	X	X
Parks (including fishing piers and boat launch ramps)	18	Each	High	X	X	X	X	X	X	X	X	X

* Total inventory is based on current MS4 GIS layer.

Evidence: Port District's own JURMP Pollutants Can be Carried to Water Bodies



The MS4 also has the potential to discharge to the receiving water. The MS4 receives pollutants generated by motor vehicles, namely, heavy metals, oil and grease, and other toxic pollutants from engine exhaust, brake linings, and leaking fluids. Waste liquids, such as oil and paint, can also be illegally dumped into conveyance system structures. Illegal connections can be made to the MS4 and potentially introduce a wide variety of pollutants to the system. Street curbs and gutters, stormwater inlets, culverts and channels typically collect litter discarded in urban areas. As such, all of these pollutants can reach the MS4 with each rainfall event, and in turn, be carried to receiving water bodies.

Port's May 2008 JURMP, p. 6-7

- There is ample evidence to support naming the Port District as a Discharger for MS4 liability.
 - The Port District admits that it owns or operates MS4 facilities that discharge to the Site
 - The Port District is responsible for discharges from its MS4 facilities
 - There is substantial evidence to find that the Port District's discharges through its MS4 at the SW4/SW9 outfalls have caused or contributed to the condition of pollution or nuisance at the Site

- The DTR correctly concludes that the Port District should be named as a discharger with **primary liability** for:
 1. the acts and omissions of its tenants; and
 2. its own MS4 discharges.

- “Accordingly, the Port District should remain a named discharger under the TCAO.” (Cleanup Team’s Response to Comments Report, at 11-35.)