California Regional Water Quality Control Board
San Diego Region

Re: Tentative Cleanup and Abatement Order No. R9-2005-0126

Submitted by:

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Representing:

San Diego Unified Port District

April 22, 2008

Comment Information re Argument by Other Participants Pursuant to First Amended Order of Proceedings, Appendix C

Document Name	Letter to David King, Presiding Officer, San Diego Regional Water Quality Control Board, regarding Tentative CAO R9-2005-0126, Request that San Diego Unified Port District and City of San Diego Be Named as Dischargers
Name of Person Document is from	Christian Volz, McKenna Long & Aldridge on behalf of Designated Party BAE Systems.
Document Date	April 8, 2008
Document Type	Public Comment
Page, Paragraph, and Sentence Number	Pages 1-11
Concise Summary of Issue	The Port District is neither a discharger nor secondarily liable under Water Code section 13304; there is no legal basis to name the Port District in the Tentative CAO.

Tentative Cleanup & Abatement Order Comment Information (First Amended Order of Proceedings) Pursuant to First Amended Order of Proceedings, Appendix C

Document Name	First Amended Order of Proceedings, Tentative CAO No. R9-2005-0126
Document Date	January 30, 2006
Finding or Directive Number	Not applicable.
Page, Paragraph, and Sentence Number	Proceedings Order pages 4-6, section 3
Concise Summary of Issue	Given the volume of the record, the Regional Board should revisit the time frame for completing Phase III to assure the designated parties are afforded due process and to expedite the remedial action of the site.

Tentative Cleanup & Abatement Order Comment Information (First Amended Order of Proceedings) Pursuant to First Amended Order of Proceedings, Appendix C

Document Name	First Amended Order of Proceedings, Tentative CAO No. R9-2005-0126
Document Date	January 30, 2006
Finding or Directive Number	Not applicable
Page, Paragraph, and Sentence Number	Proceedings Order page 6, section 4 and Appendix C
Concise Summary of Issue	The "Comments Format" set forth in Appendix C to the Proceedings Order should be modified and the recommended penalty of exclusion for non-compliance should not be adopted.

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Via Email/Hand Delivery

April 22, 2008

Michael P. McCann
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Re: Tentative Cleanup and Abatement Order No. R9-2005-0126; San Diego Unified Port District's Response to BAE Systems' Request that San Diego Unified Port District Be Named as Discharger; Written Comments on Phase III Schedule and Process for Third Pre-Hearing Conference

Dear Mr. McCann:

Pursuant to the Notice of Third Pre-Hearing Conference issued by the Executive Officer on April 15, 2008 ("Third Notice"), the San Diego Unified Port District ("Port District") submits these written comments to address and respond to issues regarding the schedule and process, as established in the First Amended Order of Proceedings, dated January 30, 2006 ("Proceedings Order"), in connection with the pre-hearing procedures and determinations relating to Tentative Cleanup and Abatement Order No. R9-2005-0126 issued on April 4, 2008 (the "TCAO"). In particular, the Port District here addresses: (1) BAE Systems' renewed request, in its letter of April 7, 2008, to name the Port District as a "Discharger" in the TCAO for any contamination at the BAE Systems site between 1962 and 1979;[1] (2) requests for extensions of the time frame to complete Phase III of the Proceedings Order; and (3) the "Comments Format," which was approved by the Advisory Team and formally made a part of the Proceedings Order, as Exhibit C, on April 4, 2008.

[1] It is unclear whether the Third Notice requires a substantive response now to BAE Systems' request for a decision "immediately, within 30 days" (Volz April 7, 2008 letter, page 10) that the Port District be named in the TCAO. Given that the request arguably raises an issue of "process," which will be addressed at the April 25, 2008 Third Pre-Hearing Conference, and given that the underlying request to name the Port District lacks merit and can be summarily rejected without further delay, we respond to BAE Systems' arguments here.

In brief, the Port District submits as follows:

1. **BAE Systems' Request To Name Port District on TCAO**: BAE Systems' request to name the Port District in the TCAO should be summarily denied. The Port District takes its role as trustee and steward of the tidelands seriously, but it is the parties that caused the pollution at the Shipyard Sediment Site, and not the public trustee, that should be responsible for its cleanup. BAE Systems' request should therefore be denied on the following grounds: (a) the Regional Board has previously considered and rejected these identical arguments by BAE Systems in developing the TCAO[2]; (b) the Port District is not a "discharger" under Water Code section 13304; (c) the Port District should not be even "secondarily liable" because it does not "own" the tidelands that comprise the Shipyard Sediment Site, but is, in fact, a mere "trustee" of those tidelands on behalf of the people of the State of California; (d) even if the Port District could be deemed to be "secondarily liable," it would not become primarily responsible under the CAO unless all Dischargers default, which is not the situation now and there is no likelihood that it will ever be the case; and (e) BAE Systems, as the successor to Southwest Marine, accepted the condition of the premises called for by the Lease, assumed all risk and liability associated with any defects, and expressly agreed to indemnify and hold the Port District harmless for liability arising from the use and operation of the leased premises or any defect.

2. **Extension of the Time Frame to Complete Phase III:** As the trustee of the tidelands, the Port District has an interest in having this proceeding progress expeditiously to resolution so remedial action can be implemented to address the contamination at the Shipyard Sediment Site. To that end, the Port District believes that all Designated Parties should be afforded due process and an opportunity to be heard on the issues raised by the TCAO and the Technical Report. The unexpected size of the record produced by the Regional Board on April 4, 2008 (some 375,000 pages), has triggered certain Designated Parties' concerns (*See, e.g.*, City of San Diego ("City"), NASSCO, and SDG&E letters of April 16, 2008, April 4, 2008, and April 18, 2008, respectively) as to the feasibility of reviewing that record, undertaking discovery, and submitting substantive comments to the Regional Board in the time frames currently contemplated in the Proceedings Order. Addressing those concerns now, by revisiting and revising the tentative time frames established in the Proceedings Order, would benefit the Designated Parties and the public by reducing the number and likelihood of future procedural challenges that could delay the implementation of the ultimately-selected remedy for the Shipyard Sediment Site.

3. **Objections to the "Comments Format":** The Port District shares the concerns expressed by the City, NASSCO, and SDG&E in their letters of April 16, 2008, April 4, 2008, and

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[2] Further, as a policy matter, the Presiding Officer should reject invitations for piecemeal adjudication of the issues raised by the TCAO, as suggested by BAE Systems' request. This would serve only to further delay an already complicated and protracted process.

April 18, 2008, respectively, regarding the format for written comments and likewise asks that the Regional Board reconsider and revise those requirements.

Each of these subjects is addressed under separate heading in more detail below.

I. THERE IS NO LEGAL BASIS TO NAME THE PORT DISTRICT IN THE TCAO

A. The Regional Board Has Already Twice Considered and Rejected The Arguments Made By BAE Systems

Since at least 2003, BAE Systems has sought to have the Port District named on the TCAO as the alleged "owner" of the tidelands at the BAE Systems site. As a consequence, in 2004, the Regional Board issued two Investigative Orders (R9-2004-0026 and R9-2004-0027) requiring the Port District to show cause why it should not be named in a TCAO for the Shipyard Sediment Site. In response, on July 15, 2004, the Port District submitted a detailed legal and factual analysis that established the lack of any basis upon which the Regional Board should name the Port District as a "Discharger" in a cleanup order for the Shipyard Sediment Site. That letter is attached hereto as "Exhibit A" and is incorporated by reference as though set forth in full herein.[3] Based upon that analysis, the Regional Board correctly determined not to name the Port District in the TCAO.

In letters dated December 21, 2005, and January 20, 2006, BAE Systems again tried to persuade the Regional Board to name the Port District on the TCAO, raising the *exact* same issues, and relying upon many of the *exact* same exhibits and the same arguments it offers in its latest request. On February 7, 2006, the Port District again replied to those arguments and reiterated the legal and factual bases that preclude the Port District from being named on the TCAO. (See February 7, 2006 letter attached hereto as "Exhibit B" and incorporated herein by this reference.)

Having considered the 375,000 pages of documents in its record, and the arguments of both BAE Systems and the Port District, the Regional Board determined not to name the Port District in the TCAO. There is nothing new presented in BAE Systems' April 7, 2008 request that should change that result.[4] To the contrary, the Regional Board properly left the Port District off the Order.

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[3] In its April 7, 2008 letter, BAE Systems contends that the Port District made misleading and inaccurate statements in the July 15, 2004 letter. It then offers a preemptive rebuttal to the letter—the same rebuttal it offered to those same statements back in 2005. The Port District's statements were accurate, and are addressed in more detail in Section I.E., below.

[4] The only new "evidence" offered by BAE Systems to support its claim that the Port District should be named in the TCAO to satisfy any obligation of the Campbell/MARCO entities are emails and memoranda prepared by BAE Systems' counsel in the fall of 2007 to document limited, unsuccessful efforts made to involve Campbell/MARCO in these proceedings. As discussed in more detail below, however, whether Campbell/MARCO (or the principals to whom assets were distributed upon its liquidation during the course of these proceedings), respond to the TCAO, or

B. The Port District Is Not A "Discharger" Under Water Code Section 13304

No one claims that the Port District played any role in the actual discharge of wastes into the Bay at the Shipyard Sediment Site. Indeed, the Regional Board has concluded in the Technical Report that "[t]here is no evidence in the record that the Port of San Diego initiated or contributed to the actual discharge of waste to the Shipyard Sediment Site." (Technical Report, page 1-12.) There is, thus, no basis upon which to name the Port District as a "Discharger."

Consequently, BAE Systems seeks to have the Port District named on the TCAO because it mistakenly alleges that the Port District "owns" the tidelands on which Campbell/MARCO held a leasehold interest and should, on that basis, be jointly liable with Campbell/MARCO and step into its shoes as a primarily responsible party because (it says) Campbell/MARCO will likely default. The Port District, however, does not own the property on which the Campbell shipyard operations were conducted, and is not jointly liable with Campbell/MARCO under the Water Code for any contamination Campbell/MARCO caused.

Perhaps contributing to the confusion is the mischaracterization of the Port District as a "landowner" in the Technical Report. The Technical Report repeatedly refers to the Port District as a "non-operating landowner," and the entity that "owns" the land occupied by the named Dischargers. (See Technical Report, pages 1-9 through 1-12.) It goes so far as to state that it is "undisputed" that the Port District "owns the land leased by [the named Dischargers]." (Technical Report, page 1-10.) This statement is inaccurate.

The Port District's July 15, 2004 letter (Exhibit A hereto) explained in some depth the formation of the Port District in 1962 and its role as the *trustee* of the tidelands lying within the public trust easement in San Diego Bay. The San Diego Unified Port District Act ("Port Act"), under which the Port District was statutorily created (Harb. & Nav. Code, App. I), is replete with references to the Port District as a mere trustee and not an owner. (*See* Harb. & Nav. Code, App. I, §§ 5; 5.5; 14 ("title to [tidelands and submerged lands] shall reside in the district, and the district shall hold such lands in trust for the uses and purposes and upon the conditions which are declared in this act"); 68 (State consents to transfer of tidelands, submerged lands, swamp, overflowed and salt marshlands in San Diego Bay to district "in trust for the uses and purposes and upon the conditions specified in this act"); 87 ("the tide and submerged lands...shall be held by the district and its successors in trust").) In fact, unlike an ordinary "landowner," the Port District is prohibited from granting, conveying, giving, or alienating the lands it holds in trust, though it is entitled to lease them for up to 66 years, but only "for purposes consistent with the trusts upon which those

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have other assets, such as insurance, to satisfy any obligation they have under the TCAO, will likely be the subject of Phase III discovery by the Designated Parties. Regardless, they are irrelevant to the issue of whether the Port District can be named now in the TCAO.

lands are held by the State of California... ." (Harb. & Nav. Code, App. I, § 87(b).)[5] The Port District, thus, is not a "landowner" and has never "owned" the lands comprising the Shipyard Sediment Site.[6]

Furthermore, as noted in the Technical Report, the State Water Board has only held "landowners" accountable for discharges on their property if the landowner has knowledge of the activity causing the discharge *and* the legal ability to control the activity. (Technical Report, pages 1-7, 1-10.) As discussed in the Port District's July 15, 2004 letter, aside from the fact the Port District is not a "landowner," it had no opportunity to control Campbell/MARCO's activities at the Site. To the contrary, as BAE Systems admits, Campbell/MARCO had been operating at the site for close to 50 years before the Port District was even created. In 1962, the Port District inherited the role of landlord under that lease; it played no role in the siting of the facility, the nature and extent of the operations, or the manner in which the tenant was conducting its business. It did not and could not "control" the daily activities of Campbell/MARCO or any other tenant at the Port. Moreover, to the extent Campbell/MARCO or any other Discharger-tenant of the Port District committed waste or nuisance under the law and thereby violated its lease, the Port District's only recourse would be to hold the tenant in default under the lease.

C. The Port District Should Not Be "Secondarily Liable" For The Same Reasons It Is Not Liable Under Water Code Section 13304

In the Technical Report, the Port District is identified as a "secondarily responsible" party. (Technical Report 1-11 and 1-12.) The Technical Report explains that a "secondarily responsible party is one that is not obligated to comply with the cleanup and abatement order unless the primarily responsible party fails to do so." (*Id.*, page 1-11.) The predicate for "secondary responsibility," however, is that the secondarily liable party—here, allegedly the Port District--could be a primarily responsible party, i.e., a "discharger" under Water Code section 13304. For the

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[5] The United States Supreme Court explained the nature of the "public trust doctrine" in the seminal case of *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 455-456 (1892) as follows: "The ownership of the navigable waters of the harbor, and of the lands under them, is a subject of public concern to the whole people of the state. The trust with which they are held, therefore, is governmental, and cannot be alienated, except in those instances mentioned, of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining. This follows necessarily from the public character of the property, being held by the whole people for purposes in which the whole people are interested."

[6] The principles of "landowner liability" established in State Water Board Orders relied upon in the Technical Report (page 1-10 and 1-11) are therefore inapplicable here. Some of these were discussed and distinguished in detail in the Port District's July 15, 2004 letter. (See Exhibit A, pages 10-12.)

reasons discussed above, however, the Port District is not a "discharger" under section 13304, and is not liable under that section under an expanded theory of "landowner liability" either.

The Port District has previously suggested that, at most, it could potentially be held secondarily liable here. Upon further consideration, however, the Port District submits that its unique status as trustee over these tidelands, combined with its statutorily-prescribed rights under the Port Act, and its lack of involvement in the operations of the named Discharger-tenants that caused the subject contamination, eliminate any basis upon which it could be named as primarily or secondarily responsible for the contamination and cleanup of the Shipyard Sediment Site. That is not to say the Port District would play no role. To the contrary, as urged by the State Lands Commission, the Port District, as the trustee of the tidelands, will assist the Regional Board as appropriate to assure that its current tenants[7] comply with the CAO ultimately issued by the Regional Board.

D. Even Assuming, For The Sake Of Argument, That The Port District Could Be Held Secondarily Liable, It Would Not Become Primarily Liable Unless and Until All Named Dischargers Defaulted Under The CAO

The Technical Report currently identifies the Port District as "secondarily" responsible for the contamination created by its lessees on the grounds that "[t]here is no need to name the Port of San Diego in the Cleanup and Abatement Order as a 'discharger' with primary responsibility for compliance until it becomes clear that the Port's tenants have failed to comply with the Order." (Technical Report, page 1-13.) The Regional Board concluded that, because there "is no evidence in the record" that the Port District's tenants and other named Dischargers have insufficient financial resources to clean up the Shipyard Sediment Site...the Regional Board is not now naming the Port of San Diego as a 'discharger'...but may do so in the future if the Port's tenants fail to comply with the Order." (Technical Report, pages 1-10, 1-11.)

BAE Systems presumes, and we believe correctly, that the Regional Board's position is that the Port District would not become liable for the Shipyard Sediment Site cleanup unless and until all named Dischargers defaulted in their joint and several liability under the CAO. BAE Systems calls this an "outrageous proposition" and offers its own view, without citation to any legal authority, that "secondary" responsibility (and when it becomes "primary") must be "evaluated and determined on a case-by-case, i.e., parcel-by-parcel and lease-by-lease basis." (April 7, 2008 letter, pages 3-4.) The law is to the contrary and instead supports the Regional Board's position in the Technical Report that secondarily liable parties should not be required to step into a primary role absent a total default by all named Dischargers.[8] (*See, e.g., In the Matter of the Petitions of*

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[7] These do not include named Dischargers San Diego Gas and Electric (Sempra Energy), the United States Navy, or the City of San Diego.

[8] We reiterate, however, that we dispute the Regional Board's inclusion of the Port District as a

Wenwest, Inc., Susan Rose, Wendy's International, Inc. and Phillips Petroleum Co., SWRCB Order No. WQ 92-13, page 9 (secondarily responsible parties "should be required to perform the cleanup only in the event of default by Redding *and* Phillips" [the named parties] (emphasis added); *In the Matter of the Petitions of Arthur Spitzer, et al.*, SWRCB Order No. WQ 89-8, page 21 ("L.A. Land [the secondarily liable party] should be responsible for the tasks required by the Orders, only if Spic & Span, Aratex *and* T & F [primarily responsible parties] fail to timely carry out the requirements of the Orders." (emphasis added)).

Even if viewed on a "parcel-by-parcel" basis as BAE Systems suggests (and, again, there is no authority to require or support taking such an approach), and even assuming, for the sake of discussion, that the Port District could be held secondarily responsible, there still would be no basis for the Port District to assume primary responsibility for the cleanup of the BAE Systems site unless and until BAE Systems itself defaulted, and there is no indication it will. Even if it does, pursuant to the State Water Board's policy, the Regional Board would look to the Port District only "as a last resort," after pursuing an enforcement action against BAE Systems to obtain its compliance.[9] (See *In the Matter of the Petition of San Diego Unified Port District,* SWRCB Order No. WQ 90-3, page 10.)[10]

Consequently, the argument advanced and the evidence offered by BAE Systems as to Campbell/MARCO's corporate status, financial condition[11], and unwillingness to participate in the proceedings (all of which will undoubtedly be the subject of Phase III discovery by the Designated Parties and potential further enforcement action by the Regional Board) have no bearing on the propriety of the Regional Board's decision not to name the Port District in the TCAO and should not trigger any modification of the TCAO.

E. In Any Event, BAE Systems' Lease Requires It To Indemnify The Port District For The Existing Conditions At The BAE Leasehold

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"secondarily responsible" party to the TCAO.

[9] BAE Systems' contention that the Regional Board parse liability into even smaller segments, i.e., "lease-by-lease," is wholly unsupportable in the context of these proceedings. What BAE Systems really is seeking is an allocation of responsibility among the Dischargers (named and unnamed) depending upon what contamination occurred during various timeframes at the BAE Systems' site. Such allocation is not within the jurisdiction of the Regional Board in these proceedings. (*See* Water Code section 13304.)

[10] The Port District subsequently initiated steps to challenge SWRCB Order No. WQ 90-3 in court regarding the "secondary liability" issue, but then reached a settlement with the State and Regional Boards, as discussed in more detail in the July 15, 2004 letter attached hereto as Exhibit A at pages 7-8.

[11] BAE Systems also ignores the insurance assets Campbell/MARCO may have available to satisfy their obligations under the TCAO.

BAE Systems rehashes the same arguments regarding its lease as it made in December 2005, in response to the facts and arguments made by the Port District in the July 15, 2004 letter (Exhibit A). Suffice it to say, the Port District maintains its position that the language of the lease is plain and not susceptible of the interpretation BAE Systems seeks to give it.[12] By the express terms of the lease, BAE Systems, as the successor to Southwest Marine, accepted the condition of the premises called for by the Lease, assumed all risk and liability associated with any defects, and expressly agreed to indemnify and hold the Port District harmless for liability arising from the use and operation of the leased premises or any defect. To the extent there is a dispute over the lease terms or their interpretation, that is a matter for a court of competent jurisdiction, and not the Regional Board, to adjudicate.

For all of the reasons set forth in Section I, above, BAE Systems' request to have the Port District named in the TCAO should be summarily denied.

II. THE REGIONAL BOARD SHOULD REVISIT THE TIME FRAME FOR COMPLETING PHASE III TO ASSURE THE DESIGNATED PARTIES ARE AFFORDED DUE PROCESS AND TO EXPEDITE THE REMEDIAL ACTION AT THE SITE

NASSCO, SDG&E and the City have each submitted written requests to extend the time frame for the completion of Phase III in order to fully review the 375,000-page record that supports the Technical Report, which was produced by the Regional Board on April 4, 2008, and to undertake discovery as contemplated in the Proceedings Order. They each have asserted that their due process rights would be violated in the event a new schedule is not established.

Extending the Phase III time frame will, in practical effect, expedite the process toward remediation of the Shipyard Sediment Site. By assuring the Designated Parties have full opportunity to review the record, undertake discovery, and brief the matter in an orderly fashion, the Regional Board will reduce the likelihood that the proceedings will be challenged on due process

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[12] BAE Systems takes issue with the Port District's statement in the July 15, 2004 letter that Southwest Marine (BAE Systems' corporate predecessor) "took over the prior lease between the Port, and Southwest Marine's predecessor-in-interest, [Campbell/MARCO]." (July 15, 2004 letter (Exhibit A), page 15.) It claims that Southwest Marine did not "take over" the lease; it entered its own lease. The Port District does not dispute that Southwest had its own lease. But it is also true that, in 1979, when Campbell/MARCO terminated its lease at the site, Southwest Marine acquired not only the leasehold, but purchased and succeeded Campbell/MARCO's interest in some $3.65 million (in 1979 dollars) of Campbell/MARCO's assets. (See Certificate, dated September 19, 1979, attached as Exhibit C hereto.) The Regional Board, in its Technical Report, further notes that Southwest Marine took over active operations at the site the day after the Campbell/MARCO lease terminated. (See Technical Report, April 4, 2008, page 5-4.)

grounds. Procedural challenges will only serve to delay the finality of the ultimate CAO and, hence, the implementation of remedial action at the Site.

The Port District therefore believes the Regional Board should revisit the schedule set forth in the Proceedings Order for Phase III in light of the massiveness of the record (which even the Regional Board did not anticipate) and the due process concerns it creates. We look forward to the opportunity to discuss this issue with the other Designated Parties and the Regional Board at the Third Pre-Hearing Conference in an effort to set a schedule that is reasonably achievable but does not unduly delay the TCAO Proceedings.

III. THE "COMMENTS FORMAT" SET FORTH IN "APPENDIX C" TO THE PROCEEDINGS ORDER SHOULD BE MODIFIED AND THE RECOMMENDED PENALTY OF EXCLUSION FOR NON-COMPLIANCE SHOULD NOT BE ADOPTED

The Cleanup Team had submitted a "Recommended Format for Written Comments," which, according to the "Notice of Commencement of Phase III of Proceeding," has since been approved by the Advisory Team and entered as "Appendix C" to the Proceedings Order. As discussed in letters previously submitted by the City, SDG&E and NASSCO, the "Comments Format" is unduly burdensome and we request that it be simplified. We would be comfortable with the suggestion offered by NASSCO (inclusion of comments with headings describing the issues addressed), or some similar approach.

Additionally, the Cleanup Team recommended that "Comments which do not conform to this format may be stricken by the presiding Hearing Officer and excluded from the administrative record." Given the importance to each Designated Party of assuring the information and evidence it has developed and offered is included in the record, it would be inappropriate for the Regional Board to exclude submittals merely for failure to follow formatting requirements. We therefore respectfully request that the Regional Board not adopt this sanction recommendation.

The Port District reserves the right to join in and/or incorporate by reference comments or objections made by other parties, dischargers and interested persons, reserves the right to offer testimony, exhibits and/or other evidence on those issues, or the issues raised in this comment letter. The Port District further reserves its rights under applicable laws, regulations and other authority applicable to the Proceedings Order, including, but not limited to, the California APA (Cal. Gov. Code §§ 11400 *et seq.* and 11513) and Title 23 of the CCR, Division 3, Chapter 1.5, sections 648 *et seq.* To the extent the Proceedings Order fails to meet requirements contained in these or other applicable authorities, the Port District reserves the right to raise these compliance issues in this and any future proceedings concerning the TCAO and any final order issued by the Regional Board.

The Port District looks forward to discussing the propriety of the Port District's exclusion from the TCAO; an appropriate time frame and procedures for conducting and completing Phase III

of the proceedings; and determining an appropriate format for submission of written comments at the April 25, 2008 Third Pre-Hearing Conference.

Respectfully submitted,

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BY: Sandi L. Nichols
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EXHIBIT A

Unified Port of San Diego

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TRANSMITTAL MEMO

TO:	DATE:
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San Diego, California 92123	

Re: Investigation Order Nos. R9-2004-0026 and R9-2004-0027	Via: ( ) 1st Class Mail (X) Hand-Delivered
	( ) Your Pick-up
	( ) Federal Express

Enclosed please find San Diego Unified Port District's Response to Investigation Order Nos. R9-2004-0026 and R9-2004-0027 including Exhibits and Technical Report.

The undersigned states, under penalty of perjury, that to the best of the signer's knowledge the foregoing is true, complete and correct.

SAN DIEGO UNIFIED PORT DISTRICT

By: Duane E. Bennett

Duane E. Bennett
Port Attorney

RECEIVED
JUL 16 2004
ENVIRONMENTAL SERVICES

Unified Port of San Diego

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July 15, 2004

VIA MESSENGER

Mr. John H. Robertus
Executive Officer
San Diego Regional Water
Quality Control Board
9174 Sky Park Court, Suite 100
San Diego, California 92123

Re: Investigation Order Nos. R9-2004-0026 and R9-2004-0027 – San Diego Unified Port District Response; PLRP:03-0066.05:otbre

Dear Mr. Robertus:

The San Diego Unified Port District ("Port") submits this response, with attachments and the enclosed technical report (hereinafter, the "Technical Report") (together "the Port's Response"), as its response to, and in compliance with, Investigation Order Nos. R9-2004-0026 and R9-2004-0027 (collectively, "Orders" or "Investigation Orders"). Order No. R9-2004-0026 was issued to the Port, Marine Construction Design Company, Chevron, Atlantic Richfield Co. ("ARCO"), San Diego Gas & Electric ("SDG&E"), and the City of San Diego ("City"), regarding the Southwest Marine Shipyard located at 2205 E. Belt, and the foot of Sampson Street, San Diego, California. Order No. R9-2004-0027 was issued to the Port, the City, the United States Navy ("Navy"), and Chevron, regarding the National Steel and Shipbuilding Company ("NASSCO") shipyard located at Harbor Drive and 28th Street, San Diego, California.[1] Neither Southwest Marine, nor NASSCO, is named in the Orders.

In its Findings, the Regional Water Quality Control Board ("Regional Board" or "RWQCB") sets forth its basis for naming the Port District in the Investigation Orders. The Regional Board finds that the Port is the owner of the lands occupied by facilities, including NASSCO and Southwest Marine, which discharged or are suspected of discharging waste to San

[1] By two letters dated April 9, 2004 from your office, the April 16, 2004 deadline to respond to both Orders was extended to July 15, 2004. Further note that the Regional Board has never served the Port with a copy of the NASSCO Order, Order No. R9-2004-0027.

Diego Bay. The Regional Board further concludes that "the Port controls decisions regarding the siting and types of facilities, which occupy lands adjacent to San Diego Bay through leases for the use of these lands." Finally, the Board concludes that the Port has "the ability under its lease agreements with facility operators to impose controls, which could prevent or reduce waste discharges to San Diego Bay." *See* Orders ¶ 6. For these reasons, the Regional Board now is requiring the Port to show cause why it should not be named in an order requiring the cleanup of contaminated sediments that have likely occurred as a result of nearly 100 years of operations at and near the NASSCO and Southwest Marine leaseholds.

The Port's Response is believed to be fully responsive to the Investigation Orders, based on information reasonably available to the Port, including the Regional Water Quality Control Board's ("Regional Board" or "RWQCB") files concerning NASSCO and Southwest Marine, and other publicly available information. Please feel free to contact the undersigned, however, should you need any additional information or if you have any questions with respect to this response.

I. INTRODUCTION

The Orders require each named party to submit a technical report showing cause why it should not be named as a discharger in a Cleanup and Abatement Order ("CAO") for the cleanup of contaminated sediments that have resulted from NASSCO's and Southwest Marine's long term operations at their sites. For the reasons set forth below, the Port District maintains that it is both premature and inappropriate to consider naming the Port in a CAO to clean up contamination caused by nearly a century of operations by others.

The Port first takes this opportunity to restate its objections to the issuance of the Investigation Orders to the Port. Section 13267 of the Porter-Cologne Water Quality Control Act ("Water Code") allows the Regional Board to issue such an order to a party who has "discharged," is "discharging," or "proposes to discharge" wastes, or who is suspected of "discharging" the wastes; the Port is none of these. To the contrary, the Port is only the trustee of the properties occupied by long-term tenants that discharged wastes. In addition, the cost/benefit analysis conducted by the Regional Board prior to issuance of the Orders, as required by Water Code § 13267(b), was inadequate.[2] Finally, the Board failed to respond,

2 The Regional Board estimates the cost of responding to each Order to be in the range of $3,000 to $5,000, basing its estimate "on a typical cost range for preparing a Phase I Environment Site Investigation Report." A typical Phase I report, however, does not anticipate the type of detail required here. The Orders require the Port to review copious records and provide extensive detailed information from nearly 100 years of numerous operations, as set forth in the Regional Board's list of required elements for an adequate technical report. The Port's costs to respond have significantly exceeded the RWQCB's estimate. Clearly, the burden and cost of preparing these reports does not bear a reasonable relationship to the benefits to be obtained from them, as required by § 13267(b)(1).

within 14 days, to the Port's March 4th written objections, as provided in the Regional Board's February 19, 2004 cover letter to Investigation Order No. R9-2004-0026.

As the Regional Board is aware, the Port is not discharging and has not discharged wastes into the waters of the State from these leaseholds. Nor has the Port caused or permitted such waste to be discharged. The Port therefore asserts that it is inappropriate to name it in a § 13304 CAO for the cleanup of such wastes. Most importantly, however, naming the Port in a CAO in this case would be contrary to the Regional Board's previous agreement to first direct compliance issues regarding the NASSCO and Southwest Marine facilities to the tenants, as will be discussed further below. The RWQCB has expressly agreed that it would look to the Port for assistance in obtaining tenant compliance only ***after*** the tenant failed to comply ***and after*** the Regional Board had taken enforcement action against the tenant. As these conditions have not yet been met, it would be premature to issue a CAO against the Port.

Even if the Regional Board finds it necessary to name the Port, it should be held only secondarily liable. Here, as the Port understands it, both NASSCO and Southwest Marine have been cooperating with the Regional Board for over 10 years to address the sediment contamination on their leaseholds. As the State Water Resources Control Board ("State Board") found in *In the Matter of the Petition of Prudential Insurance Co.*, SWCRB Order No. WQ 87-6 (6/18/87), where there is no evidence that a landowner ever contributed directly to a discharge, the landowner should bear only secondary responsibility for the cleanup where (a) the owner would not have the legal right to conduct the cleanup unless the tenant failed to do so; (b) the lease is for a long term; and, (c) the tenant is cooperating with the Regional Board. Each of these factors is present in this case, and thus if it is determined that the Port must be named in a CAO for either of these sites, it should only be held secondarily liable based upon the reasoning in *Prudential Insurance*.

For reasons unknown to the Port, NASSCO and Southwest Marine recently requested that the Regional Board take enforcement action against the Port solely because the Port "owns" their leaseholds. Southwest Marine argued, for example, that, since the Port and others "will be required to participate eventually in any event, even if only by way of contribution litigation," it is in their and the public's best interest to bring them into the process now. *See* letter dated November 12, 2003 to Regional Board from Christian Volz of McKenna Long & Aldridge, LLP. While both tenants have encouraged the Regional Board to name the Port in a CAO, they failed to make clear that each has expressly agreed in their leases to accept the condition of the premises when they signed their leases, and to defend, indemnify and hold the Port harmless from any claims arising out of their performance under the leases, their use and operation of the premises, or the condition of the premises. As such, the suggestion that the Port will be required to participate in the cleanup in any event (i.e., without the Regional Board's intervention) appears to be disingenuous at best.

II. EARLY DEVELOPMENT OF SAN DIEGO BAY

A. Early Uses of Tidelands and Submerged Lands on and near the NASSCO and Southwest Marine Sites

Both the NASSCO and Southwest Marine sites have been operated for heavy industrial and shipyard uses for nearly a century. The Port's enclosed Technical Report provides a detailed account of the historical use of these and adjacent sites dating back to the early 1900s. The Technical Report details probable sources of sediment contamination which likely occurred during the first half of the 20th Century from petroleum, shipbuilding and repair, and similar industrial operations which were conducted on properties throughout the area. The Technical Report is summarized briefly below.

Records show that Southwest Marine's predecessor, San Diego Marine Construction ("SDMC"), commenced its shipbuilding and repair operations at or in close proximity to the Southwest Marine site in as early as 1915, at the foot of Sampson Street. SDMC's lease with the City of San Diego authorized the site to be used for the "erection and maintenance of a building . . . for the purpose of carrying on and maintaining marine ways, repairing boats and construction and launching of all kinds of watercraft." SDMC constructed and procured wharves and docks to carry out its operations, and dredged tens of thousands of cubic yards of material to expand its operations, throughout the better part of the 20th Century.

Records also show that industrial operations at the NASSCO site commenced even earlier, in 1909, when Standard Oil began its operations at its bulk facility and wharf. The presence of Standard Oil was made known to all in San Diego in 1913, when a catastrophic explosion and fire occurred at the present NASSCO site, destroying Standard Oil's facility and causing an estimated two million gallons of gasoline and unrefined oil to burn and/or discharge into San Diego Bay. The facility was rebuilt after the fire, and was one of several facilities that operated at the NASSCO site over the past 96 years. Shipbuilding and repair facilities were introduced to the NASSCO site in 1939 and were taken over by NASSCO's predecessor, National Iron Works, in approximately 1944-45. NASSCO's robust shipyard operations have been continuous since that time.

In addition to the industrial and shipyard operations at the sites, records show that adjacent properties have also been used for heavy industrial purposes since the early 1900s. The United States Naval Repair Station, located adjacent to and just south of the NASSCO facility, for example, began its ship repair operations as early as 1922. The Naval Repair Station, originally known as the "US Destroyer Base," was used extensively for the repair and maintenance of U.S. Navy destroyers. Numerous destroyers were decommissioned and commissioned at this facility in the mid-1920s, which work required the removal of paint and rust from the ships, as well as the treatment of all machinery and equipment with grease and oil.

Sediments impacted by these operations were likely redistributed to the NASSCO and Southwest Marine sites when the Repair Station was dredged in 1935, to supply the fill needed for the expansion of the area between Sampson and 28th Street, where the NASSCO and Southwest Marine facilities are currently located.

Two properties located to the north of the shipyards include a kelp manufacturing business, known as Kelco, and SDG&E's Silvergate Power Plant. Kelco has operated a plant on the San Diego Bay waterfront between Sampson and Sicard Streets from as early as 1941. Records show that, over the years, Kelco maintained a number of above ground storage tanks containing butane, alcohol, muriatic acid, ammonia, and calcium chloride, as well as a 550-gallon underground storage tank for gasoline. In 1975, Kelco submitted plans for the demolition of a 500-foot pier and for the dredging of 6,000 cubic yards of sediments. The dredged sediment was tested and found to contain elevated levels of grease and oils, cadmium, lead, mercury and zinc.

SDG&E's Silvergate Power Plant is located at the southwest corner of Sampson Street and Harbor Drive and went online in 1941. SDG&E utilized an easement to the San Diego Bay for intake and discharge lines used in its cooling system. SDG&E reportedly used the surface of the easement to create holding ponds for waste disposal from the Silvergate Power Plant.

Various other operations on properties in close proximity to the NASSCO and Southwest Marine sites are discussed in further detail in the enclosed Technical Report.

B. The Port's Formation in 1962

As described in the Technical Report, this area was devoted to heavy industrial and shipyard operations for over 50 years prior to the formation of the Port District in 1962. The Port clearly had no control over the siting of these operations, nor could the Port have controlled the activities that resulted in sediment contamination during the nearly 50-year period before it was in existence. Even after the Port was established in 1962, the Port did not become the "owner" of tidelands and submerged lands in the traditional or legal sense of the word. The Port was created, rather, as an extension of the State of California, to manage the properties, in the role of a "trustee," to promote specific statewide interests on behalf of the citizens of California. *See generally* San Diego Unified Port District Act ("the Act" or "Port Act"), Stats. 1962, 1st Ex.Sess., c. 67, pp. 362 et seq. (set forth at Cal. Harb. & Nav. Code, App. 1, pp. 317 et seq. (38 Pt. 2, West 1999).

The Port Act authorized establishment of the Port to develop and manage San Diego Bay and to promote "commerce, navigation, fisheries and recreation thereon." *Id.* at § 4. In doing so, the Port Act conveyed to the Port, ***in trust***, the State's property on and near San Diego Bay, and required local cities (including the City of San Diego) to convey to the Port, in trust, those

tidelands and submerged lands that they owned. *Id.* at §§ 5, 5.5, 14. The Port Act requires the Port to hold and use these tidelands and submerged lands for specified purposes, *id.* at § 87, and requires improvement of any unimproved trust properties to avoid reversion back to the State. *Id.* at § 87(j).

In the United States Supreme Court case that is still regarded as seminal on the scope of the public trust doctrine, *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892), the Supreme Court held that, although a state, as trustee, may delegate administration of public trust lands to a local public agency, it cannot abdicate its trust over the property. *Id.* at 453-54. The Court held that "[t]here always remains with the state the right to revoke those powers." *Id.* As such, the Port is plainly not an "owner" of the NASSCO and Southwest Marine sites as that term is commonly or legally understood.[3] The State of California has simply delegated its powers to manage and control public use of these lands to the Port District. *See Graf v. San Diego Unified Port District*, 7 CalApp.4th 1224, 1229 (4th Dist. 1992). In fact, as the United States District Court for the Southern District of California recently held in a cost recovery action, the Port is simply "a body operating as an instrumentality of the state government" and, for purposes of CERCLA litigation, the Port is, in fact, "the State." *San Diego Unified Port Dist. v. TDY Industries, Inc.* (May 14, 2004), Civil Case No. 03CV1146-B (POR), Order Denying Defendants' Motion to Strike Attorney's Fees.[4] (A copy of this decision is enclosed as Exhibit "1".)

The California Coastal Act further guides and provides for oversight of the Port District's planning and management of properties in and on San Diego Bay. Section 30260 of the Coastal Act provides, for example, that "[c]oastal-dependent industrial facilities shall be encouraged to locate or expand within existing sites and shall be permitted reasonable long-term growth." This provision further requires that "where new or expanded coastal-dependent industrial facilities cannot feasibly be accommodated consistent with other policies in this division, they may nonetheless be permitted in accordance with this section . . . if (1) alternative locations are infeasible or more environmentally damaging; (2) to do otherwise would adversely affect the public welfare; and (3) adverse environmental effects are mitigated to the maximum extent feasible." Given the constraints placed upon the Port District in managing the lands it holds in trust, combined with the historical development of these shipyards, clearly the Port should not be

[3] "Ownership" is defined as "the collection of rights to use and enjoy property, including the right to transmit it to others . . ." and as the "entirety of the powers of use and disposal allowed by law." (Blacks Law Dictionary (4th ed. 1968) pp. 1260-61.)

[4] If ownership alone is sufficient to justify naming the property owner in a CAO under Water Code § 13304, arguably liability under § 13304 for the NASSCO and Southwest Marine sites should extend to the State, which has the ultimate authority over how the properties may be used, how title to the properties is to be held, and to whom title to the properties may revert or be transferred. The State, in effect, is the equitable and beneficial "owner" of the NASSCO and Southwest Marine sites.

held responsible for the siting of the NASSCO and Southwest Marine operations. Most importantly, the Port District is not an "owner" for purposes of attaching liability under Water Code Sections 13267 or 13304.

III. NAMING THE PORT IN A CAO WOULD BE PREMATURE BASED UPON THE BOARDS' ESTABLISHED POLICY FOR ADDRESSING PORT RESPONSIBILITY FOR TENANT OPERATIONS

In as early as 1990, the State and Regional Boards acknowledged the Port's limited responsibility for the operations of its tenants, when both Boards agreed not to take any enforcement action against the Port for a tenant's failure to comply with permit requirements until after efforts to obtain tenant compliance had first failed, and then only after the Port had been given an effective opportunity to obtain the tenant's compliance. The Regional Board's current policy arose as a result of the Port District's challenge to being designated as a "discharger" in addendums to waste discharge requirements ("WDR") issued to six boatyards and shipyards (including the NASSCO facility) in 1989.[5] *See In the Matter of the Petition of San Diego Unified Port Dist.*, SWRCB Order No. WQ 90-3 (6/6/90). The Port petitioned the State Board to either: (1) remove its name as a "responsible party" on the permits; or (2) in the alternative, name it only as being "secondarily responsible" for permit compliance. *Id.*

The State Board denied the Port's request to remove the designation entirely, but concluded that it had been the Regional Board's intent to hold the Port only secondarily responsible for the tenant's monitoring program and day-to-day operations.[6] *Id.* at 16. The State Board remanded the matter to the Regional Board to clarify the Port's limited responsibility. At the same time, the State Board opined that, as a public agency, the Port should be given the opportunity to obtain compliance from the tenant prior to enforcement action being taken against the Port. *Id.*

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[5] The WDR/NPDES permits that were the subject of the Port's challenge included Regional Board Order Nos. 85-01 (NPDES Permit No. CA 0107646—Campbell Industries), 85-02 (NPDES Permit No. CA 0107654—Kettenburg Marine Corp.), 85-03 (NPDES Permit No. CA 0107719—Nielsen Beaumont Marine), 85-05 (NPDES Permit No. CA 0107671–NASSCO), 87-49 (NPDES Permit No. CA 0108006—Bay City Marine), and 87-65 (NPDES Permit No. CA 0108332—Continental Maritime of San Diego). *See* State Board Order No. WQ 90-3, at 1.

[6] The State Board quoted a November 27, 1989, letter from the Regional Board's Executive Director to the Port in which the Executive Director confirmed that the "tenants in their capacity as operators of the facilities ***retain the primary responsibility to maintain compliance and to take remedial action to correct any violations.***" Order No. WQ 90-3, pg. 10. The Regional Board further stated, in response to the Port's petition, that the Regional Board would take enforcement action against the Port "***only as a last resort***" and only ***after*** the Port had "***ample opportunity***" to compel the Port's tenants to comply with the Regional Board's orders. *Id.*

Since the State Board's direction to the Regional Board did not sufficiently clarify the Port's obligations as a "secondarily responsible" party, the Port initiated steps to challenge the order in Superior Court. Prior to filing its lawsuit, however, the Port District reached an agreement with the State and Regional Boards as to the specific language to be placed in its tenants' permits. This language was set forth in a letter from the Port District, approved by officers of both the State and Regional Boards, *see* July 2, 1990 letter from David B. Hopkins to Sheila K. Vassey and David T. Barker, a copy of which is attached hereto as Exhibit "2", and is as follows:

> "The Regional Board will notify the Port District of any violation by [the tenant] of any permit conditions, for the purpose of obtaining the assistance of the Port District in attempting to obtain compliance by [the tenant]. The Port District is not primarily responsible for compliance with the permit requirements. The Regional Board will not take enforcement action against the Port District for violations by [the tenant] unless there is a continued failure to comply by [the tenant] after the Port District has been given notice of the violations, and until after the Regional Board has issued against [the tenant] either a cleanup and abatement order, cease and desist order, or complaint for administrative civil liabilities." *Id.*

Thus, over fourteen (14) years ago,[7] and as is still set forth in both the Southwest Marine and NASSCO permits issued by the Regional Board, the Regional Board committed to take no enforcement action against the Port District for its lessees' violations "unless there is a continued failure to comply by lessee after the [Port] has been given notice of the violations and an opportunity to obtain compliance of the lessee."[8] *See* WDR for NASSCO, Order No. R9-2003-0005 at ¶ 14(c), and WDR for Southwest Marine, Order No. R9-2002-0161 at ¶ 13 (c), attached hereto as Exhibits "5" and "6," respectively.

In light of the Boards' policy regarding the Port District's responsibility for its tenants' permit compliance, the Port maintains that it would be premature to name the Port in a CAO for the cleanup of its tenants' leaseholds at this time.[9] Here, we do not believe that the Regional

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[7] See Addendum No. 2 to Order No. 85-05, dated March 11, 1991, and attached hereto as Exhibit "3."

[8] The Regional Board subsequently adopted the same policy to apply regarding all shipyard tenants in the region. See Order No. 97-36 NPDES Permit, No. CAG039001, attached hereto as Exhibit "4."

[9] Although this policy was designed in response to permit issues, the State Board determined that the same analysis applied whether dealing with a CAO or WDRs. *Id.* at p. 10. As such, the policy applies equally to the situation before us today.

Board has notified the Port of any specific tenant violations issued in connection with the sediment contamination that is the subject of the Investigation Orders, and we are unaware of the failure by the tenants to comply with any Regional Board directive to address the issue. Instead, it appears as though both NASSCO and Southwest Marine are cooperating fully with the Regional Board's investigation of the sediment contamination, and have not indicated an unwillingness to comply with any Regional Board orders. Based upon the State and Regional Boards established approach with respect to the Port District's responsibility for its tenants' activities, naming the Port in a CAO for the cleanup of the NASSCO and Southwest Marine leaseholds at this time is inappropriate.

IV. THE PORT DISTRICT SHOULD, AT MOST, BE NAMED SECONDARILY LIABLE IN ANY CAO

A. Water Code Section 13304

Section 13304 of the California Water Code allows the Regional Board to issue a CAO to a person who has discharged, or who has caused or permitted a discharge of, waste into the waters of the state where such discharge "creates, or threatens to create, a condition of pollution or nuisance." As described in the Investigation Orders, based on sediment analytical results for the NASSCO and Southwest Marine shipyards, the Regional Board identified the following contaminants of concern ("COCs"): arsenic, cadmium, chromium, copper, lead, total polycyclic aromatic hydrocarbons (PAHs), polychlorinated biphenyls (PCBs), mercury, nickel, silver and zinc. As set forth in the Port's Technical Report, there is little question that the shipyard operations at and near the present NASSCO and Southwest Marine sites have, for the better part of the last century, substantially contributed to the sediment contamination. According to the Regional Board, potential shipyard sources of the COC's include, without limitation, ship painting activities, sand-blast grit from stripping paint, ship construction and repair activities, iron working, engine repairs or overhauls, bilge water, and fuel spills or leaks. In addition to potential sources of COCs from the shipyards and nearby naval facilities, Chollas Creek discharges urban runoff from industrial and residential communities into San Diego Bay through a concrete-lined channel that separates the NASSCO leasehold from the US Navy Repair Base. Chollas Creek has been designated a toxic hot spot by the Regional Board based on water quality and sediment data analytical test results.

In contrast to these long-term industrial operations, the Port District has never operated on these properties. To the contrary, it merely inherited leases allowing the existing operations to continue when the Port was created in 1962.

B. Potential Landowner Liability

The Port acknowledges that the State Board has consistently taken the position that a passive landowner can be held accountable for discharges that occur on the property so long as the landowner has knowledge of the activity and the ability to regulate it. *See, e.g., In the Matter of the Petition of United States Department of Agriculture, Forest Service*, SWRCB Order No. WQ 87-5, (4/16/87). The State Board has also held, however, that a landowner should bear only "secondary" responsibility for a cleanup under certain circumstances, including when the following facts are present: "(a) the [owner] did not in any way initiate or contribute to the actual discharge of waste, (b) the [owner] does not have the legal right to carry out the cleanup unless its tenant fails to do so, (c) the lease is for a long term, and (d) the site investigation and cleanup are proceeding well." *In the Matter of Petition of Prudential Insurance Company*, SWCRB Order No. WQ 87-6 (6/18/87). Here, while we do not believe that the Port should be named in a CAO issued for the cleanup of contaminated sediments at the Southwest Marine and NASSCO leaseholds, in the event that the Port is ultimately named in a CAO, we strongly urge that it be held only secondarily liable for the reasons set forth below.

1. The Port Should Not Be Held Accountable for the Shipyards' Discharges

Although the State Board has upheld the imposition of primary responsibility on non-operating landowners, generally such cases have involved some active involvement by the landowner, combined with the tenant's failure to comply. In *In re Petition of Logsdon*, SWRCB Order No. WQ 84-6 (1984), for example, landowners Harold and Joyce Logsdon had leased their property to Valley Wood Preserving ("VWP") for use as a wood treatment facility. While the Logsdons were not the "operators" of the facility, Mr. Logsdon was the president of VWP and made routine visits to the site. *Id.* at p. 17. The State Board found that he was keenly aware of the operations and the potential for discharges of contaminants resulting from wood treatment operations. In addition, the Regional Board had exhausted all efforts to obtain compliance from VWP before it initiated enforcement action against the Logsdons.

Unlike in *Logsdon*, here the Port has not been involved in the operations of its shipyard tenants other than to act as a lessor in its capacity as trustee of the property. Moreover, the shipyards, to our knowledge, are continuing to cooperate with the Regional Board. As such, the facts in this case would not support a finding of primary liability under the *Logsdon* analysis.

The State Board also confirmed a finding of primary responsibility in *In re Petition of San Diego Unified Port District*, SWRCB Order No. WQ 89-12 (1989)(hereinafter "*Paco Terminals*"). There, the Board found that the tenant, Paco Terminals, was several months behind in implementing the CAO that the RWQCB had issued to it, that the Port had substantial control over the areas on the leasehold where the discharges of copper ore had occurred, that the Port now had exclusive control over the site since the tenant's short term lease had ended, and that the

Port had been involved in assisting the tenant in getting its operations started. The State Board further noted that the Port clearly had knowledge, given that its environmental assessment document prepared prior to the initiation of Paco's operations had identified the potential for the discharge of copper ore into San Diego Bay. Moreover, the Board noted that the Port itself had proposed the mitigation measures, as part of the environmental review, to be implemented to avoid such discharges. The *Paco Terminal* facts are clearly distinguishable from those in the instant matter.

As discussed above, unlike the situation in *Paco Terminals*, the Port here inherited the existing shipyard sites in 1962, and so had nothing to do with the siting or approval of these operations on tidelands.[10] Moreover, unlike in *Paco Terminals*, there is no question here that the Port has never conducted operations that resulted in discharges at the NASSCO or Southwest Marine sites; nor have there been allegations that the Port assisted in operations that resulted in such discharges. The Port has had no control over the pre-existing operations of the shipyards and provided no instructions to its tenants as to where and how their discharges were to be managed – this authority has long rested with the Regional Board. As such, the Port should not be held responsible for their discharges. *See, e.g., City of Modesto Redevelopment Agency v. Superior Court*, 119 Cal. App. 4th 28 (1st Dist. 2004).

In *Paco Terminals*, a short-term lease ended leaving the Port with exclusive possession and control of the property that was the subject of the CAO. In contrast, here the Port has no authority to enter the NASSCO and Southwest Marine leaseholds and take possession of the properties in order to remedy the contamination. At best, the Port could, if justified by a clear tenant default, attempt to terminate one of these long-term leases. Such an attempt, however, would be fraught with difficultly and most likely prove fruitless given the political realities of the situation, including oversight by the cities and the Coastal Commission.

Rather than the Port, it is the Regional Board that has the authority to regulate discharges from its tenants' industrial operations. Since January 1, 1970, section 13263 of the Water Code has required regional boards to regulate proposed and existing discharges from facilities such as these. Consistent with this obligation, the Regional Board here issued WDRs and other permits to both NASSCO and Southwest Marine, beginning in as early as 1974. Clearly, the Port could not develop and enforce its own, separate discharge requirements, or otherwise regulate the discharges of these facilities once that authority was legislatively delegated to the Regional Board. Moreover, had the Port made any attempt to regulate its tenants' discharges, it clearly

[10] As the Regional Board is aware, these shipyards were in place long before the Port was created and the Port has never had a legitimate opportunity to relocate these established facilities from their original locations. The concept that the Port somehow controls (or controlled) decisions over the siting of facilities of the size, infrastructure, and intensity of NASSCO and Southwest Marine is simply a fiction. A monumental decision such as re-siting such facilities would not be the Port's alone, but would require at a minimum the consent and approval of the California Coastal Commission, among others. *See, e.g.*, Pub. Res. Code §§ 30700-30721; 14 C.C.R. §§ 13600-13648.

would be preempted from doing so under the Water Code. *See, e.g., Water Quality Association v. County of Santa Barbara,* 44 Cal.App.4th 732 (2d Dist. 1996)(an otherwise valid local regulation is preempted by state statute if it duplicates or contradicts the statute, or if it enters into a field of regulation expressly or impliedly reserved to the state).

The permit requirements imposed by the Regional Board on these facilities under the WDRs/NPDES permit program are extensive and complex. The Port must rely on the expertise of, and the extensive enforcement and oversight powers and responsibilities exercised by, the Regional Board. The Port's only recourse for a violation of the law by a tenant is to hold the tenant in default under its lease. Although the Port's leases with both NASSCO and Southwest Marine require compliance with all laws, the Port is not aware of any violation except where such violations were already being corrected by the facilities with oversight by the Regional Board. Since these facilities have not been alleged to have been operating outside the terms of their validly issued permits, there has been no event triggering a potential default upon which the Port could even contemplate holding them in default of their leases. To suggest that the Port has any greater authority is a fallacy.[11]

2. If Named at All, the Port Should be Held Only Secondarily Liable

Time and again, the State Board has refused to hold passive landowners primarily responsible where the landowner has not in any way contributed to the actual discharge and the tenant is complying with an outstanding CAO or WDRs. *See, e.g., In re Petition of Spitzer,* SWRCB Order No. 89-8 (5/16/89); *In re Petition of Prudential Insurance,* SWRCB Order No. WQ 87-6 (6/18/87); *In re Petition of U.S. Department of Agriculture,* SWRCB Order No. WQ 87-5 (4/16/87); *and, In re Petition of Wenwest, Inc.,* SWRCB Order No. 92-13 (10/22/92). The common thread through these cases is that, in each case, those actually responsible for waste discharges were available and were complying with efforts to address the contamination or violation. In such cases, the Board has consistently held that it is appropriate to hold the landowner only secondarily liable.

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[11] With regard to the siting or types of facilities which may have contributed to waste discharges into San Diego Bay, the Regional Board was keenly aware of the location and types of facilities located on these properties at the time it issued its WDRs for the facilities. To the extent a particular structure or facility was of an inappropriate "type" or was inappropriately "sited" on the NASSCO or Southwest Marine premises, the Regional Board could have and should have exercised its own control through its regulatory oversight and enforcement responsibilities. To argue that liability should be imposed against the Port now simply because it allowed existing tenants to continue operating in accordance with a Regional Board-permitted or preexisting uses, in a permitted location, strains ones concept of fairness and is inconsistent with public policy supporting such uses in San Diego Bay. Such a position would tend to allow the actual discharger to escape full responsibility for the conditions that it, on its own and without support of the Port, created and has maintained.

Consistent with State Board precedent, the RWQCB should here too only name the Port, if it names it at all, as secondarily liable in any CAO for cleanup at the NASSCO and Southwest Marine sites.[12] Both NASSCO and Southwest Marine are viable, ongoing concerns, and both, to the best of the Port's knowledge, are complying with Regional Board directives. Moreover, the facts here make for an even more compelling case that the Port should not be named as primarily responsible. Here, as in *Prudential Insurance*, the Port has demonstrated that it did not in any way initiate or contribute to the actual discharge of waste from the NASSCO and Southwest Marine leaseholds, and no allegations have been made to the contrary. The Port is not able to go on to the tenants' leaseholds at this time and carry out a cleanup, and so holding the Port primarily responsible would be unworkable. The tenants' leases here are for a long time – in Southwest's case through 2034, and in NASSCO's case, through 2040. And, most importantly, Southwest Marine and NASSCO, the responsible parties, are complying with the Regional Board's requirements. For all of these reasons, the Port should be named, if at all, as only secondarily liable in any CAO issued to its tenants.

IV. THE NASSCO AND SOUTHWEST MARINE LEASES REQUIRE THE TENANTS TO INDEMNIFY THE PORT DISTRICT

It is our understanding that the Regional Board's decision to name the Port District in the Investigation Orders was influenced, at least in part, by letters from NASSCO and Southwest Marine urging the Regional Board to do so. The tenants argued that the Port should be named in a CAO because the tenants will ultimately seek contribution from the Port for cleanup costs associated with the sediment contamination in any case. Southwest Marine also claims, erroneously, that "the Port has recognized that it is responsible for the condition of the property prior to the lease with SWM." *See* November 12, 2003 letter from Christian Volz of McKenna, Long and Aldridge, to the Regional Board, at p. 2.

While it may be true that our tenants will surely embroil the Port District in a lawsuit in an attempt to share in the ultimate cost of any cleanup, this fact alone should not persuade the Regional Board to name the Port District in the CAOs. Liability as between the Port and its tenants is clearly spelled out in their lease agreements. In particular, both tenants have expressly agreed to accept full responsibility for the condition of their leased premises at the time they entered into their existing leases, and to indemnify the Port for any claims arising from their activities on the leaseholds or the condition of the property. As such, the Port District maintains that it has no liability for site conditions.

[12] If the Port must be named in any CAO for cleanup of its tenants' leaseholds, naming it as secondarily liable is also more consistent with the Regional Board's long term policy regarding involving the Port in tenant violations only as a last resort, as discussed above in Part III of this letter.

A. The NASSCO Leases

As indicated above, NASSCO has operated a shipyard on its leasehold since the 1940's (originally under the name, "National Iron Works"). Initially, NASSCO operated its facility under a series of leases entered into with the City of San Diego, at a time when the City owned the premises in fee. The Port became NASSCO's landlord in 1962. NASSCO entered into a series of leases with the Port beginning in April 1974. The Port's current leases with NASSCO were entered into in 1991 and 1995, and are hereinafter referred to as the NASSCO Leases.[13]

As it had done in past leases, NASSCO accepted the condition of the premises in its present condition, when it signed the NASSCO Leases, and affirmatively represented that it had independently inspected the premises and ***"made all tests, investigations and observations necessary to satisfy itself of the condition of the premises."*** *See* NASSCO Leases ¶ 38. NASSCO further represented that the premises were in a condition "as called for by the Lease" and that ***the Port had performed "all work with respect to the premises."*** *Id.* NASSCO, moreover, accepted complete responsibility ***"for any risk of harm to any person and property from any latent defects in the premises."*** *Id.* Since NASSCO had been operating its facility on at least a portion of the same property for the prior 35-year period, the tenant was uniquely qualified to assess the condition of its premises at the time it entered into the NASSCO Leases and did so, accepting the condition of the premises. As a result, NASSCO has effectively released the Port from any and all claims and liability resulting from the condition of the premises at the time it entered into the NASSCO Leases.

NASSCO also expressly agreed, in its Leases, to defend, indemnify, and hold the Port harmless from any damages or injuries "resulting directly or indirectly from granting and performance" of the Leases "or arising from the use and operation of the leased premises." NASSCO Leases ¶ 21. Specifically, the NASSCO Leases state:

> "Lessee shall be liable and responsible for any Contaminants located on the leased premises and arising out of the occupancy or use of the leased premises by Lessee. Such liability and

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[13] In October 1991, the Port renewed NASSCO's lease for a portion of its facility, affecting approximately 5,498,071 square feet of tidelands, located at Harbor Drive and 28th Street in the City of San Diego, for a term ending December 31, 2040. A copy of this lease is attached hereto as Exhibit "7." The lease was amended on December 6, 1994. A copy of this Amendment is attached hereto as Exhibit "8." NASSCO renewed a separate lease with the Port on January 10, 1995, for a different portion of the NASSCO facility affecting approximately 73,366 square feet of tidelands located generally to the northwest of the October 1991 leasehold. The January 1995 lease was entered into for a term of forty-six years, ending December 31, 2040. A copy of this lease is attached hereto as Exhibit "9." With some exceptions not material to this discussion, the October 1991 Lease, as amended, and the January 1995 Lease are identical in all respects.

> responsibility shall include, but not be limited to, (i) removal from the leased premises any such Contaminants; (ii) removal from any area outside the premises, including but not limited to surface and ground water, any such Contaminants generated as part of the operations on the leased premises; (iii) damages to persons, property and the leased premises; (iv) all claims resulting from those damages; (v) fines imposed by any governmental agency, and (vi) any other liability as provided by law."

NASSCO Leases ¶ 43.

Thus, not only do the NASSCO Leases prohibit NASSCO from discharging wastes in violation of any rule, regulation, ordinance, order or law, but to the extent such a violation may have occurred, NASSCO must hold the Port harmless from any damages it may suffer as a result. Similarly, NASSCO must indemnify the Port for any costs arising from any allegation that the Port is responsible for any damage to the premises, including damages arising from NASSCO's operations.

B. The Southwest Marine Leases

As with NASSCO, Southwest Marine has operated its facility at the Southwest Marine site for several decades. In 1979, Southwest Marine took over the prior lease between the Port, and Southwest Marine's predecessor-in-interest, San Diego Marine Construction Corporation ("SDMC"). SDMC was operating on the leasehold when the Port was formed in 1962, and the Port renewed SDMC's in 1972. SDMC operated until its successor, Southwest Marine took over in 1979, at which time the Port and Southwest Marine entered into a lease, dated September 17, 1979 (hereinafter the "Southwest Marine Lease")[14]

As with the NASSCO Leases, the Southwest Marine Lease contains an "ACCEPTANCE OF PREMISES" provision, wherein Southwest Marine accepted the condition of the premises and assumed all risk and liability associated with any defects in the premises. It reads as follows:

> "38. ACCEPTANCE OF PREMISES: By signing this Lease, Lessee represents and warrants that it has independently inspected the premises and made all tests, investigations and observations

[14] The September 1979 Lease contained a lease term of 39 years and three months, commencing September 1, 1979, and ending November 30, 2018. The lease was amended April 23, 1985, by way of an "Amendment No. 1," which, among other things, contained a new lease term of 50 years, beginning September 1, 1984, and ending August 31, 2034. A copy of this lease is attached hereto as Exhibit "10." The April 23, 1985 Amendment superceded the September 1, 1979 Lease, except as to any rentals due the Port under the prior lease and any "remedies granted to Lessor" under the prior lease.

> necessary to satisfy itself of the condition of the premises. Lessee agrees that it is relying solely on such independent inspection, tests, investigations and observations in making this Lease. Lessee further acknowledges that the premises are in the condition called for by this Lease, that Lessor has performed all work with respect to premises and that Lessee does not hold Lessor responsible for any defects in premises."

Southwest Marine Lease ¶ 38.

Southwest Marine also expressly agreed to indemnify and hold the Port harmless for any liability "resulting directly or indirectly from granting and performance of [the] lease or arising from ***the use and operation*** of the leased premises ***or any defect in any part thereof.***" *Id.* at ¶ 21. Thus, Southwest Marine expressly represented and agreed, at the time it entered into its Lease, that it was satisfied with the condition of the premises, that the Port had no responsibility for the then-existing conditions on the premises, and that Southwest Marine would indemnify the Port for any liability arising from Southwest Marine's operations and for any defects in the premises.

Because the Port has never operated the shipyards, and is contractually indemnified for any investigation or cleanup costs it may incur, these facts combined with each tenant's express acceptance of the condition of its leased premises, should compel the Regional Board to resist the temptation to give in to the tenants' ill-intentioned attempts to avoid their own liability. Instead, the Regional Board should impose responsibility for the cleanup and abatement of the sediment contamination where such responsibility squarely belongs, on those who have discharged wastes.

V. CONCLUSION

For the foregoing reasons, the San Diego Unified Port District respectfully requests that it not be named in any CAO with respect to the Southwest Marine and NASSCO sites. As demonstrated herein, good cause exists for ***not*** naming the Port as a discharger to a Cleanup and Abatement Order to be issued by the Regional Board for the subject sediment contamination.

Very truly yours,

E. David Merk
Director, Recreation & Environmental Services

Enclosures

cc: Duane E. Bennett, Port Attorney
Susan J. Flieder, Deputy Port Attorney

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EXHIBIT B

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25th Anniversary
1980 - 2005

Writer's E-Mail:

February 7, 2006

John Minan, Esq.
Chairman
California Regional Quality Control Board
San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340

Re: Matter: CRWQCB INVESTIGATION ORDER
No. R9-2004-0026 ("Southwest Marine")

Dear Mr. Minan:

The San Diego Unified Port District (Port) submits this response to attorney Christian Volz' letters dated December 21, 2005, and January 20, 2006, made on behalf of BAE Systems San Diego Ship Repair Inc. (BAE Systems) formerly Southwest Marine, Inc. (Southwest Marine) addressed to the San Diego Regional Water Quality Control Board (Board). BAE Systems renewed its request to have the Port added as a "discharger" on the Tentative Cleanup and Abatement Order.

Pursuant to the Board's First Amended Order of Proceedings, discovery is to be conducted in Phase III of the proceedings with a rebuttal phase immediately thereafter. BAE Systems' demands to the Board, therefore, are wholly premature and improper as no discovery has been conducted. Therefore, the Board should not be persuaded at this time to change its determination regarding the Port's position in this matter.

Based on the Port's information, Campbell Industries is financially viable and has sufficient insurance proceeds to fully participate in the investigation and cleanup of the site. Thus, BAE Systems' assertion that the Port should be added by virtue of Campbell's and/or MARCO's insolvency, is baseless.

The Port has fully set forth by letter dated July 15, 2004, and supported by the submitted Technical Report, the legal and factual arguments supporting the Port's position as to the inappropriateness and prematurity in naming the Port as a "discharger." The Port again reiterates that in the Southwest Marine Lease, Southwest Marine fully accepted the condition of the premises called for by the Lease and assumed all risk and liability associated with any defects. It expressly agreed to indemnify and hold the Port harmless for liability arising from the use and operation of the leased premises or any defect, as stated in the pertinent "ACCEPTANCE OF PREMISES" and "HOLD HARMLESS" provisions.

California Water Code section 13304 allows the Regional Board to issue a Cleanup Order to dischargers, or those causing or permitting discharges of wastes in waters of the state. As the Board knows, the Port has never operated on the subject property. In addition, BAE Systems can not prevail on its assertion that liability under the Water Code for "necessary costs of remediation . . . is not a liability for property damage." Property damage due to environmental contamination certainly could be measured by the costs of remediation.

Notwithstanding, it would appear that the Board is not in a adjudicatory position at this time regarding the interpretation of the Lease based on prematurity and lack of jurisdiction of this specific issue.

The Port therefore fully reiterates each and every legal and factual argument it previously submitted to the Board. It is the continued position of the Port, based on the previously-submitted arguments, that it is premature and inappropriate to consider naming the Port in a CAO for the cleanup of the contamination of the subject sites. In addition, BAE Systems' demand for a further full briefing on the interpretation of the lease agreement also is premature, improper, and misplaced.

Therefore, the Port respectfully renew its request to the Board not to name the Port as a "discharger" in any Cleanup and Abatement Order for the subject sediment contamination. In the alternative, the Port should only be named as a secondary responsible party. As fully stated in the Port's July 15, 2004 response letter, good cause exists for the Port's position.

Very truly yours,

William D. Brown

WDB/mek
cc: Duane E. Bennett, Esq., Port Attorney, San Diego Unified Port District

JOHN MINAN, ESQ.
CHAIRMAN
CALIFORNIA REGIONAL QUALITY CONTROL BOARD
SAN DIEGO REGION
9174 SKY PARK COURT, SUITE 100
SAN DIEGO, CA 92123-4340

EXHIBIT C

CERTIFICATE

The undersigned, Secretary of Campbell Industries, a California corporation (the "Company"), does hereby certify that the following is a true and correct copy of resolution duly adopted by the directors of the Company on July 27, 1979 and that the same has not since been modified or rescinded:

> RESOLVED that the sale of certain assets of San Diego Marine Construction Corp., a wholly-owned subsidiary of the Company, to Southwest Marine, Inc. at the price of $3.65 million, substantially on the terms and conditions set forth in the form of Agreement of Purchase and Sale attached hereto as Exhibit "A" is hereby authorized and approved.

The undersigned does hereby further certify that the document attached hereto as Exhibit "A" is the Agreement of Sale and Purchase referred to in the foregoing resolution.

IN WITNESS WHEREOF, the undersigned has hereunto set his hand and the seal of the Company this 19th day of September, 1979.

Secretary

CERTIFICATION OF ELECTRONIC SUBMITTAL

1. I, Kathryn D. Horning, am an attorney with the law firm of Allen Matkins Leck Gamble Mallory & Natsis LLP, counsel for the San Diego Unified Port District in the proceedings related to the San Diego Bay Sediment Cleanup (Shipyard Sediment Site) and San Diego Regional Water Quality Control Board Tentative Cleanup and Abatement Order No. R9-2005-0216.

2. On April 22, 2008, I prepared for distribution and electronically distributed to the complete list of Designated Parties and other interested parties as indicated on the Service List electronic versions of the original April 22, 2008 submission of the San Diego Unified Port District to the Advisory Team of the San Diego Regional Water Quality Control Board, Michael P. McCann, Supervising WRC Engineer, Regarding Tentative Cleanup and Abatement Order No. R9-2005-0126; San Diego Unified Port District's Response to BAE Systems' Request that San Diego Unified Port District Be Named as Discharger; Written Comments on Phase III Schedule and Process for Third Pre-Hearing Conference.

3. Pursuant to the requirements of paragraph 4, page 6 of the First Amended Order of Proceedings, Pre-Hearing Conference for Tentative Cleanup and Abatement Order No. R9-2005-0126, this is to certify that the electronic submittal and distribution described in paragraph 2 herein is a true and accurate copy of the signed original submitted herewith.

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

Executed on April 22, 2008, at San Diego, California.

Kathryn D. Horning
(Type or print name)

_____
(Signature)