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BAE SYSTEMS SAN DIEGO SHIP REPAIR INC.

8
9 CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

10 SAN DIEGO REGION

11 IN THE MATTER OF:
12 TENTATIVE CLEANUP AND
13 ABATEMENT ORDER NO. R9-2011-001

**BAE SYSTEMS SAN DIEGO SHIP
REPAIR INC.'S MOTION TO EXCLUDE
ENVIRON INTERNATIONAL CORP.'S
MAY 26, 2011 TECHNICAL COMMENTS
REGARDING TENTATIVE CLEANUP
AND ABATEMENT ORDER NO. R9-2011-
001**

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17 BAE Systems San Diego Ship Repair Inc. ("BAE Systems") hereby objects to San Diego
18 Gas and Electric's ("SDG&E") May 26, 2011 submission of ENVIRON International Corp.'s
19 Technical Comments ("ENVIRON Report") regarding Tentative Cleanup and Abatement Order
20 No. R9-2011-001 ("TCAO"). The ENVIRON Report, while styled as "Technical Comments," is
21 in fact an expert report. However, the California Regional Water Quality Control Board's
22 ("Regional Board") October 27, 2010 Order reopening discovery and extending the discovery
23 schedule in the above referenced matter expressly states that the last day to submit expert reports
24 was March 11, 2011 ("Order"). (See Exhibit A, Order at IV.) The Order does not permit
25 submittal of expert reports (either initial or supplemental) beyond the March 11th deadline.
26 SDG&E submitted the ENVIRON Report on May 26, 2011, well after the applicable deadline.
27 BAE Systems hereby moves to exclude the ENVIRON Report, and further requests that the

1 Regional Board disregard the portions of SDG&E's May 26, 2011 Request for Rescindment of
2 Discharger Designation and Comments on Tentative Cleanup and Abatement Order No. R9-
3 2011-001 and Draft Technical Report ("Rescindment Request") that refer to and rely upon the
4 ENVIRON Report.

5 **I. FACTUAL BACKGROUND**

6 On September 15, 2010, the San Diego Water Board Cleanup Team released a revised
7 TCAO and supporting Draft Technical Report ("DTR"). On October 19, 2010, the San Diego
8 Unified Port District ("Port District") filed a Motion to Reopen and Extend Discovery Deadlines
9 in these proceedings. On October 27, 2010, the Regional Board issued the Order which expressly
10 states that the parties were to submit their expert reports no later than March 11, 2011. (Exhibit
11 A, Order at IV.) SDG&E acknowledged this deadline and submitted three expert reports
12 prepared by Dr. Conder of ENVIRON including: (1) Analysis of Causality Between Aquatic Life
13 Beneficial Use Impairment and Site Primary COCs at the San Diego Shipyard Sediment Site; (2)
14 Evaluation of the Regional Board's Human Health Risk Assessment for the San Diego Shipyard
15 Sediment Site; and (3) Comparison of 2001-2002 and 2011 Chemical Conditions in Surface
16 Sediment at the San Diego Shipyard Sediment Site. BAE Systems also submitted reports for
17 three of its experts by the March 11, 2011 deadline.

18 SDG&E submitted the ENVIRON Report on May 26, 2011. The ENVIRON Report
19 provides opinions related to the Regional Board's: (1) analysis of Aquatic Life Beneficial Use
20 Impairment; (2) determination of Human Health Aquatic Life Beneficial Use Impairment; and (3)
21 assessment of Aquatic Dependent Wildlife Beneficial Use Impairment. The subject of and basis
22 for the opinions in the ENVIRON Report were known to SDG&E as of and addressed in its
23 March 11, 2011 expert reports. Thus, the opinions in the ENVIRON Report should have been
24 included in the prior reports and are not proper supplemental opinions. SDG&E's submission of
25 the ENVIRON Report in its Rescindment Request is unreasonable and untimely given that the
26 deadline to submit expert reports provided all Designated Parties, including SDG&E, with more
27 than six months to conduct the discovery necessary to address the revisions contained in the
28 TCAO. For this, and other reasons set forth more fully below, the Regional Board should exclude

1 the ENVIRON Report.

2 **II. THE CALIFORNIA CODE OF CIVIL PROCEDURE GOVERNS EXPERT**
3 **ISSUES**

4 The Final Discovery Plan in the above referenced matter issued by the Presiding Officer,
5 dated February 18, 2010, specifically incorporates the California Code of Civil Procedure (the
6 “Code”), except as modified in the Order, for purposes of governing discovery in this matter,
7 including expert discovery. (2/18/10 Final Discovery Plan at § I.) The Final Discovery Plan does
8 not modify the Code with respect to experts. It does, however, affirm that “submission of expert
9 evidence must adhere to discovery schedule to preserve all parties’ procedural and due process
10 rights.” (*Id.* at II-B-1.) The current Order “reopens and extends the discovery schedule
11 previously adopted by Order dated February 18, 2010, with all discovery to be completed on or
12 before March 11, 2011.” (Order at § I.) Specifically, that Order provides that March 11, 2011 is
13 the “last day to submit expert reports.” (*Id.*, at IV.) Thus, the Code (section 2034.010 *et seq.*)
14 governs expert discovery issues in this proceeding, including resolution of the instant Motion to
15 exclude the untimely ENVIRON Report.

16 **III. LEGAL STANDARD**

17 Upon demand, all parties are required to exchange written information about their expert
18 witnesses, including reports and writings made by the expert witnesses in the course of preparing
19 their opinions. Cal. Civ. Proc. Code § 2034.210(c). As courts have noted, the need for pretrial
20 discovery is greater with respect to expert witnesses than ordinary fact witnesses because the
21 opponent must prepare to cope with the expert’s specialized knowledge. *Boston v. Penny Lane*
22 *Centers, Inc.*, 170 Cal. App. 4th 936, 951 (2009). In particular, the expert pretrial discovery
23 provisions of the Code allow “the parties to assess whether to take the expert’s deposition, to fully
24 explore the relevant subject area at any such deposition, and to select an expert who can respond
25 with a competing opinion on that subject area.” *Bonds v. Roy*, 20 Cal. 4th 140, 147 (1999).
26 Section 2034.250(b)(3) of the Code gives the Regional Board discretion to order that this
27 exchange of information be made only on specified terms and conditions. A party, in limited
28 circumstances, may supplement its initial expert witness list. Section 2034.280 of the Code

1 provides that:

2 [a]ny party who has engaged in the exchange may submit a
3 supplemental expert witness list containing the name and address of
4 any experts who will express an opinion on a subject to be covered
5 by an expert designed by an adverse party to the exchange, *if the
party supplementing an expert witness list has not previously
retained an expert to testify on that subject.*

6 Cal. Civ. Proc. Code § 2034.280(a) (emphasis added). Here, the ENVIRON Report is not a
7 proper supplemental opinion as it provides opinions on the *same* subjects that Dr. Conder had
8 previously provided in his March 11, 2011 expert reports. As a result, the ENVIRON Report
9 should be excluded.

10 **IV. ANALYSIS**

11 On July 19, 2010, SDG&E designated Dr. Conder as an expert witness and submitted his
12 three expert reports on March 11, 2011. Despite having submitted these three expert reports (on
13 the same subject matters), SDG&E now attempts to circumvent the Order. The Order does not
14 permit expert reports (either initial or supplemental) beyond the March 11th deadline. Yet, two
15 and a half months later, on May 26, 2011, SDG&E submitted the ENVIRON Report in which Dr.
16 Conder offers opinions on a number of issues related to the findings set forth by the Regional
17 Board in the TCAO and supporting DTR. SDG&E's submission of these opinions is improper
18 for a number of reasons.

19 First, SDG&E had been aware of the revisions to the TCAO and DTR since September
20 2010, giving Dr. Conder more than enough time to prepare complete reports addressing the issues
21 significant to SDG&E. All opinions provided in the ENVIRON Report should have been fully
22 and completely provided in Dr. Conder's three prior expert reports. There is simply no
23 reasonable explanation for why SDG&E did not submit the opinions provided in the ENVIRON
24 Report to all Designated Parties by the Regional Board ordered deadline.

25 Second, as explained above, the ENVIRON Report is not a proper supplemental report.
26 On March 11, 2011, SDG&E submitted three expert reports authored by Dr. Conder: (1) Analysis
27 of Causality Between Aquatic Life Beneficial Use Impairment and Site Primary COCs at the San
28 Diego Shipyard Sediment Site; (2) Evaluation of the Regional Board's Human Health Risk

1 Assessment for the San Diego Shipyard Sediment Site; and (3) Comparison of 2001-2002 and
2 2011 Chemical Conditions in Surface Sediment at the San Diego Shipyard Sediment Site. The
3 ENVIRON Report provides opinions related to the Regional Board's: (1) analysis of Aquatic Life
4 Beneficial Use Impairment; (2) determination of Human Health Aquatic Life Beneficial Use
5 Impairment; and (3) assessment of Aquatic Dependent Wildlife Beneficial Use Impairment. The
6 subject of and basis for the opinions in the ENVIRON Report were known to SDG&E as of and
7 addressed in its March 11, 2011 expert reports and should have been included in the prior reports.
8 Accordingly, the opinions in the ENVIRON Report are not proper supplemental opinions.

9 Third, after the deadline passed (and SDG&E received expert reports from other
10 Designated Parties, including BAE Systems), SDG&E failed to seek relief from its failure to
11 provide complete expert reports for more than two months. In fact, SDG&E still fails to seek
12 relief, instead opting to simply submit the ENVIRON Report to the Regional Board, without
13 addressing the tardiness of the report. SDG&E's failure to seek relief for failing to provide the
14 Designated Parties with thorough expert reports is clearly an attempt to thwart BAE Systems' and
15 the other Designated Parties' efforts to challenge those opinions. *See, e.g., Zellerino v. Brown*,
16 235 Cal. App. 3d 1097, 1116-17 (1991) (plaintiff's failure to comply with the requirements of the
17 expert disclosure statute and failure to move for leave to submit tardy information prejudiced the
18 defense, which did not have the ability to counter the testimony of the belatedly disclosed
19 experts.)

20 Fourth, SDG&E's untimely submission is prejudicial to BAE Systems, which has
21 complied with the deadlines set forth in the Order, including those related to expert witnesses. By
22 submitting the ENVIRON Report after the March 11th deadline, Dr. Conder had the benefit of
23 reviewing and analyzing other parties' submissions, and was then able to refine his original
24 opinions with that benefit.¹ Essentially SDG&E is submitting a rebuttal expert opinion report
25 under the guise of "Technical Comments."

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28 ¹ This is evident by a brief review of the references cited in the ENVIRON Report in which Dr. Conder specifically
cites to three expert reports submitted on March 11, 2011.

1 Finally, BAE Systems has promptly moved to exclude the ENVIRON Report, which was
2 first disclosed when SDG&E submitted its Rescindment Request on May 26, 2011. The fact that
3 BAE Systems has not delayed in moving for exclusion weighs in favor of exclusion. See
4 *Stanchfield v. Hamer Toyota, Inc.*, 37 Cal. App. 4th 1495, 1503 (1995) (finding that party's delay
5 in seeking relief makes it less likely that the conduct of the party offering the expert is
6 unreasonable).

7 **V. CONCLUSION**

8 For the foregoing reasons, BAE Systems respectfully requests that the Regional Board
9 exclude the ENVIRON Report from consideration, and disregard the portions of SDG&E's May
10 26, 2011 Rescindment Request that refer to and rely upon the untimely expert opinions.

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12 DATED: June 23, 2011

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13
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EXHIBIT A



California Regional Water Quality Control Board San Diego Region



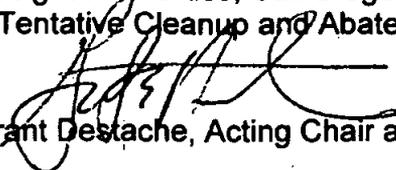
Linda S. Adams
Secretary for
Environmental Protection

Over 50 Years Serving San Diego, Orange, and Riverside Counties
Recipient of the 2004 Environmental Award for Outstanding Achievement from USEPA

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TO: Designated Parties, San Diego Bay Shipyard Sediment Site,
Tentative Cleanup and Abatement Order No. R9-2011-0001

FROM: 
Grant Destache, Acting Chair and Presiding Officer for Prehearing Proceedings

DATE: October 27, 2010

SUBJECT: Order Reopening Discovery Period, Establishing Discovery Schedule, and
Identifying Star and Crescent Boat Company as a Designated Party for
Purposes of Tentative Cleanup and Abatement Order No. R9-2011-0001

I. Procedural Background

The California Regional Water Quality Control Board, San Diego Region's (San Diego Water Board), through its former Presiding Officer for Prehearing Proceedings, issued an order adopting a Final Discovery Schedule for the above matter on February 18, 2010. That Final Discovery Schedule provided for close of discovery on August 23, 2010. After considering a motion by the San Diego Water Board Cleanup Team, in July 2010, the San Diego Water Board declined to extend the discovery period beyond August 23, 2010. On August 9, 2010, the Designated Parties submitted a stipulation extending the discovery schedule through October 26, 2010, under Code of Civil Procedure section 2024.060. The San Diego Water Board's Presiding Officer for Prehearing Procedures thereafter indicated that any disputes arising during the stipulated, extended discovery period should be resolved by Tim Gallagher. On September 15, 2010, the San Diego Water Board Cleanup Team released a revised Tentative Cleanup and Abatement Order No. R9-2011-0001 (TCAO) and supporting draft technical report (DTR). The TCAO/DTR revises Tentative Cleanup and Abatement Order No. R9-2010-0001 and the earlier draft technical report in a number of respects, and as relevant here, for the first time identifies the San Diego Unified Port District (Port District) and the Star and Crescent Boat Company (Star and Crescent) as Dischargers.

On October 19, 2010, the Port District submitted a Motion to Reopen and Extend Discovery Deadlines (Motion) in the matter of the TCAO/DTR. By the noon deadline on October 22, 2010, many of the Designated Parties submitted responses to the Motion. On October 25, 2010, the Port District submitted a reply to the Designated Parties' responses. As explained

California Environmental Protection Agency

below, this Order reopens and extends the discovery schedule previously adopted by Order dated February 18, 2010, with all discovery to be completed on or before March 11, 2011.

II. Presiding Officer as Appropriate Decisionmaker

The Port District directed its Motion to the San Diego Water Board's Presiding Officer. Several Designated Parties argue that the Motion should properly be resolved by Timothy Gallagher, who has acted as mediator and discovery referee during a substantial portion of these proceedings. As mentioned above, the previously adopted Final Discovery Schedule closed the discovery period on August 23, 2010. The Designated Parties stipulated among themselves to extend that schedule through October 26, 2010, and to designate Timothy Gallagher as the final arbiter of discovery disputes "absent an appeal and final ruling to the presiding officer." (August 9, 2010, Stipulation, p. 3, ¶ 6.) The Designated Parties also agreed that the stipulation does not "prohibit any party from seeking permission from the Presiding Officer to take additional discovery that is not authorized by this stipulation or the terms of the Final Discovery Plan." (Id., ¶ 5.) Even though then-presiding officer King declined to take an active role in resolving discovery disputes beyond August 23, 2010, the San Diego Water Board has not relinquished its authority to resolve prehearing matters, which include the reestablishment of a discovery schedule. (See Wat. Code § 13228.15.)

The decision as to whether to reopen and extend the previously adopted discovery schedule previously is appropriately before the Presiding Officer for San Diego Water Board.

III. Reopening the Discovery Schedule/Limitations on Scope

On September 15, 2010, the San Diego Water Board Cleanup Team released the TCAO/DTR which, for the first time during this proceeding, identifies the Port District and Star and Crescent as Dischargers. The discovery period established in the August stipulation concluded October 26, 2010, leaving only approximately 5 weeks for completion of all discovery. The DTR, which sets forth the Cleanup Team's technical support for the TCAO, totals more than 1000 pages. A redline version comparing the TCAO with the earlier version was released several weeks ago. However, a redline comparison showing revisions appearing in the new DTR has not yet been released. The Cleanup Team anticipates making it available to the Designated Parties on or before November 1, 2010. (See October 22, 2010 E-mail from Cris Carrigan to the Designated Parties.) It is appropriate that more time be allowed for discovery by Designated Parties on revisions to the TCAO and DTR made by the Cleanup Team.

Scope of Discovery

As proposed by the Port District and supported by the Cleanup Team and other Designated Parties, the scope of additional discovery allowed by this Order is limited to revisions to the TCAO/DTR released on September 15, 2010 as compared to the December 2009 versions of these documents. With the exception of discovery directed at financial resources/insurance assets against Port tenant/dischargers (see below), additional discovery may only be directed at the Cleanup Team. The Designated Parties are cautioned that any proposals to redepose witnesses must be strongly supported by connection to revisions to the TCAO/DTR as compared to the December version of the tentative order.

BAE Systems Ship Repair (BAE), National Steel and Shipbuilding Company (NASSCO), Campbell Industries and San Diego Gas & Electric (SDG&E) argue that the Port District should not be permitted to seek discovery about Port tenant/Dischargers' financial resources and insurance assets. The September 15, 2010, DTR provides: "Although the Port District is a public government entity, and there is no evidence in the record that the Port District initiated or contributed to the actual discharge of waste to the Shipyard Sediment Site, it is nevertheless appropriate to name the Port District as a discharger in the CAO to the extent the Port's tenants, past and present, have insufficient financial resources to clean up the Shipyard Sediment Site and/or fail to comply with the order. (Citations.) 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, p. 11-5.)

The Port District is reasonably entitled to attempt to demonstrate that its former and/or current tenant/Dischargers have sufficient resources to clean up the Shipyard Sediment Site and to comply with the order to support an argument that the San Diego Water Board should find the Port to be secondarily responsible under a final order. The Port District is entitled to make such an argument *before*, not only after, adoption of a final Cleanup and Abatement Order in this proceeding. The Port District is therefore allowed to conduct discovery as against its former and current tenant/Dischargers on the issue of financial resources/insurance assets. The Port District is cautioned to make every effort to avoid duplicating discovery that has already been taken in this proceeding or may be submitted in this proceeding. If discovery on financial resources/insurance assets raises confidentiality concerns, the affected Designated Parties are encouraged to stipulate as to how the discovery may be used and/or maintained.

IV. Discovery Schedule

Various proposed schedules were submitted by the Port District, the San Diego Water Board Cleanup Team and San Diego Coastkeeper/Environmental Health Coalition (the Environmental Groups). The Port District requests that the discovery schedule continue until March 31, 2011. The Port notes that when it began discussions with other Designated Parties to arrive at a mutually acceptable schedule, it had proposed that discovery continue until the end of May, 2011. The San Diego Water Board Cleanup Team proposes that discovery close on March 4, 2011. The Environmental Groups prefer that discovery close sooner but no later than March 1, 2011, noting that the draft Environmental Impact Report (EIR) is expected to be released on March 3, 2011.

While it is premature to establish a hearing date and comment period for the TCAO (and DTR), there is benefit in concluding discovery on these documents before or as close as possible to the start of the comment period for the draft EIR. Moreover, as the Environmental Groups point out, the Port District's request for extension would result in a discovery schedule that exceeds the effective discovery period allowed in the February 2010 Final Discovery Schedule. The scope of discovery allowed through this Order also is narrower than the previous discovery scope because it is limited to revisions from the December 2009 tentative Cleanup and Abatement Order. As reflected below, the discovery

schedule, as limited in scope, above, allows more than four months for completion of discovery prior to release of the draft EIR. Given the nature of the TCAO revisions raised by the Port District, this period provides more than adequate opportunity to complete necessary discovery.

The discovery period therefore is reopened, subject to the limitations in scope discussed above, in accordance with the following schedule:

November 5, 2010: Cleanup Team makes available a complete update to Administrative Record and a redline version of the DTR showing revisions from the December 2009 DTR. Cleanup Team produces, upon request, for inspection and copying all non-privileged documents that relate to the allegations in paragraphs 5 and 11 of the TCAO/DTR.

November 29, 2010 Last day for all Designated Parties to serve the Cleanup Team with written discovery on revisions in the TCAO/DTR; last day for Port District to serve written discovery on financial resources/insurance assets of tenant/Dischargers.

January 5, 2011 Last day for Designated Parties to respond to discovery served on November 29, 2010.

January 18, 2011 Last day for Designated Parties to designate expert and non-expert witnesses on revisions to the TCAO/DTR; last day for Port District and Star and Crescent Boat Company to designate expert and non-expert witnesses for all purposes.

February 4, 2011 Last day for Designated Parties to make expert witness counter-designations on revisions to the TCAO/DTR; last date for Port District and Star and Crescent Boat Company to make expert witness counter-designations for all purposes.

March 11, 2011 Discovery period closes; last day to submit expert reports.

This ruling on Discovery Schedule incorporates Sections I (Types of Permissible Discovery) and II A. and B. (Preservation of Procedural and Due Process Rights) in the Final Discovery Schedule adopted on February 18, 2010. **All objections/motions for protective orders must be made within 10 days of service of objectionable discovery.**

VI. Discovery Referee

While during the mediation process, the Presiding Officer previously appointed Timothy Gallagher as designated discovery referee and provided that decisions by the Discovery Referee may be appealed to the Presiding Officer, the board-referred mediation was terminated in July 2010. The Designated Parties are encouraged to select a Discovery Referee, whether Timothy Gallagher or some other person, to resolve discovery disputes subject to final resolution by the Presiding Officer. The designated parties shall meet and confer about whether to continue to engage a discovery referee for this purpose and shall report back to the Presiding Officer about the results of the meet-and-confer process by **November 12, 2010.**

VII. Designation of Star and Crescent Boat Company as a Designated Party for Purposes of these Proceedings

Because the TCAO alleges for the first time that Star and Crescent Boat Company is a Discharger under the terms of the TCAO, Star and Crescent is a Designated Party, with full rights to participate in this matter, both during prehearing proceedings and during a hearing when scheduled before the San Diego Water Board. (See Cal.Code.Reg., tit. 23, § 648.1(a).) All communications with or among Designated Parties must include the representative for Star and Crescent Boat Company, currently identified as Sarah Brite Evans, Esq.