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16 CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

17 SAN DIEGO REGION

18 IN RE TENTATIVE CLEANUP AND
 19 ABATEMENT ORDER NO. R9-2011-
 20 0001 (formerly No. R9-2010-0002)

21 **BAE SYSTEMS SAN DIEGO SHIP
 22 REPAIR INC.'S COMMENTS
 23 REGARDING REVISIONS TO TCAO AND
 24 DTR AND DRAFT EIR RELEASED BY
 25 CLEANUP TEAM ON SEPTEMBER 15,
 26 2011**

27 Presiding Officer: Grant Destache

28 Pursuant to the September 19, 2001 Notice of Public Hearing, and the Third Amended
 29 Order of Proceedings, dated June 8, 2011, and related procedural orders, with respect to Tentative
 30 Cleanup and Abatement Order No. R9-2011-0001 (“TCAO”) and its associated Draft Technical
 31 Report (“DTR”) for the San Diego Bay Shipyard Sediment Site, San Diego County (“Shipyard
 32 Sediment Site” or “Site”), Designated Party BAE Systems San Diego Ship Repair Inc. (“BAE
 33 Systems”) respectfully submits these written comments regarding (1) Revisions to the TCAO and
 34 DTR made by the Cleanup Team and released on September 15, 2011; and (2) Revisions to
 35 and/or responses to comments on the draft EIR made by the Cleanup Team and released on-
 36 September 15, 2011.

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1 **I. COMMENTS REGARDING REVISIONS TO THE TCAO AND DTR MADE BY**
2 **THE CLEANUP TEAM AND RELEASED ON SEPTEMBER 15, 2011**

3 BAE Systems appreciates and recognizes the significant task recently completed by the
4 Cleanup Team of reviewing, analyzing and responding to a mountain of written comments by
5 Designated Parties, and subsequently revising the TCAO and DTR as they deemed appropriate.
6 BAE Systems provides certain comments regarding those revisions, which are set forth below.

7 BAE Systems expressly preserves, and does not waive, any and all objections to those
8 technical issues, evidence or legal argument to which BAE Systems does not address herein, and
9 further reserves the right to supplement, modify or withdraw its comments on any issue identified
10 herein.

11 **A. Revised DTR Pages 18-4 and 18-5**

12 As noted in the revised DTR text, there are no tributyltin ("TBT") values that can be used
13 in the SQGQ1 calculation. However, a site-specific toxicity-based threshold for TBT is available
14 for the Shipyard Sediment Site, and can be applied to evaluate stations with only chemistry data.
15 This threshold value is the Lowest Apparent Effects Threshold ("LAET"). The only two Site
16 stations that exceed the LAET for TBT (*see* Table 12-3 of the shipyard sediment report [Exponent
17 2003]) are included within the cleanup footprint. An acknowledgement of the relevance of the
18 LAET could be included in the revised DTR text as additional support for the approach that was
19 taken by the Cleanup Team.

20 Furthermore, TBT was not related to any measure of toxicity or benthic community
21 condition at the site (Table 9-8 of the shipyard sediment report), and also was not a risk driver for
22 either the ecological risk assessment or the human health risk assessment. There is therefore
23 ample site-specific data with which to draw conclusions about the possible impact of TBT, even
24 without including it in the SQGQ1 calculation.

25 In addition, the appropriateness of the use of other chemicals as a surrogate for TBT can
26 be further supported by reference to the chemical correlations presented in Table 9-2 of the
27 shipyard sediment report. These correlation coefficients demonstrate that chemicals used in the
28 SQGQ1 calculation are strongly correlated with TBT concentrations. In particular, the

1 correlation coefficients for TBT and copper, HPAH, and total PCB are 0.89, 0.80, and 0.80,
2 respectively, which are among the highest correlations observed. Consequently, cleanup
3 decisions based on SQGQ1 values will address areas with elevated TBT values.

4 **B. Revised DTR Page 32-12**

5 In the modified paragraph, the text "all wildlife receptors (excluding the sea lion)" puts an
6 important piece of information into a parenthetical statement. An abbreviated quote from this
7 sentence, that omits the parenthetical phrase, would be misleading. An alternative phrase that
8 eliminates this potential problem is "wildlife receptors other than the sea lion."

9 **C. Revised DTR Page 34-3**

10 In the revised text, the phrase "post-remedial dredge area concentrations" is ambiguous. It
11 could be taken to mean any of the following:

- 12 • The alternative cleanup level; or
- 13 • The estimated post-remedial SWAC; or
- 14 • The mean post-remedial concentration in all dredged areas.

15 This phrase should be clarified or replaced. By analogy with the previous version of this
16 text, which referred to background concentrations, the revised text is assumed to refer to
17 alternative cleanup levels. The second of the alternatives listed above is not appropriate because
18 it would consist of comparing a point concentration with a SWAC. The third alternative listed
19 above is not appropriate because 20% variation is within the range of variability of duplicate
20 laboratory analyses of organic chemicals, and the criterion would therefore be likely to flag
21 samples that are not meaningfully different from the overall mean concentration. Consistent with
22 this interpretation, the phrase "post-remedial dredge area concentrations" should therefore be
23 replaced with the phrase "alternative cleanup levels."

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1 **II. COMMENTS REGARDING REVISIONS TO AND/OR RESPONSES TO**
2 **COMMENTS ON THE “PROPOSED FINAL” EIR MADE BY THE CLEANUP**
3 **TEAM AND RELEASED ON SEPTEMBER 15, 2011**

4 BAE Systems submits the following comments regarding the proposed Final
5 Environmental Impact Report (“FEIR”) released September 15, 2011. Specifically, BAE
6 Systems’ comments relate to the Mitigation Monitoring and Reporting Program (“MMRP”), set
7 forth in Section 7 of the FEIR.

8 BAE Systems expressly preserves, and does not waive, any and all objections to those
9 technical issues, evidence or legal argument to which BAE Systems does not address herein, and
10 further reserves the right to supplement, modify or withdraw its comments on any issue identified
11 herein

12 **A. Mitigation That is Legally Infeasible May Not be Adopted.**

13 CEQA mitigation may not be adopted unless it is “feasible,” or “capable of being
14 accomplished in a successful manner within a reasonable period of time, taking into account
15 economic, environmental, legal, social, and technological factors.” CEQA Guidelines § 15364.
16 Legal infeasibility arises where the mitigation being considered is beyond the powers conferred
17 by law on the agency, or prohibited by statutes governing the agency. *Kenneth Mebane Ranches*
18 *v. Superior Court*, 10 Cal. App. 4th 276, 291 (1992); *Sequoyah Hills Homeowners Ass’n v. City*
of Oakland, 23 Cal. App. 4th 704, 715-16 (1993).

19 **1. Regional Board May Not Impose Mitigation Measures That Have Not**
20 **Been Subjected to Economic Feasibility Analysis Under Resolution 92-**
49.

21 In connection with its authority to issue cleanup and abatement orders, the Regional Board
22 must evaluate all cleanup levels for economic feasibility and cost effectiveness. *See* State Water
23 Resources Control Board Resolution No. 92-49, at 6-8 (“The Regional Water Board shall . . .
24 ensure that dischargers shall have the opportunity to select cost-effective methods for . . . cleaning
25 up or abating the effects [of wastes discharged and] . . . require the discharger to consider the
26 effectiveness, feasibility, and relative costs of applicable alternative methods for investigation,
27 cleanup and abatement.”). *See also* Water Code § 13307 (requiring that policies include
28 procedures for identifying and utilizing “the most cost-effective methods . . . for cleaning up or

1 abating the effects of contamination of pollution”); Water Code § 13267 (requiring that the
2 Regional Board engaged in cost-benefit analysis in adopting any “technical or monitoring
3 program reports”).

4 Certain of the mitigation measures that are identified in the FEIR (which are set forth
5 below) were not considered in the TCAO/DTR’s economic feasibility analysis, and have not
6 otherwise been subjected to the economic feasibility analysis required by Resolution 92-49. As
7 such, those measures are legally infeasible under CEQA, and they should be removed as
8 requirements from the FEIR.

9 Even if the Regional Board subjected these mitigation measures to the economic
10 feasibility analysis, such an analysis would reveal that these particular mitigation measures are
11 not economically feasible. These requirements are unnecessarily restrictive, and, if required,
12 would significantly increase construction costs without providing a commensurate increase in
13 environmental protection. Based on the evaluation of NASSCO’s expert Anchor QEA, these
14 mitigation measures could add approximately \$12 million to the total project costs. (*See* Anchor
15 QEA Memorandum, attached to NASSCO’s October 19, 2011 Comments on the Final EIR
16 (hereinafter “Anchor Memorandum”), at 1.) Without a corresponding benefit to the environment,
17 such costs are economically infeasible under CEQA and cannot be required components of the
18 FEIR.

19 **a. Mitigation Measure 4.2.1: Automated Turbidity Monitoring**

20 As the FEIR currently reads, automatic systems must be used to monitor turbidity in the
21 vicinity of the dredge operation. Setting aside the fact that automated turbidity monitoring is not
22 the industry standard, such a requirement could actually adversely impact the project by imposing
23 unnecessary delays and additional costs. As more fully explained in the Anchor Memorandum,
24 automated turbidity monitoring, as opposed to manual turbidity monitoring, could lead to a high
25 proportion of false positive readings caused by ambient conditions and statistical “noise” created
26 by external factors, such as currents, weather, and vessel traffic. (Anchor Memo. at 2.) Manual
27 turbidity monitoring gives the contractor the ability to make adjustments for these external factors
28 as the project progresses in a more seamless manner, thereby preventing any unnecessary work

1 stoppage like that which is likely to result from automated turbidity monitoring. As noted in the
2 Anchor Memorandum, dredging effectiveness is primarily driven by production rate. (*Id.*)
3 Accordingly, measures that may result in unnecessary work stoppages, like automated turbidity
4 monitoring, should be avoided, especially where environmental protectiveness is unlikely to be
5 increased by the proposed measure.

6 **b. Mitigation Measure 4.2.2: Dredging Best Management**
7 **Practices**

8 The current FEIR requires the contractor to exercise dredging best management practices
9 (“BMPs”). In addition to not comporting with standard industry practice, the particular BMPs set
10 forth below will slow down the rate of progress on the project, thereby increasing construction
11 costs, without any increased benefit to the environment.

12 For example, the FEIR requires the use of a double silt curtain enclosure. As noted by
13 Anchor, such a requirement would slow down the rate of progression on the project, while adding
14 approximately \$250,000 to \$500,000 to its total cost. Such an expense is unnecessary when a
15 single silt curtain enclosing the point of dredging, combined with implementation of other water
16 quality management BMPs, would sufficiently ensure water quality standards are met. (Anchor
17 Memo. at 3.)

18 The FEIR also requires the contractor to use specialized bucket additions and controls
19 (e.g. closure switches and Clam Vision™). These requirements, however, would impose
20 unnecessary implementation costs (approximately \$250,000 to \$500,000), as the contractor would
21 have to purchase, install, maintain, calibrate and otherwise manage them. Moreover, use of such
22 equipment and controls could add additional costs to the effort, as their use could result in
23 ambiguous or misleading data that the contractor would have to address as the project progresses.
24 As Anchor properly points out, the contractor can ensure compliance with the Section 401 Water
25 Quality Certification, and still remain efficient, through use of other equipment that is not
26 specifically identified in the FEIR. (Anchor Memo. at 3.)

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c. Mitigation Measure 4.2.3: Complete Silt Curtain Enclosure

As discussed previously in 4.2.2 above, this measure repeats the overly restrictive approach by requiring redundant (inner and outer) silt curtains around the dredging area, imposing a significant, yet unnecessary additional cost. The use of an outer silt curtain is unnecessary and would have little to no resulting environmental benefit, especially considering the numerous other controls and monitoring already mandated during dredging.

d. Mitigation Measure 4.2.7: Permanent Cap under Piers

The most troubling mitigation measure set forth in the FEIR is the apparent requirement that a permanent cap be placed below the piers. As described more fully in the Anchor Memorandum, the cap design requirement is exceedingly complex, and is likely to substantially increase the costs of construction by as much as \$5 to \$7 million. (Anchor Memo. at 4-5.) But not only is the contemplated cap expensive and complex, it could impose undue stresses on the foundations and soils that underlie the overwater marine structures. BAE Systems agrees with Anchor’s conclusion that a cover layer of sand or a sand-gravel mixture below the pier areas is a more appropriate mitigation measure. It would protect against unnecessary and unreasonable incidences of exposed contaminants, while facilitating the ongoing process of sedimentation. (*Id.*)

e. Mitigation Measure 4.2.8: Hydraulic Placement of Sand

The FEIR contemplates that sand cover will be placed hydraulically. This measure, however, could impede otherwise qualified contractors who do not have such capabilities in the bidding process, when other methods of placing sand cover beneath overwater structures are available. This in turn would deprive the parties of the benefit of a competitive bidding process, resulting in a potential increase in costs of approximately \$1.5 to \$2 million. (Anchor Memo. at 5.) As such, this requirement should be removed. Any means which would provide for adequate distribution of sand under piers should be allowed.

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1 **2. The Regional Board May Not Dictate Cleanup Methods.**

2 In addition to the fact that these mitigation measures have not been subjected to the
3 economic feasibility analysis required by Resolution 92-49 and are not, in fact, economically
4 feasible, these measures are also legally infeasible because they impermissibly dictate cleanup
5 methods. The scope of the Regional Board’s authority is not unfettered. Water Code Section
6 13360 specifically states that “[n]o waste discharge requirement or other order of a regional board
7 . . . shall specify the design, location, type of construction, or particular manner in which
8 compliance may be had with that requirement, order, or decree, and the person so ordered shall be
9 permitted to comply with the order in any lawful manner.” Put another way, the Regional Board
10 has authority to issue orders that require particular results that it expects the cleanup to achieve
11 (e.g., cleanup levels), but it is precluded from dictating the cleanup methods used to achieve those
12 results. Despite the Regional Board’s lack of authority in this regard, it uses the FEIR to require
13 the parties to undertake particular mitigation measures. Because the Regional Board cannot use
14 CEQA mitigation to dictate cleanup measures, those measures are legally infeasible under CEQA
15 and should be removed as requirements from the FEIR.

16 **B. Conclusion**

17 Because the mitigation measures imposed in the FEIR have not been subjected to the
18 economic feasibility analysis under Resolution 92-49, and are not economically feasible, they are
19 legally infeasible and should not be required elements of the FEIR. In addition, the mitigation
20 measures are legally infeasible and should be removed from the FEIR because the Regional
21 Board lacks authority to require the use of particular cleanup methods. For these reasons, BAE
22 Systems respectfully requests that the Regional Board revise the FEIR and remove these
23 mitigation measures as requirements.

24 Dated: October 19, 2011

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26 By /s/ Michael S. Tracy

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