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CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

In the Matter of Petition for Review of San Diego Regional Water Quality Control Board's Cleanup and Abatement No. R9-2022-0007 Directing Lockheed Martin Corporation to Cleanup or Abate the Effects of Waste Discharged from the Former Tow Basin and Former Marine Terminal and Railway Facilities in the East Basin of San Diego Bay, California	**LOCKHEED MARTIN CORPORATION'S PETITION FOR REVIEW OF SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD'S CLEANUP AND ABATEMENT NO. R9-2022-0007;** **WATER CODE § 13320 AND 23 CAL. CODE REGS. § 2050.** **REQUEST FOR HEARING AND PETITION FOR STAY;** **WATER CODE § 13321 AND 23 CAL. CODE REGS. § 2053.**

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I. INTRODUCTION

This Petition presents the State Board with three key issues arising from the San Diego Regional Water Quality Control Board's errors in adopting its CAO R9-2022-0007 on August 10, 2022 (the "2022 CAO"; Exhibit 1) given the very lengthy regulatory history at the Former Tow Basin and Marine Terminal and Railway sites, located at the Harbor Island East Basin of the San Diego Bay (the "Site"):

1. Can the Regional Board circumvent State Board Resolution 92-49 by redefining "background conditions" to include only natural sources of compounds, making new regulatory policy through cleanup orders without notice and comment? Can the Regional Board erase with no explanation decades of study and its own detailed, legally adopted, Site-specific findings of background levels for contaminants (PCBs and mercury) and demand *new* findings more to its liking, by unilaterally rescinding a prior CAO (R9-2017-0021, the "2017 CAO"), and adopting a radically different new 2022 CAO?

2. Where a cleanup is designed to achieve background levels of contaminants—the most protective cleanup allowed under State Board Resolution 92-49—can the Regional Board force the 2018 Sediment Quality Objectives into use as a post-remedial monitoring requirement (as opposed to a pre-remedial investigation tool) despite that, so used, the SQOs could only confirm the remedy's success (an objective already achieved through simpler, less expensive means) or demand *greater* than a background cleanup, in violation of Resolution 92-49? Can the Regional Board impose such obligation when doing so could mean closure would be technically unachievable at the site?

3. Can the Regional Board interpret and adjudicate the validity of a private party settlement to justify naming only one of three dischargers as the implementing party at a site based only on its preference to work with one party rather than three? Can and should the Regional Board punish that cooperating discharger for stepping forward to implement a *prior* CAO by then rescinding it and issuing a *new* CAO with demands far beyond those ever imagined by the parties when they made their settlement? Is this policy, which disincentivizes cooperation among dischargers and fuels private party disputes, rather than streamlining cleanups, appropriate under

the facts?

The answer to each of these questions is "no." The Regional Board's errors through its recent adoption of the 2022 CAO have caused obvious and immediate prejudice to Lockheed Martin. Moreover, if left to stand, these errors signal policy that will hinder cleanup efforts throughout the Regional Board's jurisdiction and thereby harm the San Diego Bay. The Regional Board's errors will:

- Undermine the State Board's clear directives requiring science- and reason-based limitations to "background levels" in cleanups, removing consistent science-based standards and lengthening the investigative and remedial phases by *years* in future cleanups;
- Misapply the State's 2018 SQOs, creating scientific absurdities, confusion, and threatening the sound application of those objectives for their intended use; and
- Strongly discourage cooperative parties like Lockheed Martin from stepping up to lead cleanup efforts at multi-discharger sites, fuel private party disputes, and encourage all dischargers to stick with the herd and wait to be compelled to action.

Lockheed Martin entreats the State Board to correct the Regional Board's errors. The State Board should act to protect its Resolution 92-49, so that it is not rendered meaningless by tortured interpretations of what constitutes a "background level." The State Board should be deeply concerned about the Regional Board's erroneous application of the SQOs to post-remedial monitoring plans for cleanups to background contaminant levels, where they cannot replace other measures of remedial success to mandate *more than* a background cleanup, and will therefore result in confusion and, eventually, inefficacy and lack of finality at a site. The State Board should restore policies that support—not punish—proactivity and cooperation by dischargers and discourage Regional Boards from adjudicating legal disputes among private party dischargers merely because they prefer one party over another.

We emphasize that Lockheed Martin is in the unique position of seeking a State Board ruling that will allow it to do what it has tried mightily to do for *years*—perform a highly protective, background level cleanup for a *very* small two-acre sediment Site in San Diego Bay that has been studied in detail for decades. Had the Regional Board allowed Lockheed Martin to

do what it stepped forward to do six years ago (with explicit agreement from the other dischargers, the federal court, *and* the Regional Board), this cleanup would be long-since complete and the beneficial uses at the Site protected. Instead, Lockheed Martin's specific agreement to be the implementing party in this protective cleanup has been met with years of delay and goalpost moving by the Regional Board. Lockheed Martin has been faced with a continuing sequence of new demands of increasing complexity and impropriety, none of which were raised while Regional Board staff directly participated in the original remedy design specifically incorporated in the 2017 CAO.

That 2017 CAO was drafted in 2016 and issued in coordination with the settlement of the parties' litigation in 2017. The Regional Board then began pushing for more and more activity—reaching far beyond the clear and straightforward findings and directives of its own 2017 CAO. Lockheed Martin, intent on accomplishing the cleanup of this Site, attempted to appease the Regional Board by acceding to each of these requests until they became abjectly unfair and unworkable with the late 2019 demand that the 2018 SQOs be somehow incorporated into the post-remedial monitoring plan for the Site. At that point, Lockheed Martin petitioned the State Board and, ultimately, the Superior Court for relief—all the while seeking a workable compromise with the Regional Board.

Rather than reach a compromise or even engage on the substance of Lockheed Martin's claims, the Regional Board chose legal tactics and maneuvering. It unilaterally *rescinded* the 2017 CAO, purporting to discard and erase decades of study and its own scientific findings, to issue an entirely rewritten cleanup order at the Site, in the 2022 CAO.

The 2022 CAO so significantly changes and expands the cleanup obligations from the 2017 CAO that it far exceeds anything contemplated by the parties or the Regional Board when Lockheed Martin stepped forward to implement a specific remedy under a specific settlement. Foremost, the Regional Board forces parties back to the beginning by, with zero explanation or justification, erasing scientifically confirmed and already approved background concentrations that the Regional Board itself adopted in detail in the 2017 CAO (84 ppb for total PCBs and 0.57 ppm for mercury). With no precedent or scientific rationality, the Regional Board now concludes that

total PCB background should be "zero" merely because PCB is not a natural compound. This position would rewrite State Board Resolution 92-49 entirely, transmuting its definition of "background conditions" from "the water quality that existed before the discharge" into "the water quality that existed '500 years ago,'"[1] rendering the resolution meaningless and imposing technically infeasible cleanups. The 2022 CAO also violates Resolution 92-49 by requiring a new background analysis for mercury without any mention of the scores of scientific analyses already performed and approved by the Regional Board prior to arriving at *both* 2017 CAO background cleanup levels (something Regional Board staff omitted mentioning to the Regional Board at the hearing prior to adoption).

Beyond the problem of erasing background cleanup levels, the 2022 CAO perpetuates the misapplication of the 2018 SQOs into the post-remedial monitoring requirements of a background level cleanup (the subject of Lockheed Martin's prior petition under the 2017 CAO). This is unlawful. The Water Code and State Board Resolution 92-49 prohibits Regional Boards from requiring reports with costs that do not bear a reasonable relationship to the needs and benefits obtained. The same Resolution provides that "under no circumstances" shall it be interpreted to require cleanup to conditions better than background conditions. And, if used as additional narrative criteria evaluating remedy success—regardless of whether background contaminant concentrations were achieved—the SQOs would provide no useful additional information, despite the substantial costs of generating the reporting they would require. This is a clear violation of Resolution 92-49. The 2018 SQOs were intended as an investigatory tool (indeed, in this case, the parties had *already* used SQOs to evaluate the Site and develop the RAP) or, at most, to evaluate a non-background, alternative cleanup level remedy—not to evaluate remedial success of a background cleanup in post-remedial monitoring. Accordingly, to date, we are aware of no precedent where the Regional Board has requested, let alone successfully implemented, the SQOs in post-remedial monitoring.

Compounding these problems, the 2022 CAO so exceeds the scope of work in the 2017

[1] *See* August 10, 2022, Regional Board Hearing Recording, at 1:29:40.

CAO that it entirely vitiates the Settlement Agreement the Site dischargers entered, under which Lockheed Martin stepped up as the implementing party. At the time of rescission, the Regional Board appeared to agree, arguing that Lockheed Martin's pending litigation was rendered moot by the 2017 CAO rescission and expected issuance of a new CAO. Now, after issuing the 2022 CAO that dramatically expands the scope of work, the Regional Board conveniently takes the opposite position and purports to rely on the Settlement Agreement as if the prior cleanup were still intact, naming *only* Lockheed Martin to the new 2022 CAO. The Regional Board wishes to "have its cake and eat it, too." Nonetheless, absent the parties' Settlement Agreement, state law, regulations, and State Board guidance mandate that the Regional Board name *all* dischargers in the CAO. (Wat. Code § 13304; Code of Regulations, title 23, § 2907; State Board Resolution 92-49.) Lockheed Martin was named the implementing party under the 2017 CAO *solely and explicitly* because the Settlement Agreement covered the cleanup obligations reflected in that 2017 CAO that Lockheed Martin agreed to implement. Despite this, the Regional Board has continually ignored Lockheed Martin's repeated statements that its 2022 CAO vitiates and cancels the Settlement Agreement. Its staff has justified this by purporting to review and adjudicate the disputed positions of the parties about the Settlement Agreement's continuing validity. This is improper—a Regional Board should not insert itself as adjudicator of parties' private settlement arrangements. Absent agreement otherwise, all dischargers must be named.

The Regional Board provides myriad shifting reasons why it continues to name only Lockheed Martin, even beyond its improper adjudication of the Settlement Agreement. None of those shifting reasons holds water. The Regional Board suggests Lockheed Martin should be the sole implementing party because it has continued to engage the Regional Board staff in technical discussions without the other dischargers. But parties that cooperate with Regional Board staff to seek technical solutions to complex problems should not be penalized down the road by being solely named to implement costly cleanup obligations outside their agreements. Nor should Regional Board staff's view that other parties might not cooperate as effectively intimidate the Regional Board from naming all dischargers. These approaches would only encourage recalcitrance. It is patently unfair to not impose equal cleanup obligations on *all* dischargers at the

Site merely because the Regional Board would prefer to focus on Lockheed Martin. Besides violating state law, the Regional Board's decision creates terrible policy precedents that will discourage cooperation in nearly every multiparty site moving forward.

Lockheed Martin requests that the State Board correct the San Diego Regional Board's errors and restore the original cleanup obligations at the Site. This is necessary not only because the Regional Board's eleventh-hour maneuvering taken in the face of the last pending litigation fundamentally prejudices Lockheed Martin, but more importantly, because the original cleanup proposed—a dredge and sand cover remedy to restore background conditions of total PCBs and mercury—*is the most protective cleanup a discharger could perform at the Site.* At a minimum, the Regional Board should be estopped from imposing these ever-changing and technically unsound obligations that have only served as a roadblock to a lawful, highly protective, and successful cleanup of the Site.

II. NAME AND ADDRESS OF PETITIONER

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III. REVIEW OF REGIONAL BOARD'S CAO R9-2022-0007

After participating in a multi-session mediation among the dischargers at this Site (the San Diego Unified Port District, General Dynamics, and Lockheed Martin), the Regional Board issued 2017 CAO to Lockheed Martin consistent with an agreement among the litigating parties—coordinated and encouraged by the Regional Board—that Lockheed Martin would be named the implementing party pursuant to that 2017 Settlement Agreement (this arrangement is acknowledged in the 2017 CAO itself, Footnote 1.) The 2017 CAO was specifically designed by the Regional Board to facilitate the protective background cleanup that the parties had designed with the Regional Board's input. The 2017 CAO included specific findings for background concentrations for the two contaminants of concern—total PCBs (84 ppb) and mercury (0.57 ppm). Indeed, the 2017 CAO was so integrally coordinated with the dischargers' settlement that

the draft was issued to the parties months before the Settlement Agreement was signed, and it was incorporated into the Settlement Agreement's exhibits and specifically referenced in it.

After the 2017 CAO was issued, the Settlement Agreement signed and approved by the federal court in the Southern District of California, and Lockheed Martin had begun dutifully implementing it, the Regional Board began moving the goalposts. Not long thereafter, the Regional Board made numerous, serial requests to incrementally and substantially modify the RAP that staff had previously agreed was sufficient. In service of getting the remedy implemented and done, Lockheed Martin complied with each one.

However, Regional Board staff ultimately required Lockheed Martin to add elements incorporating the 2018 SQOs into the Post Remedial Monitoring Plan for the 2017 CAO, despite the remedy designed to achieve background concentrations prescribed by the 2017 CAO. The SQO requirement violated State Board Resolution 92-49, ignored the terms of the 2017 CAO, was technically improper, and frustrated the terms of the Settlement Agreement. Even for Lockheed Martin, this novel requirement was a bridge too far. Lockheed Martin appealed that demand to the State Board and, after denial by operation of law, filed a writ petition with the San Diego Superior Court.

While the litigation was pending, Lockheed Martin continued to engage the Regional Board to secure a technical resolution that would resolve the issues and allow dismissal of litigation and, most importantly, advance the cleanup of the Site. Lockheed Martin submitted a compromise proposal (its SQO Framework Proposal) on March 10, 2021, proposing to implement the RAP's contemplated dredge and sand cover remedy to achieve background levels *and* evaluate the success of the remedy under the SQOs through analysis of existing data. Rather than engage constructively, Regional Board staff did not respond to Lockheed Martin's SQO Proposal, and instead unilaterally rescinded the 2017 CAO on May 14, 2021—without any Regional Board review or hearing—unwinding years of effort to get to remedy completion.

In rescinding the 2017 CAO, the Regional Board staff reset the entire process, taking all parties back to square one, eventually issuing an entirely rewritten and dramatically expanded new CAO with major changes far beyond the SQO requirement previously at issue. The Regional

Board ultimately adopted the new CAO on August 10, 2022. Lockheed Martin petitions the State Board for review of the current CAO and the impropriety of Regional Board actions at the Site that led to it—more than a decade after investigation began.

The CAO now reflects the Regional Board's demand that SQO analysis be included in the PRMP, but the changes go *far* beyond that original request. The CAO seeks to undo *years* of scientific analysis by erasing well-founded, previously approved, Site-specific background concentrations for PCBs and mercury that the RAP had been designed to achieve. Nonsensically, the CAO now dictates that total PCB background concentration is no longer 84 ppb, but rather "zero" because the contaminant is not "natural"[2] This defies Resolution 92-49's definition of background, seeks to institute new policy without proper notice and comment, ignores the swathes of scientific evidence underlying the previously Regional Board-approved, Site specific background concentrations, is an untenable cleanup level given that PCBs exist throughout the San Diego Bay, and is inconsistent with other approved background levels for similarly situated sites in the same portion of the Bay. The Regional Board provides no legal or technical justification for changing or revisiting this settled fact. And Regional Board staff mischaracterized the issue for the Regional Board at the hearing prior to adoption of the CAO.

For example, in responding to a pointed question regarding background conditions from Regional Board Vice Chairwoman Betty Olson, staff counsel materially understated the Site-specific nature of the background condition findings, claiming "[t]he 84 that was used in another matter is an artificial and irrelevant data point in this matter. That was a legal determination reached by settlement and negotiation among many parties in the Shipyard settlement matter that was expressly limited to that Settlement. And so 84 isn't a number that is reflective of what we are trying to achieve or of what is protective." (August 10, 2022, Regional Board Hearing Recording,

[2] Or, as staff testified at the Regional Board hearing on August 10, 2022, "the point is that PCBs do not naturally occur, they are manmade chemicals, so in any environment 500 years ago they wouldn't have existed. So for this Site, if they so wanted to, Lockheed Martin would be able to complete an assessment of what concentration of PCBs exist now, but that wouldn't be a background level." (August 10, 2022, Regional Board Hearing Recording, at 1:29:40.)

at 1:33:07.)[3] But the 84 ppb PCB background number was *far* from artificial or irrelevant. It directly applied to this Site. As detailed *infra* at Section VIII, Argument (A)(2), 84 ppb was the Site-specific background concentration for total PCBs that resulted from careful analysis by the Regional Board. (*See, e.g.,* Ex. 18, 2015 Correspondence with Regional Board regarding RAP and Background Analysis; Ex. 19, Updated Background Analysis and Revised Analytical Data Tables, Draft Remedial Action Plan; Ex. 3, July 23, 2020 Petition to California State Water Resources Control Board, at Ex. D at Ex. 6, September 16, 2015, Regional Board Approval of Background; Ex. 3 at Ex. A, 2017 CAO, at p. 7.)[4] Similarly, without any justification, the Regional Board erased the approved mercury background level of 0.57 ppm, which had been derived in parallel with the Site-specific PCB background analysis (*ibid.*), arbitrarily demanding a new background analysis without any change in Site conditions.

These fundamental changes to the CAO, after unilateral recission of the 2017 CAO, far exceeded the bounds of the parties' Settlement Agreement, vitiating it completely and eliminating the basis for the Regional Board to name Lockheed Martin as the implementing party. That was the minimum impact of the Regional Board staff's tactical decision to rescind the 2017 CAO. Despite Lockheed Martin repeatedly asserting it no longer agreed to sole implementing status, however, and despite the Regional Board's explicit findings that the Port of San Diego and General Dynamics share liability as dischargers, and despite its mandatory duty to name all dischargers under the law, the Regional Board once again named *only* Lockheed Martin in the new CAO. And it did so based on an arbitrary, unfounded interpretation of the private Settlement Agreement's terms—which the Regional Board is not authorized to evaluate—stating that it is "not aware that the terms of the settlement agreement ... have changed." (Ex. 1, 2022 CAO, Footnote 15; *see also Id.* at Finding 5.) The terms of settlement have more than changed; indeed, the Regional Board's recission of the 2017 CAO has eviscerated them.

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[3] Recording available at https://www.waterboards.ca.gov/sandiego/board_info/agendas/2022/aug/bd_mtg_08102022.mp3.

[4] To minimize the duplication of exhibits, we include Lockheed Martin's July 23, 2020 Petition to the State Board at Exhibit C as well as all exhibits to that Petition. Thus, the 2017 CAO is attached hereto at Exhibit A to the Petition at Exhibit C.

The parties can (and do) dispute liability under the Settlement Agreement given it was expressly based on and attached the *now rescinded* 2017 CAO*,* the draft RAP, and the draft CDP—documents that are no longer operative given the dramatically expanded cleanup obligations. (Ex. 2, Settlement Agreement.) By naming only Lockheed Martin, the Regional Board steps outside its bounds as an administrative agency responsible for restoring California's water quality and inserts itself into an interpretative discussion of the cost-allocation terms of a contract to which it is not bound. At a minimum, the Regional Board must stop its unauthorized adjudication of a disputed private settlement and issue the CAO to all parties.

Finally, the Regional Board has severely prejudiced Lockheed Martin by rescinding the 2017 CAO, years after study and negotiation to implement a protective remedy, and issuing an entirely new and expanded 2022 CAO without technical or legal justification. Even if this CAO were otherwise lawful (it is not) the Regional Board should be equitably estopped from issuing it to Lockheed Martin and barred by the doctrine of laches.

Petitioner requests that the State Board reverse the Regional Board's adoption of the 2022 CAO; require it to respect its earlier determination of PCB and mercury background concentrations of 84 ppb and 0.57 ppm, respectively; remove the erroneous requirement for the remedy to achieve both background concentrations and the SQOs; and reissue the CAO to *all* dischargers – including the Port of San Diego and General Dynamics.

IV. THE DATE ON WHICH THE REGIONAL BOARD ACTED

The Regional Board acted by adopting CAO R9-2022-0007 on August 10, 2022. Lockheed Martin timely files this Petition within thirty days following adoption.

V. A FULL AND COMPLETE STATEMENT OF THE REASONS THE ACTION WAS INAPPROPRIATE OR IMPROPER

As set forth in detail in the Statement of Points and Authorities (see Section VIII, *infra*), the Regional Board's CAO is unlawful, inappropriate, and prejudicial because it:

(1) Redefines "background concentrations" to exclude anthropogenic sources without proper notice and comment serving to substantially narrow the State Board's duly adopted Resolution 92-49;

(2) Changes PCB background concentrations to "zero" or "not detected" without any legal or technical justification, despite the scientifically confirmed and expressly established PCB background concentration of 84 ppb set forth in the 2017 CAO. (*Compare* Ex. 1, p. 31 *with* Ex. 3 at Ex. A, 2017 CAO, at p. 7.)

(3) Requires performance of a new background analysis for mercury without any legal or technical justification, despite the scientifically confirmed and expressly established mercury background concentration of 0.57 ppm set forth in the 2017 CAO. (*Ibid.*)

(4) Violates Resolution 92-49 because it requires a cleanup to achieve lower than background levels for the contaminants at issue by also requiring compliance with the SQOs in post-remedial monitoring. No party disputes that the Site's RAP is designed to achieve a background cleanup and the PRMP, as written, is sufficient to determine whether background cleanup has been achieved—which is all that may be required under Resolution 92-49. (Ex. 2 at Ex. C, RAP, as amended by Ex. 18; Ex. 4, § 8 and Appendices E and F, PRMP, as amended by Ex. 18.)

(5) Names only Lockheed Martin as the implementing party despite Lockheed Martin repeatedly confirming to the Regional Board that the Settlement Agreement with the other known dischargers (the Port of San Diego and General Dynamics) was vitiated by the rescission of the 2017 CAO and issuance of the radically expanded 2022 CAO.

Further, Lockheed Martin relied to its detriment on the Regional Board's representations (and on Resolution 92-49) that cleanup to the approved background levels was permissible and that the 2017 CAO would govern cleanup. The Regional Board's rescission of the 2017 CAO and issuance of an entirely new and expanded CAO created a circuitous administrative path that caused needlessly wasted resources to implement the 2017 CAO only to arrive back at the beginning under a new CAO more than five years later. This is improper and unlawful, and the Regional Board's unjustifiable delay in imposing the above-described, materially altered conditions on Lockheed Martin exacerbated that prejudice.

VI. THE MANNER IN WHICH THE PETITIONER IS AGGRIEVED

As described in Section V, *supra*, and Section VIII, *infra*, Lockheed Martin is aggrieved

because the Regional Board now seeks to unlawfully ignore Resolution 92-49, revise background concentrations without explanation or justification, mandate cleanup to technically unattainable levels that go beyond background or otherwise coerce Lockheed Martin into establishing new alternative cleanup levels, mandate application of the 2018 SQO as a success criterion beyond a background level cleanup, expanding what would constitute remedial success, and despite these sweeping changes, name only Lockheed Martin in the CAO. The Regional Board's actions in rescinding the 2017 CAO and RAP that are the result of over a decade of careful evaluation, study, plan development, and coordination, and reissuing this entirely new and expanded 2022 CAO, leaves Lockheed Martin with a dramatically expanded, burdensome and costly cleanup for the Site. If the Regional Board's unlawfully issued CAO is allowed to stand, it may be technically impossible to ever achieve closure at the Site.

VII. THE SPECIFIC ACTION BY THE STATE OR REGIONAL BOARD WHICH PETITIONER REQUESTS

Petitioner respectfully requests that the State Board rescind and amend the CAO to:

- Reinstate PCB background concentrations to 84 ppb;
- Reinstate mercury background concentrations to 0.57 ppm;
- Remove the requirement that the PRMP include evaluation of the SQOs as a success criterion for cleanups designed to achieve background levels of concentration; and
- Name all dischargers, including the Port of San Diego and General Dynamics, as implementing parties.

Petitioner also requests a stay, while this petition is pending, of any action by the Regional Board to assert Lockheed Martin is in violation of the CAO for failing to implement its terms.

In addition, Petitioner requests an evidentiary hearing by the State Board.

VIII. STATEMENT OF POINTS AND AUTHORITIES

Since 2017, when the Regional Board issued the 2017 CAO, Lockheed Martin has worked closely with the Regional Board staff to tailor a background-cleanup remedy—the most stringent that can be required under state law. The 2017 CAO confirmed that the Site's background cleanup level for total PCBs was 84 ppb and for mercury was 0.57 ppm. (Ex. 3 at Ex. B at p.7.) Lockheed

Martin provided the Regional Board with a Feasibility Study and RAP that addressed all of the Regional Board's and stakeholders' comments, proposing a dredge and sand cover remedy to achieve these background concentrations. (*See generally* Ex. 4, Feasibility Study; Ex. 2 at Ex. C, as amended by Ex. 18.)

In November 2019, the Regional Board staff suddenly reversed course. After over a decade of progress, the Regional Board initiated its improper demand that Lockheed Martin incorporate an SQO-based evaluation as an additional success criterion in its RAP and PRMP. But the 2017 CAO did not require that additional obligation. Achieving background concentration levels, which Lockheed Martin's RAP and PRMP would do, met the terms of the 2017 CAO and would have left the site with "the water quality that existed before the discharge" as required by Resolution 92-49. (Ex. 3 at Ex. I, Resolution 92-49, Recitals 4.) Not only would the SQO analysis be technically improper to implement following dredging and placement of clean sand, but it could only operate to require cleanup beyond background levels. Lockheed Martin appealed the improper obligation to the State Board and, receiving no response, its petition was dismissed by operation of law. Lockheed Martin sought judicial review in San Diego Superior Court on November 20, 2020. (Ex. 5, Petition for Writ of Mandate.)

Yet Lockheed Martin did not give upon resolving issues while its petition was pending in Superior Court. It engaged the Regional Board to discuss technical solutions so that it could proceed with the RAP and also evaluate the SQOs in a technically credible manner. To that end, Lockheed Martin submitted to the Regional Board a then-confidential settlement communication—the SQO Framework Proposal prepared by its consultant, Anchor QEA, on March 10, 2021. (Ex. 6, SQO Framework Proposal.) For over two months, the Regional Board provided no comments or questions on the SQO Framework Proposal and, rather than constructively engage with Lockheed Martin, on May 14, 2021, it unilaterally rescinded the 2017 CAO and notified Lockheed Martin that it would reissue a new order for the Site. (Ex. 7, May 14, 2021 Rescission Letter; Ex. 8, May 14, 2021 Letter Rejecting SQO Framework Proposal.) The Regional Board argued that rescission rendered the litigation moot given any new CAO would be entirely different. Rather than fight about the issue, Lockheed Martin agreed to dismiss the

Petition without prejudice, continuing to seek constructive engagement. (*Id.*)

On August 10, 2022, the Regional Board adopted the new CAO, making even more dramatic changes to the original RAP and 2017 CAO than its initial SQO demand. Foremost, the CAO ignored the scientifically settled background concentrations for both PCBs and mercury—which were approved in the 2017 CAO—without any legal or technical justification. For PCBs, it disregarded Resolution 92-49's definition of "background" as "the water quality that existed before the discharge" and inserted new policy that PCB background concentration is "zero" or "not detected," because it is not "natural," which is inaccurate and a technically infeasible cleanup level. (Ex. 1, p. 31.) PCBs have and do exist throughout the San Diego Bay notwithstanding anything that happened at the Site. For mercury, the CAO requires a new background analysis be performed without any mention of the 0.57 ppm level that had been justified and previously confirmed in the 2017 CAO. (*Id*.) In making these sweeping changes, the Regional Board provides virtually no explanation or justification.

Despite these drastic changes, and despite Lockheed Martin notifying the Regional Board that it considered the dischargers' 2017 Settlement Agreement vitiated upon rescission of the 2017 CAO, the Regional Board insisted on naming Lockheed Martin as its sole implementing party, with the only justification being the Settlement Agreement. (Ex. 1, Footnote 15 and Finding 5; Ex. 9, January 14, 2022 Lockheed Martin Comment Letter to Administrative Draft CAO; Ex. 10, July 15, 2022 Lockheed Martin Comment Letter to Tentative Draft CAO.) As the CAO itself confirms, it is undisputed that the Port of San Diego and General Dynamics are dischargers at the Site. By naming only Lockheed Martin, the Regional Board steps outside its bounds to attempt to adjudicate the validity of a Settlement Agreement—something it is unauthorized and ill-suited to do. Instead, where all dischargers are named, present, and engaged at the Site, the Regional Board has a mandatory duty to name all dischargers in an order. (Wat. Code § 13304; Code of Regulations, title 23, section 2907; Ex. 3 at Ex. I, Resolutions 1.A.)

The State Board should direct the Regional Board to revise the CAO so that is consistent with state law, State Board Guidance, and is technically sound so that parties can finally implement the long-awaited background level cleanup and restore water quality at the Site to the

pre-discharge concentrations without further delay.

FACTUAL AND PROCEDURAL BACKGROUND

A. Lockheed Martin Has Been Ready, Willing, and Able to Remediate the Site to Background Levels of Contaminants for Years

The Former Tow Basin and Marine Terminal and Railway sites are located at the Harbor Island East Basin of the San Diego Bay (the "Site") and have a lengthy regulatory history. (*See, e.g.,* Ex. 3 at Ex. D, Lockheed Martin Request for Hearing to the Regional Board.) The Regional Board began investigating marine sediments at the Tow Basin site in 2009, and at the Marine Terminal site in 2011. Lockheed Martin, General Dynamics, and the Port of San Diego were identified as potential responsible Parties. Since that time, the Site has been extensively studied—including under the SQOs—and cleanup levels have been established. Parties also resolved federal court litigation on respective liabilities in a 2017 Settlement Agreement and based that resolution on the Regional Board's draft 2017 CAO and planned RAP. The Regional Board issued a final 2017 CAO without change and approved Lockheed Martin's Feasibility Study. The Port of San Diego certified the Environmental Impact Report under CEQA and approved the Coastal Development Permit based on the 2017 CAO and planned RAP. Lockheed Martin also submitted its updated draft RAP and PRMP for approval, and was poised to implement the cleanup.

In November 2019, the Regional Board made its initial demand to include an additional success criterion to the PRMP—that the dredge and sand cover remedy achieve both background cleanup levels *and* compliance with the SQOs, a request wholly absent from the 2017 CAO itself. Remedy implementation has since been at a standstill due to the Regional Board's technically improper and unlawful demands. And rather than work towards compromise or resolve the dispute, the Regional Board *rescinded* the 2017 CAO, attempting through such tactics to render Lockheed Martin's challenge moot, and issued a new CAO with additional, undiscussed significant changes to the remedy, undoing years of progress. Given the severity of changes and legal and technical failings in the 2022 CAO, Lockheed Martin has no option but to challenge the 2022 CAO. Lockheed Martin is stuck seeking State Board review of this new CAO, in part given its terms make achieving closure at the Site technically infeasible, rather than implementing its

highly protective dredge and sand cover remedy designed to achieve background concentrations at the Site.

1. The Site Has Already Undergone an SQO Investigation, Which Indicated Site Contaminants Were Not Significant Benthic Impact Drivers.

An inconvenient fact completely unacknowledged by the Regional Board is that the Site has already undergone investigation pursuant to SQOs. At the Regional Board staff's request, from approximately 2010 to 2013, the Parties investigated the Site under the SQOs then in effect ("2009 SQOs".) (Ex. 3 at Ex. E, 2009 SQOs.) The Site was essentially one of the "test sites" and among the first regulated in California to implement the SQOs. After a lengthy and expensive process to develop a workplan and perform testing, General Dynamics and Lockheed Martin submitted an SQO Stressor Identification Report to the Regional Board on November 14, 2013. (Ex. 3, Ex. D, Ex. 2, Tow Basin Stressor ID Report.) The Stressor Identification Report, although inconclusive, found no correlation between contaminants associated with the Tow Basin site and benthic impairment:

> When all available LOEs [Lines of Evidence] are considered, there is no clear indication of any single cause of benthic community impacts at the former Tow Basin Site. It appears that multiple stressors influence the various metrics that determine the MLOE station scores, including sediment chemistry ... ***chemicals associated with the former Tow Basin Site (primarily PCBs) do not appear to be significant drivers of benthic community disturbance, and are not causing measurable toxicity***." (*Id.* p. 43) (emphasis added.)

Following the Stressor Identification Report, General Dynamics and Lockheed Martin sought input from the Regional Board staff and Steve Bay, the Regional Board's consultant and one of the actual authors of the SQOs. With Mr. Bay's guidance, General Dynamics, Lockheed Martin, and the Regional Board staff agreed that continuing under the SQO process would result in substantial uncertainty, significant delay, and considerable expense. The Parties looked to non-SQO alternatives.

2. The Regional Board and All Parties Agreed on a Background-Based Cleanup.

At the Regional Board staff's suggestion, General Dynamics and Lockheed Martin began

in 2014 to explore remedial approaches that were not based on the SQOs.[5] Lockheed Martin worked closely with the Regional Board staff and the parties to decide upon and develop a background-based cleanup. On June 4, 2014, General Dynamics and Lockheed Martin met with the Regional Board to present a "Preliminary Sediment Remedial Analysis" for the Site that outlined a proposed remediation model based on an adjacent site's Enhanced Monitored Natural Recovery process. (Ex. 3 at Ex. D at Ex. 3, Preliminary Remedial Analysis.) General Dynamics and Lockheed Martin proposed a sand cover remedy to achieve background conditions. A few months later, General Dynamics and Lockheed Martin submitted a draft RAP for the Site. (Ex. 3 at Ex. D at Ex. 4, Draft RAP, October 2014.) On December 18, 2014, Regional Board staff provided comments to the draft RAP and identified four minor issues for additional discussion. (Ex. 3 at Ex. D at Ex. 5, Email from S. Chehreh, Dec. 18, 2014.) The Parties again conferred with Regional Board staff on January 23, 2015, and February 26, 2015; and in July 2015, the Parties prepared a bathymetric survey to address navigational concerns with the remedial proposal.

In keeping with the proposed RAP and a background-based cleanup approach, the Regional Board approved the proposed values of "84 parts per billion for total PCBs and 0.57 parts per million for mercury [as] appropriate cleanup levels for the East Basin sediments" on September 16, 2015, (Ex. 3 at Ex. D at Ex. 6), as again expressly confirmed in the 2017 CAO. (Ex. 3 at Ex. B, p. 7.) When the Port of San Diego District also expressed concerns about navigational impacts to the East Basin with the proposed sand cover remedy, the Regional Board staff issued guidance indicating:

> [I]f the parties remove sediment in areas where the water depth is less than -10 feet MLLW, ***sediment need only be removed to target depths to achieve the background SWAC cleanup level across the site***. (Ex. C, Ex. D, Ex. 7, March 4, 2016, Letter from Julie Chan (emphasis added.))

In light of the Port of San Diego District's concerns, Lockheed Martin began considering a

[5] General Dynamics and Lockheed Martin looked to the adjacent TDY site (T10000006060), located less than a mile to the east, and collected considerable information about TDY's Enhanced Monitored Natural Recovery (EMNR) process through meetings with the Regional Board, TDY's own stakeholders, and General Dynamics' and Lockheed Martin's environmental consultants.

cleanup that included certain remedial dredging to ensure target navigational depths.

During the investigation, and the Parties' then-pending federal litigation related to responsibility for the costs of cleanup, Magistrate Judge William Gallo convened periodic status conferences to discuss progress at the Site—these status conferences included regular attendance and participation by Regional Board staff member John Anderson. After years of status conferences without any final resolution, Judge Gallo indicated he would lift the informal stay and require the Parties to return to litigation. During these status conferences, representatives from the Regional Board's staff and Office of Enforcement attended and updated the Court on the investigation's status (*see* Ex.3 at Ex. D at Ex. 8, December 18, 2014, Minute CAO), and the Regional Board's staff and the Parties would discuss the background-quality cleanup. Tellingly, no mention was made of returning to the SQOs as a criterion of remedial success.

At the Regional Board's suggestion, the Parties began mediating before Timothy Gallagher, an experienced environmental mediator. The Regional Board was involved throughout the mediation process: members of Regional Board staff and counsel from the State Board's Office of Enforcement attended multiple mediations before Mr. Gallagher (*see, e.g.*, Ex. 3 at Ex. D at Ex. 9, February 11, 2016 email), and the Regional Board staff reviewed, commented on, and ultimately approved a detailed final remedial framework for the Site. For instance, on August 25, 2016—months before the Regional Board issued an order—State Board counsel Anna Kathryn Benedict requested a copy of an updated RAP with the "most recent plan for cleanup" in order to "provide guidance regarding the proposed remedy." (Ex. 3 at Ex. D at Ex. 10, August 25, 2016, Email from Anna Kathryn Benedict.) After months of mediation sessions, the Parties—with the involvement and tacit approval of the Regional Board—arrived at a negotiated remedy and settlement.

To move forward with the cleanup, Lockheed Martin agreed in the mediation to be the implementing party for the remedy contemplated at that time and reflected in a Court-approved settlement. At the conclusion of these mediated discussions, the Regional Board issued a draft CAO No. R9-2016-0208 on October 21, 2016. Observing the mediation and settlement confidentiality, Lockheed Martin provided comments on the Draft 2017 CAO, noting that the

comments were based on "a proposed, negotiated remedy that is part of the settlement process." (Ex. 3 at Ex. D at Ex. 12, November 8, 2016, Comments [Mediation and Settlement Confidential].) Of particular note, Lockheed Martin commented that the Draft 2017 CAO required a Feasibility Study to assess cleanup alternatives, which was an unnecessary expenditure given that the Parties were pursuing a background cleanup and had already arrived upon a negotiated remedy that was far more protective to the environment than was required by law. (*Id.*)

3. The Regional Board Issued CAO No. R9-2017-0021 Based on the Parties' Settlement and Negotiated Remedy.

After seven years of investigation, the Regional Board issued the 2017 CAO to Lockheed Martin to remediate the Site "[p]ursuant to a settlement agreement reached by the parties in a separate lawsuit," on April 4, 2017. (Ex. 3 at Ex. B, Footnote 1.) The Regional Board, however, "reserve[d] the right to name any additional parties ... and to amend and/or reissue the CAO for any reason." (*Id.*)

The Parties entered into a Settlement Agreement to resolve the litigation and to fund the remediation. (Ex. 2.) Before finalizing the settlement, the proposed remedial action was fully vetted with Regional Board staff and was discussed at length with all Parties, the mediator, Judge Gallo, and Regional Board staff counsel, and attached as Exhibit B. Significantly, as set forth in the Settlement and underlying documents, Lockheed Martin's obligations extended only to performing the agreed-upon "Remedial Action," which must be in substantial conformity with the action described in an exhibit to the settlement (Ex. 2, § 2.1(a)): a sand cover remedy and focused dredging in the DMMU 2 area around LM1 and LM2.

4. Over the Ensuing Two Years, the Regional Board Required a Feasibility Study and Mandated Multiple Changes to the Proposed Remedy.

Since issuing the 2017 CAO, the Regional Board's staff insisted on additional elements that strayed further and further from the remedy the Parties and staff developed, and which formed the basis of the Settlement Agreement. Although Lockheed Martin previously expressed concern that requiring a Feasibility Study was excessive and unnecessary, as Regional Board staff had directly participated in formulating the agreed-upon remedy, Lockheed Martin agreed at the

Regional Board staff's insistence to prepare a Feasibility Study outlining hypothetical remedial alternatives for the Site. On October 27, 2017, the Regional Board provided 47 written comments to the Feasibility Study. (Ex. 11, October 27, 2017 Regional Board Comments to Feasibility Study.) Over the next two years, the Regional Board staff imposed additional requirements on the previously acceptable remedy (which already included the four issues raised by Regional Board staff in December 2014 concerning the Remedial Action.) These requirements included:

- **Additional Hotspot Dredging.** The Regional Board requested additional dredging to remove concentrations of mercury at (LM-C-4.) Lockheed Martin agreed to expand the dredge footprint.
- **Pre- and Post-Remedial Porewater Sampling.** The Regional Board requested pre- and post-remedial porewater sampling, even though the CAO is based on contaminant background levels and does not require it. Porewater results, however, would not be a success criterion. Lockheed Martin agreed.
- **Adjustment and Removal of Granulated Activated Carbon.** The Regional Board required either the removal of carbon-amended sand *or* pre-and post-remedial monitoring of its impacts. Lockheed Martin ultimately incorporated both requirements into its remedy. (Ex. 3 at Ex. D at Ex. 15, H. Mapes Email, March 12, 2019.)

Lockheed Martin updated and revised the Feasibility Study and RAP to address each of these issues. As of November 2019, both the Feasibility Study and RAP were ready for approval and implementation.

B. In November 2019, the Regional Board Reversed Course and Demanded Compliance with 2018 SQO Amendments for the First Time.

On June 5, 2018, the State Water Board adopted the 2018 SQO Amendments. (Ex. 3 at Ex. A, 2018 SQO Amendments.) Nearly one year later, in March 2019, Heather Mapes, from the State Board's Office of Enforcement, sent an email to Lockheed Martin and Port of San Diego counsel describing the necessary elements for the Site's PRMP. (Ex. 3 at Ex. D at Ex. 15.) At no point did she mention the 2018 SQOs. Similarly, in May 2019, Regional Board staff sent Lockheed Martin a "summary of our understanding of the proposed monitoring program." (Ex. 3 at Ex. D at Ex. 16,

May 21, 2019 Letter.) The letter did not indicate that Lockheed Martin would be required to adopt the 2018 SQOs into its cleanup or PRMP. (*Id*.) This omission was not surprising or unexpected: the SQOs were not applicable because Lockheed Martin had already agreed to clean up the Site to background levels.

On November 8, 2019,[6] after Lockheed Martin prepared and submitted numerous versions of the Feasibility Study and PRMP and was poised to begin implementation, the Regional Board staff sent comments stating *for the first time* that the 2018 SQOs "should be incorporated into this and future documents" as the Regional Board "retains full discretion and authority to apply prescribed scientific methods and other performance measures, as appropriate, to evaluate the effectiveness of remedies implemented." (Ex. 3 at Ex. D at Ex. 17, Nov. 8, 2019, Letter.) The Regional Board's letter offered no explanation, other than its purported inherent authority, for how the 2018 SQOs could be applied to a background-based cleanup. Nor did the Regional Board explain why it failed to advise Lockheed Martin, General Dynamics, the Port of San Diego District, or the Court of this asserted requirement years earlier.

On March 10, 2020, Lockheed Martin received correspondence from Julie Macedo, the assigned counsel for the Regional Board, that stated, in relevant part, the "amendments to the Enclosed Bays and Estuaries Plan need to be incorporated into ongoing remedial activities." (Ex. 3, at Ex. D at Ex. 20 at p. 1.)

C. Lockheed Martin Appealed the Requirement to Include SQOs in the PRMP to the State Board and San Diego Superior Court.

Lockheed Martin had no choice but to appeal the Regional Board's new requirement to expand the 2017 CAO. In July 2020, Lockheed Martin petitioned for review by the State Board, which was denied by operation of law, and subsequently filed a writ petition in San Diego Superior Court on November 20, 2020. (*See* Exs. 3 and 5.)

Following the filing of the writ petition, the Regional Board technical staff convened with

[6] The Regional Board staff's reversal of course came 17 months after the State Board adopted the 2018 SQO Amendments, and six months after the Regional Board's letter to Lockheed Martin summarizing the Regional Board's understanding of the proposed monitoring program.

Lockheed Martin and its environmental consultant, Anchor QEA, to seek a technical resolution where the dredge and sand cover remedy to achieve background concentrations could be implemented *and* the SQOs could be achieved. To that end, Anchor QEA submitted an SQO Framework Proposal on March 10, 2021, describing in further detail the proposal discussed at the meetings. (Ex. 6.) Lockheed Martin waited hopefully for over two months for the Regional Board to revert with questions or comments on the Proposal, but none came.

To the surprise and frustration of Lockheed Martin, on May 14, 2021, the Regional Board instead opted to formally rescind the 2017 CAO, and notified Lockheed Martin that it would issue a new order, and asserted its actions rendered the pending litigation moot. (Exs. 7 and 8.) Lockheed Martin agreed to dismiss its petition without prejudice and alerted the Regional Board that any new order that was not in substantial conformity with the 2017 CAO would vitiate the 2017 Settlement Agreement among Parties (consistent with the Regional Board's assertion that the litigation had been mooted).

D. The Regional Board Issued an Entirely New and Substantively Different CAO, Ultimately Adopted on August 10, 2022

On December 17, 2021, the Regional Board issued Administrative Draft CAO R9-2022-0007, which contained material deviations from the 2017 CAO, including expressly requiring achievement of the SQOs as a success criterion in the PRMP. (Ex. 13, Administrative Draft CAO.) Lockheed Martin and General Dynamics submitted comment letters to the Regional Board outlining the many technical and legal problems. (See Ex. 9; Ex. 14, General Dynamics Comment Letter to Administrative Draft CAO.) Instead of engaging constructively, the Regional Board staff responded by making even *more* sweeping changes and issued a revised Tentative Draft CAO R9-2022-0007 for public comment, which was ultimately adopted at the August 10, 2022 hearing. (Ex. 1.)

For example, without any legal or technical justification, the 2022 CAO wiped away the previously established and approved PCB and mercury background concentrations that were adjudicated and confirmed as the cleanup levels in the 2017 CAO. (Ex 1.) The 2022 CAO sets PCB background to "zero" or "not detected" and requires a new background analysis be

performed for mercury. (*Id.* p. 31.) The 2022 CAO makes no mention of the prior cleanup levels of 84 ppb and 0.57 ppm for PCB and mercury, respectively, except in Footnote 16 where it references the PCB background level prior to rescission of the 2017 CAO. *(Id.* Footnote 16.)

Despite these significant changes and that Lockheed Martin has alerted the Regional Board that the 2017 Settlement Agreement is no longer valid, and despite that no parties dispute that the Port of San Diego and General Dynamics are *also* responsible parties, the 2022 CAO only names Lockheed Martin. The Regional Board justifies naming only Lockheed Martin because it "is not aware that the terms of the settlement agreement ... have changed." (Ex. 1, Footnote 15.)

All parties submitted additional comments to the Tentative CAO on July 15, 2022. (Ex. 10; Ex. 15, General Dynamics Comment Letter to Tentative CAO; Ex. 16, Port Comment Letter to Tentative CAO.) On August 1, 2022, the Regional Board issued a response to comment table with only cursory explanation for its revisions. (Ex. 17, Regional Board Response to Comments.) While some minor revisions were made, *e.g.*, allowing for the submission of combined reports, the Regional Board made no changes to the fundamental unlawful deficiencies in the 2022 CAO before adopting it on August 10, 2022.

ARGUMENT

The State Board is authorized to review Regional Board actions and, where it finds such actions are "inappropriate or improper," direct that the appropriate action be taken, take the appropriate action itself, or do both. (Wat. Code, § 13320.)

The State Board's standard of review for factual findings under § 13320 is akin to the "independent judgment" standard of judicial review for evaluating whether an agency has abused its discretion, which "permits the reviewing court to take a fresh look at the facts to see if the weight of the evidence supports the decision" and does not require the court to "defer to the agency if the court disagree[s] with the conclusion." (*In the Matter of the Petition of Exxon Company, U.S.A., Et Al.*, (Aug. 22, 1985) Order No. WQ 85–7, 1985 WL 20026, at *5-6.) Moreover, because "any findings made by an administrative agency in support of an action must be based on substantial evidence in the record ... [w]hile [the State Board] can independently review the Regional Board record, in order to uphold a Regional Board action, [the State Board]

must be able to find that finding ... was founded upon substantial evidence." (*Id.* (citing *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506).)

Whether the Regional Board properly interpreted the law is a legal question that should be reviewed *de novo*. (*See Stewart Enterprises, Inc. v. City of Oakland* (2016) 248 Cal.App.4th 410, 420-421.) Where the law is unambiguous, the Regional Board's interpretation should be accorded no weight. (*See Bonnell v. Medical Board* (2003) 31 Cal.4th 1255, 1265.) Where it is ambiguous, depending on the context, the agency's interpretation "may be helpful, enlightening, even convincing. It may sometimes be of little worth." (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7-8.) The degree of deference to afford an agency's legal interpretation depends on "complex factors material to the substantive legal issue before it, the particular agency offering the interpretation, and the comparative weight the factors ought in reason to command." (*Id.* at 12.) Relevant here, one such factor is "evidence that the agency 'has consistently maintained the interpretation in question, especially if [it] is long-standing[.]'" (*Id.* at 13.)

As detailed below, the Regional Board's 2022 CAO contains both legal and factual errors that render it "inappropriate and improper." Accordingly, the State Board should direct the Regional Board to revise its findings to (i) confirm Site background concentrations are 84 ppb for total PCBs and 0.57 ppm for mercury; (ii) remove the obligation to perform an SQO analysis as part of post-remedial monitoring, and (iii) name the Port of San Diego and General Dynamics in the CAO, under Water Code § 13320.

A. PCB and Mercury Background Concentrations Should Be Reinstated to the Scientifically Established and Regional Board-Approved Levels Reflected in the 2017 CAO.

Background concentrations of PCBs and mercury for this portion of the San Diego Bay have been well-established for over a decade. For the Site specifically, such concentrations were approved by the Regional Board in 2015 and re-confirmed in the 2017 CAO. (Ex 3 at Ex. D at Ex. 6; Ex. 3 at Ex. B at p. 7.) There is no doubt that the PCB background concentration is 84 ppb and the mercury background concentration is 0.57 ppm, which all Parties relied on as cleanup levels when developing the remedy and executing the Settlement Agreement. Yet the 2022 CAO

disregards these established levels, providing instead that "background concentrations of total PCBs should be near zero (0) or not detected (ND)," and directs Lockheed Martin to conduct an entirely new background analysis "to determine background sediment cleanup levels for mercury[.]" (Ex. 1, at p. 31.) The Regional Board's disregard for Resolution 92-49's definition of "background concentrations" and for prior scientific analysis without any technical or legal justification is prejudicial and unlawful.

The Regional Board's choice to ignore previously determined background concentrations of PCBs and mercury at the Site is "inappropriate and improper" under Water Code § 13320(c). Far from being supported by "the weight of the evidence[,]" this decision completely disregards the extensive scientific analysis that the Regional Board previously approved and relied upon without any reference to it at all. (*In the Matter of the Petition of Exxon Company, U.S.A., Et Al.,* 1985 WL 20026, *supra*, at *5-6.) Worse still, the Regional Board offers no justification for this about-face, nor does it attempt to question the validity of, or otherwise challenge, the underlying data—because it cannot.

The Regional Board's sudden reversal also violates the doctrine of administrative finality. "[A]lmost without exception, courts have held that the determination of an administrative agency as to the existence of a fact or status which is based upon a present or past group of facts, may not thereafter be altered or modified." (*Olive Proration Program Committee for Olive Proration Zone No. 1 v. Agricultural Prorate Commission* (1941) 17 Cal.2d 204, 209.) Factually, the background concentrations for PCB and mercury, based as they are on the water quality before the subject discharge, should be the same or very similar to those when the Regional Board first set them. The Regional Board should not now find otherwise.

1. Applicable Law Unambiguously Defines Background Concentrations as Pre-Discharge Conditions.

In ordering cleanup under Water Code § 13304, the Regional Board must comply with the standards set forth in Resolution 92-49, which defines "background conditions" as "the water quality that existed before the discharge[.]" (Ex. 3 at Ex. I, Recitals 4.) A remedy that achieves background level concentrations is the most stringent cleanup level that the Regional Board can

require under Resolution 92-49:

> **under no circumstances** shall [the Regional Board] require cleanup and abatement which achieves water quality conditions that are better than background conditions." (*Id*. § III.F (emphasis added).)

"If background levels of water quality cannot be restored," a discharger must conduct a study to develop alternative cleanup levels to be approved by the Regional Board. (*Id*. § III.G; see also C.C.R. tit. 23, § 2907.) Such alternative cleanup levels must:

> 1. Be consistent with maximum benefit to the people of the state;
> 2. Not unreasonably affect present and anticipated beneficial use of such water; and
> 3. Not result in water quality less than that prescribed in the Water Quality Control Plans and Policies adopted by the State and Regional Water Boards[.] (*Id*.)

Thus, the Regional Board's power to issue cleanup and abatement orders is not unfettered. It must use proper methods to determine background levels, which protect regulated entities from being compelled to perform unlimited cleanups. Artificially low background concentrations would necessarily require a discharger to perform costly studies to identify alternative cleanup levels.

2. Total PCB Background Concentrations is 84 PPB, Based on Significant Scientific Analysis and Regional Board Scrutiny.

The Regional Board first formally adjudicated PCB background concentrations for the nearby Shipyard Sediment site in 2012, in CAO No. R9-2012-0024. There, relying on rigorous study and analysis based on sampling throughout San Diego Bay, the Regional Board determined background concentrations for total PCBs and mercury to be 84 ppb and 0.57 ppm, respectively. (*See* CAO No. R9-2012-0024 and accompanying Technical Report for Shipyard Sediment Site.) The Regional Board reaffirmed these findings for other nearby sites within San Diego Bay, including the two sites most proximate to the Site at issue here—the Teledyne Ryan sediment site in 2015 and the Navy Boat Channel site in 2017. (CAO No. R9-2015-0018 for TDY and Final Remedial Action Plan for Installation Restoration Site 12, Boat Channel Sediments Former Naval Training Center.) These facts, ignored by the Regional Board, are important. Under Resolution 92-49, cleanup levels must be "consistent with appropriate levels set by the Regional Water Board for analogous discharges that involve similar wastes, site characteristics, and water quality considerations" and these sites are all geographically near and chemically similar to the Site. (Ex. 3 at Ex. I § II.A.7.)

Critically, in October 2014, Lockheed Martin and General Dynamics presented the Site's draft RAP, which justified the same background concentrations of 84 ppb for total PCBs and 0.57 ppm for mercury for the Site, "based on dozens of reference pools considered by the Water Board, resources agencies, and non-governmental organizations (NGOs); [concluding] therefore, these background concentrations are deemed to be protective of beneficial uses within San Diego Bay, including the Site, and are the extent to which State Water Resources Control Board Resolution 92-49 requires cleanup." (Ex. 3 at Ex. D at Ex. 4, October 2014, RAP, at p. 8.) The RAP further justified these levels as follows:

> The proposed cleanup goals of 84 µg/kg for total PCBs and 0.57 mg/kg for total mercury are below commonly accepted marine sediment criteria for the protection of the benthic community: 180 µg/kg effects range median (ERM) and 189 µg/kg Probable Effect Level (PEL) for total PCBs and 0.71 ERM and 0.7 PEL mg/kg for total mercury. By achieving these criteria on a SWAC basis, benthic organisms are expected to be protected on a community basis. Protection of benthic organisms on a community basis is consistent with both the State of California sediment quality objective, which states that "pollutants in sediments shall not be present in quantities that, alone or in combination, are toxic to benthic communities" and USEPA's Ecological Risk Assessment and Risk Management Principles for Superfund Sites which states that "remedial actions generally should not be designed to protect organisms on an individual basis (the exception being designated protected status resources, such as listed or candidate threatened and endangered species or treaty-protected species that could be exposed to site releases), but to protect local populations and communities of biota." (*Id.*)

Following submission of the RAP, the Regional Board responded with a series of questions and comments. In particular, the Regional Board focused on the appropriateness of relying on the Shipyard Sediment site data sets. On or around February 24, 2015, Lockheed Martin and General Dynamics presented a power point to the Regional Board summarizing the background data sets and the Site's comparison to the Shipyard background levels. (Ex. 18, 2015 Correspondence Between General Dynamics and the Regional Board.) The Regional Board analyzed the data and analysis and requested follow up information, which parties responded to, for example, on May 27, 2015, July 14, 2015, and August 25, 2015, by submitting the raw data sets, including the station codes, sampling time, analysis of results, method detection limits and reporting limits, as well as further summary reports. (Ex. 18; Ex. 19, Updated Background Analysis and Revised Analytical Data Tables, Draft Remedial Action Plan.)

Ultimately, based on the Regional Board's careful and thorough review over months, the Regional Board concluded on September 16, 2015, that "[t]he analysis of the PCB and mercury sediment concentration data for the Shipyards Sediment Site and the [Site] did not show that the two datasets are statistically different." (Ex. 3 at Ex. D at Ex. 6.) Accordingly, "[t]he proposed values of 84 parts per billion for total PCBs and 0.57 parts per million for mercury are appropriate cleanup levels for the [Site] sediments." (*Id*.) The Regional Board again confirmed these background concentrations in the final 2017 CAO, citing Lockheed Martin's Draft RAP. (Ex. 3 at Ex. B, at 7.)

Now, ignoring over a decade of investigation and evaluation, along with its own interpretation of applicable law and explicit factual findings, the Regional Board reverses course in the 2022 CAO. The CAO simply states that "natural background concentrations of total PCBs should be near zero (0) or not detected (ND)." (Ex. 1 at 31.) There is no legal, factual, or logical justification for concluding that the PCB background concentration—the water quality before the subject discharge—has now moved from 84 ppb to zero.

3. Changing PCB Background to Zero is Contrary to Law

The Regional Board offered no justification for unilaterally changing background concentrations of PCBs to zero except to summarily state that "PCBs are a group of man-made chemicals that do not naturally occur in the environment" and thus "[t]he pre-discharge concentrations of PCBs in the San Diego Bay, or any environment, should be minimal or non-detect."[7] (Ex. 17 at pp. 4-5, 11-12, 12-13.) The Regional Board appears to take the position that, because anthropogenic compounds do not naturally occur, the background concentration for *any* anthropogenic compound must necessarily be zero. While absurd on its face and contrary to the Regional Board and State Board's longstanding interpretation of Resolution 92-49, this conclusion is particularly untenable when applied to a site within San Diego Bay, which contains PCBs that

[7] The Regional Board also claimed to be "concerned" that, in pointing out the absurdity of disregarding its prior findings and setting PCB background concentrations at zero, Lockheed Martin was "attempt[ing] to set a 'floor' or 'background' for PCBs at 84 parts per billion[.]" (Ex. 17.) To be clear, Lockheed does seek to set a "floor" but rather, the Regional Board should abide by the evidence-based PCB background concentration it previously set for this Site, specifically.

cannot be attributed to operations at the Site.

In suggesting that all anthropogenic compounds have a background of zero simply because they are not "natural", the Regional Board reads in language to Resolution 92-49 that does not exist—*i.e.*, a natural vs. anthropogenic distinction, which has the effect of impermissibly requiring dischargers to remediate contamination they did not discharge, violating Water Code § 13304, or otherwise be forced to establish alternative cleanup levels.

i. The Regional Board's New Definition of Background Concentrations to Exclude Anthropogenic Sources Violates Water Code § 13304 and Resolution 92-49

Resolution 92-49 defines "background conditions" as follows:

> This section [WC Section 13304] authorizes Regional Water Boards to require complete cleanup of all waste discharged and restoration of affected water to background conditions (i.e., **the water quality that existed before the discharge).** (Ex. 3 at Ex. I ¶ 4, emphasis added.)

On its face, this definition refers to the water quality prior to *the discharge that is the subject of the cleanup,* and would be attributable to named dischargers—not, as the Regional Board would suggest, the water quality prior to *any* discharge whatsoever. Here, the Regional Board's decision to set PCB background concentrations at zero would require Lockheed Martin to clean up the Site to pre-industrial levels, ignoring the fact that the Site is not responsible for the entirety of PCB contamination in the Bay. PCBs are not "natural" yet are known to exist throughout the San Diego Bay irrespective of the Site, impacting "the water quality that existed before [Lockheed Martin's] discharge." (Ex. 3 at Ex. I ¶ 4.)

Instead, the Water Code limits the Regional Board's authority to require cleanup by "[a] person... who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is ... [and] shall, upon order of the regional board, clean up *the* waste or abate the effects of *the* waste[.]" (Water Code § 13304 (emphasis added).) Courts have since carefully interpreted what it means to "cause or permit" a discharge under § 13304, holding that the person must bear some responsibility for a discharge to be compelled to remediate that discharge and be named in an order: "[t]he term 'cause' clearly connotes direct responsibility for a discharge," while "the term 'permit' encompasses a spectrum of conduct, from giving formal

authorization for a discharge to allowing the activity that caused the discharge." (*United Artists Theatre Circuit, Inc. v. California Regional Water Quality Control Bd*. (2019) 42 Cal.App.5th 851, 867, as modified on denial of reh'g (Dec. 18, 2019) (emphasis added).) Similar to Resolution 92-49, Water Code § 13304 also expressly focuses on "*the*" waste, not *any* waste that may be encountered while performing cleanup. (Wat. Code § 13304(a).)

In short, background conditions encompass "the water quality that existed before the discharge" that was caused or permitted by the person(s) named in the order. Resolution 92-49 requires cleanup to achieve these pre-discharge conditions—not, as the Regional Board's finding would suggest, to achieve conditions that existed before the chemical was ever made or entered the environment regardless of the discharge, *i.e*., for anthropogenic compounds, pre-industrial levels. If the Regional Board's new interpretation of "background conditions" were correct, and total PCB background concentrations were deemed to be zero, the Regional Board would lack the very authority to require cleanup in the first instance because the discharger would not have "caused or permitted" that discharge.[8]

ii. The Regional Board's New Definition of Background Concentrations to Exclude Anthropogenic Sources Constitutes an Underground Regulation

At the very least, the Regional Board's re-writing of law by distinguishing anthropogenic from natural chemicals when defining "background" was done outside of rulemaking procedures and violates the policy against underground regulations. (*See*, e.g., *Malaga County Water District v. Central Valley Regional Water Quality Control Board* (2020) 58 Cal.App.5th 418, 434.)

The Administrative Procedures Act provides that "'[n]o state agency shall issue, utilize, enforce, or attempt to enforce… a regulation' without complying with the APA's notice and comment provisions… This requirement is applicable to regulations utilized by the Water Quality Board." (*Id.* at 434 (quoting Gov. Code, §§ 11340.5, subd. (a), 11400.20, subd. (b) and citing Cal.

[8] In keeping with this logic and common sense, analogous state and federal statutes—including the Hazardous Substance Account Act, Comprehensive Environmental Response, Compensation, and Liability Act, Clean Water Act, Clean Air Act, and the Resource Conservation and Recovery Act—do not require dischargers to cleanup to pre-industrial levels.

Code Regs., tit. 23, § 648, subd. (b)).)

The APA provides "a very broad definition" of what constitutes a "regulation," but there are "two principal identifying characteristics" as follows: (*Ibid.* citing Gov. Code, § 11342.600.)

> First, the agency **must intend its rule to apply generally**, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. [Citation omitted.] Second, the rule **must 'implement, interpret, or make specific the law enforced or administered** by [the agency], or ... govern [the agency's] procedure. (*Ibid* citing *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571, emphasis added.)

The first of these factors is easily met here, as evidenced by (1) the CAO's plain language; (2) Regional Board staff's explanation in its Responses to Comments; (3) staff's explanation at the hearing before the Regional Board's adoption of the CAO; and (4) the fact that language also appears in the newly amended September 1, 2021, San Diego Region Basin Plan. The Regional Board admittedly intends for manmade compounds like PCBs to automatically have a background concentration of zero simply because they are not "natural." And because background cleanup levels of zero are infeasible to achieve, the Regional Board effectively forces dischargers to instead establish alternative cleanup levels, in violation of State Board Resolution 92-49.

Specifically, the 2022 CAO prescribes: "[a]s PCBs do not naturally occur, natural background concentrations of total PCBs should be zero (0) or not detected (ND), so determination of a background cleanup level for total PCBs is not necessary." (Ex. 1 at p. 31.) Staff's justification for this new principal demonstrates the intent for it to be applied broadly.

In the Response to Comments, staff explains that "PCBs are a group of man-made chemicals that do not naturally occur in the environment" and thus "[t]he pre-discharge concentrations of PCBs in the San Diego Bay, *or any environment,* should be minimal or non-detect." (Ex. 17 at pp. 4-5, 11-12, 12-13, emphasis added.) At the hearing, the Regional Board's staff project manager further explained to the Regional Board as follows:

> The point is that PCBs do not naturally occur, they are manmade chemicals, so in **any environment 500 years ago they wouldn't have existed.** So for this Site, if they so wanted to, Lockheed Martin would be able to complete an assessment of what concentration of PCBs exist now, but that wouldn't be a background level. (August 10, 2022, Regional Board Hearing Recording, at 1:29:40.)

These explanations underscore that the Regional Board has predetermined background concentrations for all manmade chemicals at zero regardless of what actual site conditions may show and has done so in violation in the APA.

Further, the Regional Board's Basin Plan shows its plan to apply its new definition throughout the San Diego Region. Chapter 4, Implementation, states the following Cleanup and Abatement Principle:

> The Regional Board shall require: [c]leanup and abatement actions to conform with the provisions of State Board Resolution No. 68-16 (Statement of Policy with Respect to Maintaining High Quality Waters in California) provided that under no circumstances shall these provisions be interpreted to require cleanup and abatement which achieves water quality conditions **that are better than "natural" background conditions.** (See San Diego Region Basin Plan at p. 4-178.)

This policy statement adds the word "natural" to Resolution 92-49's prohibition on better-than-background level cleanups. (*Malaga County Water District, supra*, 58 Cal.App.5th at 437 (finding that while hearing procedure may have been tailored to the pending proceeding, its "underlying content was consistent with a longstanding practice previously adopted for all similar cases.")

As to the second factor, there is no duly adopted law or rule mandating that background conditions of non-natural compounds must be zero. The Regional Board establishes this brand-new construct, unilaterally narrowing the State Board Resolution 92-49 definition of "background conditions" from "the water quality that existed before the discharge." (See, *infra*, Section VIII, Argument (A)(3)(iii).) Like the procedure overturned as an underground regulation in *Malaga County Water District*, the Regional Board's new definition "does not merely implement the regulation [*i.e.,* State Board Resolution 92-49]. Rather, it contradicts it; thereby *limiting rights* provided by a duly adopted regulation through a generally applicable order that has not been publicly vetted to an equal degree." (*Malaga County Water District, supra*, 58 Cal.App.5th at 439; emphasis added.) The Regional Board has violated the APA *and* State Board precedent by creating a new benchmark for background conditions without going through the proper notice and public comment procedures.

Regardless of the standard of review applied here ("harmless error" or "void on its face") the outcome is the same; the errors in the 2022 CAO must be corrected. As detailed in Section VIII. Argument (D), *infra*, Lockheed Martin is indisputably *significantly prejudiced* by the Regional Board's reversal of background concentrations at the Site. (*Id.* at 445-446.) Lockheed Martin will be forced to incur significant costs to determine new cleanup levels, potentially design a new remedial action plan, pursue other dischargers for contribution, and suffer significant delay in implementing the remedy, if the Regional Board's newfound interpretation that manmade compounds must have a background of zero is not reversed.

iii. The Regional Board's New Interpretation of "Background Conditions" Contradicts Its Previous Longstanding Interpretation

The Regional Board itself has never previously interpreted Resolution 92-49 as requiring cleanup of wastes not attributable to named dischargers. In determining that the background concentration for PCBs was 84 ppb in connection with the 2017 CAO, the Regional Board included anthropogenic sources. The same can be said for every other site the Regional Board adjudicates in San Diego Bay. It makes sense that the Regional Board's longstanding interpretation of Resolution 92-49 never distinguished anthropogenic from natural background concentrations. Doing so exceeds its authority under Water Code § 13304.

Resolution 92-49 is unambiguous: background concentrations constitute "the water quality that existed before the discharge." The Regional Board's new interpretation of this provision as "the water quality that existed before *any* discharge" is clearly erroneous. (See *Bonnell*, *supra*, 31 Cal.4th at 1265 ("The Board's interpretation is incorrect in light of the unambiguous language of the statute. We do not accord deference to an interpretation that is clearly erroneous'" (citation omitted).) Even if Resolution 92-49 were ambiguous, no deference to the Regional Board's new interpretation is warranted. One of the primary factors in deciding whether to give an agency's interpretation of ambiguous authority any weight is "evidence that the agency 'has consistently maintained the interpretation in question, especially if [it] is long-standing[.]'" (*Yamaha Corp. of America*, 19 Cal.4th at 13.) "'[A] vacillating position ... is entitled to no deference[.]" (*Id.*) The

Regional Board's new interpretation of Resolution 92-49 should not stand.

iv. Achieving PCB Background Concentrations of Zero Is Scientifically Impossible, and Would Render Resolution 92-49 Meaningless

As a technical matter, the Regional Board's interpretation of Resolution 92-49 defies logic and would be impossible to achieve. Given their persistence and ubiquity, compounds like PCBs cannot be remediated to pre-industrial levels at any particular Site—and certainly not permanently. The San Diego Bay itself illustrates this fact. PCBs currently exist throughout the San Diego Bay and upland areas. (*See e.g., San Diego Unified Port Dist., Corp. v. Monsanto Co.,* Case No.: 15cv578-WQH-AGS (S.D. Cal. Jan. 30, 2018)). And PCB contamination is ongoing: PCBs continue to be found as unintentional byproducts even in consumer goods, for example, and in fact some level of PCB concentrations is permitted by the Toxic Substances Control Act. (40 C.F.R. § 761.3; U.S. EPA, Inadvertent PCBs, https://www.epa.gov/pcbs/inadvertent-pcbs.)

Through transport and redeposition, any site remediated to pre-industrial levels (if this were possible) would immediately be re-contaminated. Remediating the Site to achieve a background concentration of zero would require remediation of the entire San Diego Bay, not to mention significant portions of the land area in San Diego County. This far exceeds any site-specific remediation contemplated by Water Code § 13304 and Resolution 92-49.

Because achieving background levels of zero for anthropogenic compounds is impossible, the Regional Board's new interpretation would render Resolution 92-49 meaningless because a background cleanup could never be undertaken. Instead, any discharger of any anthropogenic compound would be required—commandeered through regulatory coercion—to engage in costly studies to identify alternative cleanup levels, obviating Resolution 92-49's entire focus to implement a background concentration cleanup if at all possible. This would not only impose additional burdensome requirements on dischargers, but also unnecessarily complicate and delay cleanup of contaminated sites, contrary to public interest. The Regional Board's new interpretation is an attempt to end-run State Board policy and should be rejected.

4. Mercury Need Not Be Re-Analyzed, It Is 0.57 Parts Per Million

Along with approving background concentrations of PCBs, as described above, the

Regional Board has also already formally determined—based on exhaustive evidence as articulated above—that background concentrations for mercury at the Site are 0.57 ppm. However, just as it did in the case of PCBs, the Regional Board ignored its previous findings in the 2022 CAO and directed Lockheed Martin to conduct an entirely new background analysis "to determine background sediment cleanup levels for mercury[.]" (Ex. 1 at 31.) The Regional Board's unjustified reversal of its previous factual findings with respect to mercury is as improper as it is in the context of PCBs—there is no justification or need for a new background analysis.

In addition, the Regional Board's actions are proscribed by Water Code § 13267(b)(1), which prohibits the Regional Board from demanding any reports where the burden (including costs) to the party does not "bear a reasonable relationship to the need for this report and the benefits to be obtained from the reports." Performing an entirely new background analysis will be as costly as it is unnecessary. The background concentration for mercury has already been established based on extensive evidence, and the Regional Board cites no need for performing the same background study a second time. The State Board should require the Regional Board to conform the CAO to its earlier determination that the mercury background concentration at the Site is 0.57 ppm.

B. Applying the SQOs as an Additional Success Criterion Materially Expands the 2017 CAO, Violates State Board Resolution 92-49, Water Code §§ 13267 and 13360, and is Technically Infeasible.

The Regional Board's demand to require an SQO analysis where the RAP is intended to achieve background levels—described as "Approach A" in the CAO—is unlawful, illogical, technically infeasible and cannot be supported by the evidence, and therefore constitutes "inappropriate and improper" conduct. (*In the Matter of the Petition of Exxon Company, U.S.A., Et Al.,* 1985 WL 20026, *supra*, at *5-6; Ex. 1, §§ A, F.) Applying an SQO standard in addition to a cleanup to background contaminant levels would, if it could function in this context at all, require cleanup to lower-than-background concentrations. Yet, a cleanup to a lower-than-background contaminant level would flatly exceed the Regional Board's authority under Resolution 92-49, which includes the following limitation:

under no circumstances shall these provisions be interpreted to require a cleanup

> and abatement which achieves water quality conditions that are better than background conditions. (Ex. 3 at Ex. I, Section III(F)(1).)

The 2017 CAO was purposely and explicitly written to meet that limitation—a cleanup to background contaminant levels. (Ex. 3 at Ex. B § A "take all corrective actions necessary to cleanup and abate COC concentrations in Site sediments to background or to alternative cleanup levels that meet the SQOs . . .") The Regional Board did not, and cannot, dispute that the RAP it and the Site parties developed—which is a dredge and sand cover remedy—achieves the previously approved background cleanup levels. Nor (more importantly) can it dispute that the PRMP, as written in Lockheed Martin's proposed RAP, would confirm the success or failure of the RAP in that regard. (Ex. 4, § 8 and Appendices E and F, as amended by Ex. 18.) The demand for SQO application exceeded both the bounds of Resolution 92-49 and the plain language of the 2017 CAO.

Faced with pending litigation to challenge the Regional Board's improper demand to require something beyond a background level cleanup, the Regional Board took the drastic measure of rescinding the 2017 CAO and reissuing the new CAO to include the express SQO analysis in a background level cleanup. Specifically, the new CAO requires that the PRMP demonstrate "that the cleanup levels in the approved RAP have been achieved, **and** post-remedial sediment quality is protective of beneficial uses in compliance with the SQOs." (Ex. 1, § (F), emphasis added.) But the Regional Board cannot circumvent the clear limitation of Resolution 92-49 by requiring in an order something that exceeds law. (*In the Matter of the Petition of Exxon Company, U.S.A., Et Al.,* 1985 WL 20026, *supra*, at *5-6.) Revising the CAO to expressly include the SQO requirement does not resolve the matter. A background level cleanup is all that is allowed. (Resolution 92-49, Section III(F)(1).)

In addition, Water Code § 13267(b)(1) prohibits the Regional Board from demanding technical reports where the burden, including cost, does not "bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports [sic]." This statutory mandate is also reflected in the CAO itself. (Ex. 1, § 17.) Demanding that Lockheed Martin include the technically inappropriate SQO analysis in the PRMP where the PRMP would already be designed

to confirm the most stringent cleanup the Regional Board may require (*i.e.,* a background cleanup under Approach A), would be a substantial burden to Lockheed Martin in terms of cost, time, effort, and delay, which outweighs any benefit that the SQO analysis could possibly serve.

To illustrate—if the PRMP evaluation indicates the RAP has achieved background sediment surface concentrations, the Regional Board lacks any legal authority to take further action. If the PRMP evaluation indicates otherwise, then—as written—it requires specific additional steps until that background standard is reached. Unless the Regional Board seeks to impose lower-than-background cleanup standards (unlawfully) or to gather academically interesting but practically non-actionable information (an unlawful unilateral demand in violation of Water Code § 13267), imposing the 2018 SQOs in the PRMP under Approach A achieves no purpose.

Further, Water Code § 13360 prohibits the Regional Board from mandating how Lockheed Martin chooses to comply with the CAO, and expressly authorizes Lockheed Martin to comply "in any lawful manner." The CAO mandates a remedy that achieves a background level cleanup or an alternative cleanup level or removes all contaminated sediments. (Ex. 1, § A.) The Regional Board's demand violates § 13360 by mandating both a background cleanup and achievement of SQOs. (Ex. 1, §§ A and F.) Lockheed Martin had designed its remedial strategy—dredge and sand cover—to achieve the previously mandated background levels. The Regional Board is prohibited from demanding anything more.

1. The Regional Board's Demand is Technically Inappropriate and Unworkable.

The demand to implement the 2018 SQOs in a PRMP for a very small site where contaminated sediment will be dredged in areas of high concentration, and covered with sand in other areas, is an abuse of the Regional Board's discretion because it is technically inappropriate and not what the 2018 SQOs were designed to accomplish. Again, the 2018 SQOs are narrative objectives that require evaluation of benthic community health (through sampling) and human health risk (through fish tissue studies) to measure risk. (Ex. 3 at Ex. A.)

But the background cleanup under the existing RAP calls for dredging and sand cover, and

the 2018 SQOs were not designed to be implemented through post-remedial monitoring. Necessarily, those remedies will initially alter benthic community structure, as they will completely replace surface substrate. Studying the benthic community in clean new sand, knowing that this community will be redeveloping, makes no technical sense. It is a useless exercise as the benthic community may take several years to reestablish and, even once reestablished, the Site will have already been cleaned up to background contaminant levels, so any issues identified could not derive from historic discharges at the Site.

Similarly, fish tissues studies would provide no valuable insight on how fish feeding at the small, two-acre Site could possibly affect human health risks to consumers of such fish. The two-acre combined Site is a postage stamp in comparison to the larger San Diego Bay, which is approximately 12,160 acres.[9] Analysis of fish tissue from the Site would say nothing about contaminants within the Site, as foraging and home ranges for such fish would be vastly larger. No reliable conclusions could be drawn about the impact of sediment contamination from the Site on fish tissue, particularly when performed after remedy implementation to background levels.

The burden imposed on Lockheed Martin in terms of cost, time, effort, and delay, outweighs any benefit the SQO analysis could possibly provide. (Wat. Code § 13267(b)(1.))

2. There Is No Legal Requirement that "All Ongoing Cleanups" Must Comply with the 2018 SQO Amendments.

Despite the Regional Board staff's position that "all ongoing and future cleanups" must comply with the 2018 SQOs—as is reflected in the new CAO (Ex. 3 at Ex. D at Ex. 19, January 14, 2020, letter; Ex 17, Response to Comments, p. 10), there is no obligation under state law, or within the language of the 2018 SQOs themselves, that supports this view.

The regulatory language clarifies that implementation of the SQOs (1) supersedes only existing *narrative* sediment quality objectives, and (2) remains discretionary. The 2018 SQO Amendments state that the "Sediment Quality Provisions "supersede all applicable *narrative water quality objectives and related implementation provisions in water quality control plans*[.]" (Ex. 3

[9] San Diego Regional Water Quality Control Board, Watershed Management Approach, Appendix A "Overview of San Diego Region Watershed Management Areas," January 25, 2002, p. A-A-4.

at Ex. A, Section III(A)(1)(b)(1) at p. 3 (emphasis added.)) As an initial matter, the fact that the 2018 SQOs supersede narrative water quality objectives does not automatically impose SQOs on every ongoing cleanup, especially where, like here, the application of SQOs has been considered and rejected in favor of a background-based approach.

Moreover, the 2018 SQOs promote the development of "site-specific sediment management guidelines where appropriate" and confirms that all such guidelines "must comply with Resolution 92-49," which prohibits Regional Boards from requiring cleanups below background levels. (Ex. 3 at Ex. A, Section IV(A)(4)(h) at p. 42.) Incorporating the 2018 SQOs is site-specific and, while subject to restrictions in Resolution 92-49, discretionary. As the State Board noted in responding to comments on the Implementation Provisions to the 2018 SQOs, "the language provides each Regional Water Board with the discretion to apply the SQOs." (Ex. 3 at Ex. J, at p. 52.)

Despite the Regional Board's insistence that the CAO, RAP, and PRMP must comply with the 2018 SQOs, there is no mandate under state law or the language of the 2018 SQOs that all existing *background-level* cleanups must suddenly adopt and implement the 2018 SQOs.

3. The Regional Board's Attempts to Justify the 2018 SQO Analysis in Post Remedial Monitoring is Flawed.

Each of the Regional Board staff's attempts to justify incorporation of the 2018 SQOs in the CAO, RAP, and PRMP fail. Its first attempt—a three-page Response rejecting Lockheed Martin's April 8, 2020 request for a hearing regarding the 2017 CAO—is internally inconsistent and contradicts the very authority it cites. (Ex. 3 at Ex. F.) Its second attempt, the Responses to Comments on the new CAO, is similarly deficient and provides no justification for how SQOs could apply to a background cleanup. (Ex. 17.)

In its hearing denial from 2020, the Regional Board claimed that it adhered to Resolution 92-49 but concludes that this Resolution "requires" corrective actions to implement Water Quality Control Plans, "including the 2018 Sediment Quality Provisions." (Ex. 3 at Ex. F at p. 2.) Yet, the Regional Board later decided to rescind the 2017 CAO so that it could expressly include the SQO mandate in the new 2022 CAO agreeing that "the language of the CAO could be considered

internally inconsistent," while also arguing that such action rendered the then-pending litigation moot. (Ex. 7; Ex. 8.) It went on to state that "the SQO requirement reflects State Water Resources Control Board directives regarding the state of the science, **appropriateness of Resolution 92-49,** and proper consideration of the human health and ecological impacts caused by discharges to enclosed bays." *(Id.* at p. 1 (emphasis added).) Such justification is circular and makes no sense.

Further, in Response to Comments on the new CAO, the Regional Board staff claims the SQOs "do not fundamentally change the burden of cleanup, but instead verify that the cleanup's remedial goals have been achieved." (Ex. 17 at p. 10.) But if the cleanup achieves the background cleanup levels, the SQOs would provide no further verification information that is consistent with Resolution 92-49's mandate that a background level cleanup is the most stringent allowed. The SQOs do not—and were not designed to—test whether a site was remediated to background concentrations.

The Regional Board, to date, has provided *no* examples for when the SQOs have been used to confirm post-remedial monitoring in a background level cleanup, any credible justification for their application in a background level cleanup, or any clear explanation for how they could possibly be applied in the context of a post-remedial monitoring. In its Response to Comments on the 2022 CAO draft, the Regional Board cites two examples of other sites where SQOs have been used—Laurel Hawthorne and Tenth Avenue Marine Terminal—*but those are investigatory, not cleanup, sites*, which is a very different (and appropriate) application given the SQO analysis would occur before the design of any remedy (which had also been performed at the investigatory phase for this Site). (Ex. 17 at p. 10.)

Tellingly, the Regional Board ignores and never resolves the restriction imposed by Resolution 92-49, which prohibits Boards from interpreting provisions to "require cleanup and abatement which achieves water quality conditions that are better than background conditions." (Ex. 3 at Ex. I, § F.1.) The Regional Board fails to explain how it is possible to use the 2018 SQOs to "evaluat[e] whether the beneficial uses at the Site have been restored and are being protected after corrective action is implemented" (*id.* at p. 2) when a background-based approach is taken. At best, the Regional Board offers that the 2018 SQO Amendments may "provide helpful

information regarding the success of any implemented remedial actions" (*id.* at p. 3), yet it fails to reconcile this implementation with Resolution 92-49's prohibition on requirements for water quality better than background levels. The Regional Board seems to imply that "alternative cleanup levels" *better* than background levels (*id.* at p. 2) could be imposed through the implementation of the SQOs in the PRMP. That is beyond the Regional Board's authority and expressly prohibited by Resolution 92-49.

The Regional Board improperly dismissed Lockheed Martin's concerns and concluded without authority or logical explanation that the 2018 SQOs are applicable to the Site.

C. The Port of San Diego and General Dynamics Should Be Named in the 2022 CAO.

The Regional Board undoubtedly agrees that the Port and General Dynamics share in liability for the discharges at the Site yet fails to name them in the CAO with its sole justification being Parties' 2017 Settlement Agreement, which has been vitiated and covers the entirely different 2017 CAO. The identification and naming of appropriate dischargers in cleanup orders is a mandatory duty under the Water Code, regulations, and State Board guidance.

Water Code § 13304 authorizes the Regional Board to issue cleanup orders to any "person who has discharged or discharges waste into the waters of this state... or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged ... into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance." Under Water Board regulations,

> the Regional Water Board *shall*: [u]se any relevant evidence to identify dischargers; [m]ake reasonable efforts to identify dischargers; ... [*and n]ame other dischargers as permitted by law*." (Code of Regulations, title 23, section 2907, emphasis added.)

State Board Resolution 92-49 is consistent, requiring the Regional Board to "[u]se any relevant evidence" in determining responsible parties under both §§ 13267 and 13304, explaining that "[i]t is not the intent of the State or Regional Water Boards to allow dischargers, whose actions have caused, permitted, or threaten to cause or permit conditions of pollution*, to avoid responsibilities for cleanup."* (Ex. 3 at Ex. I, Resolutions 1.A.)

Section 4 of the CAO ("Persons Responsible for the Waste Discharges") explicitly identifies the Port of San Diego, General Dynamics, and Lockheed Martin as responsible parties under law—*all* of these parties therefore should be named in the CAO. (Ex. 1, at p. 6.) Regional Board staff confirms this again in its Responses to Comments, stating "[f]rom the findings in all documents (2017 CAO, the Administrative Draft, and the Tentative Cleanup and Abatement Order), the ownership and activities [among dischargers] giving rise to liability are clear." (Ex. 17, at p. 9.)

However, the Regional Board prejudices Lockheed Martin by issuing the 2022 CAO only to Lockheed Martin and justifying that doing so is "pursuant to the terms of a settlement agreement reached by the Dischargers in a separate lawsuit concerning the Site." (Ex. 1, at p. 6.) In Section 7, footnote 15, the 2022 CAO further states:

> This Order is similarly issued only to LMC as the San Diego Water Board is not aware that terms of the settlement agreement, in which LMC agreed to be solely responsible for current and future response costs and implementation and completion of remedial work at the Site, have changed. (*Id*., Section 7, footnote 15, p. 13.)

Even the Regional Board acknowledges that, but for the Settlement Agreement, all responsible parties would necessarily be named in the 2022 CAO. But Lockheed Martin has made it abundantly clear to the Regional Board that, while the terms of the 2017 Settlement Agreement have not changed, the 2017 Settlement Agreement itself was *vitiated* upon issuance of an entirely new and substantially different CAO and that Lockheed Martin does not agree to be the sole implementing party of the expanded cleanup. (*See, e.g.,* Ex. 9, January 14, 2022 Lockheed Martin Comment Letter; Ex 10, July 15, 2022 Lockheed Martin Comment Letter.) The Regional Board erroneously relies on an agreement that does not govern parties' respective liabilities at the Site under the 2022 CAO to pick an implementing party for its 2022 CAO.

Regarding Footnote 15, respectfully, based on years of correspondence, meetings, detailed submissions, and briefing regarding the 2017 CAO—including a petition to the Regional Board, a second petition to the State Board, and a Petition for Writ of Mandate to the San Diego Superior Court—and various all-hands meetings since those activities, the Regional Board and its counsel

are well aware of Lockheed Martin's position that if the Tentative CAO were to be issued as-is, the Settlement Agreement no longer protects the other parties from being named in that CAO. The Regional Board itself appeared to agree, arguing rescission of the 2017 CAO rendered the then-pending litigation moot. Specifically, the Settlement Agreement contemplates:

- A Remedial Action in "substantial conformity" with the Remedial Action Plan in Exhibit C, which contemplates the dredge and sand cover remedy. (Ex. 2 at §§ 1.24, 1.25.)
- A Coastal Development Permit that is "necessary for the performance of the (a) Remedial Action pursuant to the CAO and (b) end-of-term demolition and removal activities required under the [Lockheed Martin/Port of San Diego] Lease", which "may include the conditions and special conditions set forth in the form attached as Exhibit E, or in a materially similar version, and as it may be amended in the future to address any changes in the nature or scope of work pursuant to the CAO." (*Id.* at § 1.5.)
- The CAO is defined as "No. R9-2017-0021 dated January 30, 2017, attached hereto as Exhibit B, as it may be amended, or as it may be reissued in the future as a new CAO covering the Site." (*Id.* at § 1.5.)

The Settlement Agreement was expressly based on, and attached as Exhibit B, *the now rescinded 2017 CAO,* the draft RAP as Exhibit C, and the draft Coastal Development Permit as Exhibit D. (Ex 2, at Exhibits B-D)—those documents are no longer operative under the new CAO. Further, the CDP authorizes the original Remedial Action "Project" and nothing else. The CDP specifically authorizes and "is limited to" the "Project" as required under now-rescinded 2017: "Permittee shall adhere strictly to the current plans for the Project as approved by the District and the Project features, as described above, for the Project." (Ex. 20 at p.5.) The Project includes the following:

> [1] demolition and removal of all landside and waterside components (fixtures and structures) of the existing Lockheed Marine Terminal Facilities (MTF) and [2] remediation of the waterside sediment in the surrounding basin consistent with a Remedial Action Plan (RAP), as may be approved by the Regional Water Quality Control Board, San Diego Region (Water Board) (collectively, "Project"). (*Id.* at p. 2.)

The CDP specifically authorizes only the remediation "governed by the adopted [Original] CAO", stating "the sediment remedy will proceed as described in the final RAP" and that "[p]ost-

construction monitoring of the remedy will be performed as described in the approved Post Remedial Monitoring Plan." (*Id.*) It does not contemplate a different remedy, as is required in the 2022 CAO. (Ex. 20 at p.5.)

Rather, the Regional Board forces parties to go back to the drawing board to establish new background levels or alternative cleanup levels, design a remedy that achieves the cleanup levels yet to be established or approved, as well as ensure satisfaction of the SQOs in post-remedial monitoring. Because the new CAO does not allow a remedial action in substantial conformity with that designed by the parties to the 2017 Settlement Agreement, the 2022 CAO must name the Port and General Dynamics on equal footing to Lockheed Martin. The Regional Board's unilateral rescission of the 2017 CAO and issuance of a substantially different CAO requiring a wholly new remedy was not contemplated by, nor is covered, by the Settlement Agreement. The 2017 Settlement Agreement does not govern parties' respective allocation of liability at the Site and Lockheed Martin has not agreed to be the implementing party.

The Port and General Dynamics may disagree on Parties' respective liabilities in the 2017 Settlement Agreement as they would apply to the significantly expanded and different cleanup in the 2022 CAO, but the Regional Board should not participate in that dispute. (Wat. Code §13304; Code of Regulations, title 23, § 2907.) The Regional Board acceded to the scope of cleanup to be required under the 2017 CAO and RAP. This allowed Parties regulatory certainty on to then negotiate their respective contributions—*i.e.,* identifying implementing party status versus in kind and/or monetary contributions. By weighing in now on parties' respective contributions—which it does by naming Lockheed Martin as the sole implementing party to an entirely new CAO—the Regional Board interferes with private party negotiations. While the Regional Board *knows* that its new CAO is entirely different and expands cleanup obligations at the Site (given the need to rescind it and reissue a new CAO), it improperly chooses Lockheed Martin to be the sole implementing party rather than *all* discharging parties itself has identified.

The Regional Board staff's attempts to justify naming only Lockheed Martin are baseless. First, the Regional Board erroneously suggests that, in order to name all parties, it would need to "commence an evidentiary hearing." (Ex. 17 at p. 10.) This is a false obstacle. No lawful purpose

would be served by convening a hearing when the Board has already identified all three parties as dischargers.

Similarly, in the Executive Officer Summary Report to the Regional Board, staff again curiously explains that its naming of only one party "is not intended to influence the cost allocation in any way" but then proposes that if all three parties "appear at the hearing and confirm that the remedial work required by the Tentative Order will be conducted by all three parties, the CAO findings can be modified." (Ex. 12, Executive Officer Summary Report at p. 3.) As an alternative, it proposes that "the responsible parties may represent to the San Diego Water Board a payment resolution different than the one reflected in previous mediation and court documents, and if such documents are provided, the CAO can be modified accordingly." (*Id.*) The Regional Board should not, and cannot, have it both ways—it should not maintain that it is an impartial administrative agency charged with protection of the State's waters while at the same time inviting dispute among parties by interpreting the "terms and intent" of a private agreement and refusing to name all dischargers unless all parties formally present an agreement to the Regional Board to, together, implement the work under the CAO. The Regional Board should not act as parties' referee, nor should it propose implausible solutions to problems it creates.

Lastly, the Regional Board suggests that it also chose to name Lockheed Martin as the sole implementing party because it engaged in technical discussions without the other parties. (Ex. 17, Responses to Comments, pp. 9-10.) These technical discussions were confidential settlement communications under the prior pending litigation and/or discussions for implementation under the prior 2017 CAO. Moreover, the Regional Board Executive Officer's Summary Report explains that the naming of only Lockheed Martin "reflects the intent that the remaining work be completed expediently by LMC and the costs be shared as the parties see fit, rather than naming all parties and delaying any remedial work as the parties attempt to work cooperatively." (Ex. 12 at p. 3.). Rather than exercising its authority to induce all three parties to reallocate the heavy burdens of the 2022 CAO, the Regional Board seems to have refrained from naming all dischargers solely due to its concern that the other dischargers would not cooperate with the Regional Board as

Lockheed Martin has done.[10] In so doing, the Regional Board makes bad policy by penalizing good actors—those willing to discuss, negotiate, and continually engage should not be punished by the Regional Board in holding them accountable as the sole implementing party on that basis. Such fate would only chill future efforts to engage.

The Regional Board has an administrative duty to name all dischargers, which it failed by refusing to name the Port and General Dynamics in the 2022 CAO, rendering the CAO unlawful as presently issued.

D. Alternatively, the Regional Board Should be Barred from Issuing the CAO Under Principles of Equity

Even assuming that the CAO were otherwise lawful in its terms and issuance—which it is not—the Regional Board should be both equitably estopped from issuing it to Lockheed Martin and barred by laches.

1. The Regional Board Should be Estopped from Issuing a new CAO to Solely Lockheed Martin that Substantially Alters Relied-Upon Background Concentration Levels and SQO Applicability

Following Lockheed Martin's efforts in resolving a several-years-long dispute and electing to serve as the sole implementing party for the cleanup remedy, the Regional Board's active participation in mediation and years of study and negotiation, and its representations on which Lockheed Martin detrimentally relied in developing and designing a Feasibility Study, RAP, and PRMP, the Regional Board must be estopped from its eleventh hour rescission of the 2017 CAO and pivot to a brand new, substantively distinct, heavily prejudicial, and overly burdensome CAO.

To apply equitable estoppel, four elements must be established:

> (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts;

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[10] *See* also, Ex. 17, pp. 9-10 ("[Regional Board] staff have continued to work closely with Lockheed technical personnel since the issuance of the 2017 CAO . . . [s]uch technical calls have gone forward without any participation from the Port or General Dynamics. Water Code section 13304 allows the [Regional Board] to exercise its discretion in naming responsible parties with the goal of advancing cleanup[.]"); *see also* Ex. 12 ("Given LMC's (and its consultants') level of engagement on this site for the past five years . . . the Tentative Order under consideration today names only LMC as the implementing party.").

> and (4) he must rely upon the conduct to his injury. (*City of Long Beach v. Mansell* (1970) 476 P.2d 423, 442.)

Equitable estoppel "may be applied against the government where justice and right require it." (*Id*. at 445 (internal citations omitted).)

Here, all estoppel elements are plainly established. First, the Regional Board had unequivocal knowledge of (i) the Settlement Agreement and its terms; (ii) that the Settlement Agreement was entirely premised on implementing a cleanup in "substantial conformity" with the 2017 CAO, draft RAP, and CDP, which induced Lockheed Martin to agree to serve as the sole cleanup implementing party; (iii) the background levels for total PCBs and mercury established in the draft RAP and 2017 CAO; (iv) Lockheed Martin's intention to cleanup to those background levels in exchange for monetary and in kind contribution from both the Port of San Diego and General Dynamics; and (v) Lockheed Martin's ability, as set forth in the 2017 CAO, to cleanup to background levels *or* to establish alternative cleanup levels consistent with Resolution 92-49. This knowledge is compounded by the Regional Board's *active participation* in mediation, negotiations, and studies that culminated in affirmative representations of these facts as ultimately reflected in the final 2017 CAO itself. (*See supra* at Section VIII, Factual and Procedural History, (A)(1)-(3); *Mansell*, 476 P.2d at 444 ("Especially in cases where the party to be estopped has made affirmative representations, as opposed to mere silence or acquiescence, knowledge of the true facts will be imputed to one who, in the circumstances of the case, ought to have such knowledge.").)

Second, the Regional Board expressly intended that its representations would be acted upon via remedy implementation and continued, progressive compliance with the 2017 CAO, and Lockheed Martin had the right to believe that the Regional Board so intended. The Regional Board affirmatively represented during the negotiation period, and subsequently memorialized in the 2017 CAO itself, that Lockheed Martin would be the sole named party pursuant to the terms of the Settlement Agreement, the background levels for PCBs and mercury would be set at 84 ppb and 0.57 ppm, respectively, and that Lockheed Martin retained the ability to cleanup to background levels *or* to establish alternative cleanup levels consistent with Resolution 92-49. (*See*

supra at Section VIII, Factual and Procedural History, (A)(1)-(3); Section VIII, Argument (A)(2).)

As just one example, in March 2010, at one of the first meetings between the Regional Board, General Dynamics, Lockheed Martin, the Port of San Diego, and several consultants, the Parties discussed whether they would be "implementing the Sediment Quality Objectives ***or*** Resolution 92-49 (Cleanup to background.)" (Ex. 3 at Ex. D, Ex. 21, Meeting Summary March 22, 2010, (emphasis added).) As reported in the Meeting Summary:

> ***RWQCB stated that if PRPs cleanup to background, then the SQOs will not need to be implemented;*** *however, confirmation sampling for chemistry only would have to be conducted*[11]*; As part of this approach, background concentrations would need to be established in the East Basin*. (*Id.* (emphasis added.))

The Parties, including the Regional Board staff, made these representations to the Court. The CAO formally repeated this message seven years later in 2017, that remedial action need only be conducted "to background concentrations ***or*** to alternative cleanup levels that comply with the SQOs"—not both. (Ex. 3 at Ex. D at Ex. 13, CAO, Directives A & C.1 (emphasis added.)) Such affirmative representations illustrate a "manifest[] intent" to elicit action and Lockheed Martin reasonably believed these representations (and their codification in the 2017 CAO) to constitute the Regional Board's intent. (*See City of Oakland*, 169 Cal.Rptr.3d at 78 (City's negligent assertion that shift differential pay was pensionable demonstrated an intent to elicit action from the "PFRS retirees to whom it was directed, and the retirees had the right to believe that this was the City's intent.").)

Third, in adhering to, and relying upon, the Regional Board's representations and subsequent express requirements and instructions in the 2017 CAO, Lockheed Martin was "not in a position to uncover" the supposed lack of finality or future applicability of key substantive CAO requirements proffered by a "public agency [that] purports to be informed and knowledgeable in these matters." (*City of Oakland*, 169 Cal.Rptr.3d at 78 (citing *Driscoll v. City of Los Angeles* (1967) 431 P.2d 245, 252).) Nor was it in a position to predict that the Regional Board would exercise the drastic, atypical procedural tactic of fully rescinding the 2017 CAO and issuing a

[11] Lockheed Martin's PRMP includes sampling for sediment chemistry.

brand new, substantively conflicting CAO. (*See, e.g., supra* at Section VIII, Factual and Procedural History, (C).) As the primary overseeing body facilitating CAO enforcement with the responsibility for approving CAO procedures and requirements, the Regional Board incorporated fundamental, remedy-defining components into the 2017 CAO concerning contaminant background levels and SQO applicability to which Lockheed Martin had no choice other than to proceed on a prescribed timeline to design a remedy and clean up the site. (*See supra* at Section VIII, Factual and Procedural History, (A)(1)-(4).)

Fourth, Lockheed Martin detrimentally "relied upon the claimed conduct of the [Regional Board] to [its] injury." (*Driscoll*, 431 P.2d at 255.) Relying on the Regional Board's formal recognition that Lockheed Martin was not the only discharger but would be the sole implementing party for the specific remedy in the 2017 CAO based on the Settlement Agreement, the agreed-upon PCB and mercury background levels in the 2017 CAO, and the background level-focused cleanup separate and apart from, and uninfluenced by, the SQOs, Lockheed Martin expended hundreds of thousands of dollars and spent several years designing, and refining in accordance with Regional Board comments, a Feasibility Study, a RAP, and PRMP for a background-quality cleanup. (*See supra* at Section VIII, Factual and Procedural History, (A)(1)-(4).) Tellingly, upon rescinding the 2017 CAO, the Regional Board affirmatively acknowledged Lockheed Martin's reliance-induced injury, "recogniz[ing] that the parties made significant effort to comply with the CAO and that negotiations ... were dependent on the regulatory landscape at the time of the [2017] CAO's issuance." (Ex. 8 at p. 1.) Lockheed Martin would be severely prejudiced should it now be required to add a brand-new framework to the CAO-related directives and somehow marry all strategies so that they are technically sound and achievable. The Regional Board had intimate knowledge of the development of the SQOs and countless opportunities to disclose its intention that Lockheed Martin incorporate these amendments at the Site. Instead, the Regional Board waited until after Lockheed Martin had spent several years, and incurred significant expense, to reverse its prior representations in an attempt to dramatically expand the scope of the cleanup. (*See supra* at Section VIII, Argument, (A) and (B).) Given that the Regional Board clearly induced Lockheed Martin's reliance on the Regional Board's representations that the background level

cleanup would be sufficient, the Regional Board should be, *at a minimum*, estopped from issuing a substantively different CAO that imposes new background levels and SQO-related requirements all while preserving Lockheed Martin's status as the sole implementing party in contravention of the Settlement Agreement.

In the context of government actions, an estoppel "will not be applied against the government if to do so would effectively nullify a strong rule of policy, adopted for the benefit of the public ... ." such restriction does not apply here (*City of Long Beach v. Mansell, supra*, 476 P.2d at 442 (internal quotations omitted).) Moreover, "estoppel cannot lie to contravene any statutory limitation on an agency's authority." (*City of Oakland v. Oakland Police & Fire Ret. Sys.* (2014) 169 Cal. Rptr. 3d 51, 80.)But estopping the Regional Board from issuing the new CAO "would not nullify a strong rule of policy adopted for the public's benefit" and "the injustice to [Lockheed Martin] without estoppel outweighs, and therefore justifies, any effect upon public interest or policy that results from estopping" issuance of the CAO. (*Feduniak v. California Coastal Com.* (2007) 56 Cal.Rptr.3d 591, 610.) Here, estoppel serves to *further* timely remedial efforts at the Site as required under the Porter-Cologne Water Quality Control Act and further the public interest in achieving lawful and highly protective cleanup benchmarks by preserving the years of representations and expectations surrounding the 2017 CAO and Settlement Agreement. To the contrary, permitting issuance of the new CAO enables the Regional Board to dramatically move the goalposts on the foundational, substantive underpinnings that govern the cleanup process at the Site—seemingly in perpetuity to the extent the Regional Board seeks further rescission, reissuance, amendment, or other procedural tactics to alter requirements and expectations—which serves only to delay Site cleanup even further, vitiate the Settlement Agreement, reignite responsible party disputes, and require Lockheed Martin to start from square one, once more, in background level and feasibility studies, remedy design, and post-remedial plan conceptualization after already expending *significant* funds and labor, to again stand ready to implement a brand-new yet to be defined remedy.

Nor would estoppel "contravene any statutory limitation" on the Regional Board's authority. (*City of Oakland*, 169 Calf.Rptr.3d at 80.) As discussed above, estoppel would *preserve*

lawful CAO enforcement, as the new CAO suffers from several fatal legal defects pertaining to named parties, background levels, and inclusion of SQOs. (*See supra* at Section VIII, Argument, (A)-(C).) Moreover, as detailed above, incorporating SQOs into the CAO is a *discretionary* agency determination, not a mandate, and thus estoppel would not limit any affirmative statutory obligation. (*See supra* at Section VIII, Argument, (B)(2); *City of Oakland*, 169 Cal.Rptr.3d at 81 (finding estoppel applicable where an agency "has discretion in [an] area" and applying estoppel "would not result in a situation where the [agency] is required to act in excess of its statutory authority," and reasoning that "[w]hen a statute imposes upon an administrative body discretion to act under certain circumstances, mandate will not lie to compel the exercise of such discretion in a particular manner") (internal citations omitted).)

At bottom, this matter involves a unique set of circumstances in which "the rare combination of government conduct and extensive reliance ... will create an extremely narrow precedent for application in future cases." (*Mansell*, 91 Cal.Rptr. at 51.) Lockheed Martin has been, and continues to be, ready and willing to clean up the site and fulfill its obligations to the public as codified in California environmental law. But for the Regional Board's unlawful, unjust, last-minute bait and switch on cleanup requirements in the CAO, Lockheed Martin would be well on its way towards implementing the remedy and cleaning up the Site.

In fact, the State Board need not balance "the great injustice" against Lockheed Martin with "the minimal effect upon public policy which would result from the raising of such an estoppel," (*Mansell*, 476 P.2d at 51), where estoppel would serve to *further* public policy and *benefit* the public by permitting Lockheed Martin to proceed with the already-planned, highly protective cleanup. Accordingly, this is "one of those exceptional cases where justice and right require that the government be bound" by estoppel. (*Id.*)

2. The Regional Board's Issuance of the CAO is Barred by Laches

Additionally, or in the alternative, the Regional Board is prohibited under the doctrine of laches from issuing this materially different CAO. A claim of laches "requires unreasonable delay plus either acquiescence in the act about which the [barred party] complains or prejudice to the [prejudiced party] resulting from the delay." (*Golden Gate Water Ski Club v. Cty. of Contra Costa*

(2008) 80 Cal.Rptr.3d 876, 890 (internal citations omitted).) "Laches is a question of fact ... but may be decided as a matter of law where ... the relevant facts are undisputed." (*Id*.) Moreover, "[a]s with estoppel, laches is not available where it would nullify an important policy adopted for the benefit of the public." (*Id*.)

The Regional Board unreasonably delayed issuance of the new CAO and its incorporation of new background levels and SQO requirements, which severely prejudiced Lockheed Martin. Between pre-2017 negotiations all the way up through issuance of the Tentative Draft CAO, the Regional Board *never* indicated—and thus prolongedly and limitlessly delayed mention of—any intention to unravel the pre-established, already-agreed upon contaminant background levels in the 2017 CAO.[12] (*See supra* at Section VIII, Argument, (A).) Moreover, for nearly eighteen months after the State Board amended the SQOs, the Regional Board never indicated that these amendments could impact the parties' negotiated, tailored remedy. In March 2019 and May 2019, nearly one year *after* the SQO amendments had been adopted (and a decade after the 2009 SQOs had been in place), the State Board's Office of Enforcement and the Regional Board, respectively, each described Lockheed Martin's obligations under the Site's PRMP yet made no reference to compliance with the 2018 SQO Amendments. The Regional Board raised this issue for the first time in November 2019, six months after Office of Enforcement counsel's summary of Lockheed Martin's obligations and seventeen months after the 2018 SQO Amendments' adoption. (*See supra* at Section VIII, Argument, (B).)

The above-described delays were manifestly unreasonable, as evidenced by the significant injury to, and prejudice of, Lockheed Martin. The Regional Board's belated, last-minute 2017 CAO rescission and new CAO issuance effectively undermined and superseded Lockheed Martin's years of negotiations with the Settlement Agreement settling parties, the design of the Feasibility Study, RAP, and PRMP for background-quality cleanup, the planned commencement of implementing the remedy, and the copious sums of funds expended to reach this juncture in the

[12] The Administrative Draft CAO made no mention of PCB background concentration being zero. (*See generally* Ex. 13.)

remedial process—all of which the Regional Board had agreed and/or acquiesced to throughout the 2017 CAO implementation process. (*See, e.g., supra* at Section VIII, Factual and Procedural History, (A) to (D).) Only after Lockheed Martin had spent several years and incurred significant expense did the Regional Board reverse its prior representations and attempt to dramatically expand the scope of the cleanup. These delays, and their severe prejudicial effect on Lockheed Martin in requiring it to effectively restart the cleanup process from square one, require that issuance of the new CAO be barred by laches.

CONCLUSION

This Site has awaited implementation of a cleanup for over a decade. Lockheed Martin, pursuant to the settlement with the Port of San Diego and General Dynamics, remains ready, willing, and able to implement a defined, highly protective cleanup under the 2017 CAO or a substantially similar approach as quickly as possible. Such action would benefit the Regional Board, the Parties, and, most importantly, the San Diego Bay. In pursuit of that cleanup, Lockheed Martin has accepted numerous serial requirements from Regional Board staff to amend the Remedial Action Plan and Post-Remedial Monitoring Plan with various elements. With its insistence on erasing background cleanup levels it previously approved, requiring incorporation of an SQO analysis as a success criterion in the PRMP, and refusing to name all parties in the CAO that it itself finds as liable for the discharges, the Regional Board has far exceeded its authority, ignored statutory and regulatory mandates, disregarded more than a decade of study and development, and failed to offer proper authority or a logical explanation for this demand.

In light of the foregoing, Petitioner respectfully requests that the State Board rescind and amend the CAO to properly:

- Reinstate PCB background concentrations to 84 ppb;
- Reinstate mercury background concentrations to 0.57 ppm;
- Remove the requirement that the PRMP include evaluation of the SQOs as a success criterion for cleanups designed to achieve background levels of concentration; and
- Name all dischargers, including the Port of San Diego and General Dynamics, as implementing parties.

IX. THE PETITION HAS BEEN SENT TO THE REGIONAL BOARD, TO THE PORT, AND TO GENERAL DYNAMICS

A copy of this Petition has been sent to the Regional Board and simultaneously transmitted to the other dischargers – the Port of San Diego and General Dynamics.

X. THE SUBSTANTIVE ISSUES OR OBJECTIONS IN THE PETITION WERE RAISED BEFORE THE REGIONAL BOARD

These substantive issues and objections were raised before the Regional Board, as set forth above. (*See* Exs. 9-10, 14-15; and Ex. 3 at Ex. D, Request for Hearing.)

XI. REQUEST FOR A HEARING

Petitioner respectfully requests that the State Board conduct a hearing on the Regional Board's August 10, 2022 adoption of the CAO. As set forth in detail in the Statement of Points and Authorities (see Section VIII, *supra*), a hearing will permit Petitioner to present additional argument and evidence to support that the background cleanup levels for the Site were based on sound scientific analysis and should be restored to 84 ppb for total PCBs and 0.57 ppm for mercury, and that the Regional Board's new interpretation of "background conditions" constitutes unduly adopted policy that contradicts Resolution 92-49. Further, Petitioner will present evidence that the 2018 SQOs are inappropriate to apply in post-remedial monitoring where the proposed RAP at the site—which is a dredge and sand cover remedy—is intended to achieve the background concentration levels for site contaminants. Petitioner will also present evidence that the Port of San Diego and General Dynamics should be named in the CAO and that the Regional Board's action of rescinding the 2017 CAO and reissuing a substantially different CAO is improper and unlawful. The evidentiary hearing will allow Lockheed Martin to present evidence that had not been adequately presented as the Regional Board refused to acknowledge the prior scientific evidence and detailed technical analysis developed under the 2017 CAO before adopting this new 2022 CAO.

XII. PETITION FOR STAY

Lockheed Martin requests a stay of the Regional Board's implementation of the 2022 CAO, or of any determination by the Regional Board that Lockheed Martin is in violation of the

2022 CAO before the ruling on this Petition. (Water Code § 13321.) A stay is appropriate if petitioner alleges facts and produces proof of: "(1) substantial harm to petitioner or to the public interest if a stay is not granted, (2) a lack of substantial harm to other interested persons and to the public interest if a stay is granted, and (3) substantial questions of fact or law regarding the disputed action." (Cal. Code Regs. tit. 23, § 2053.)

A stay is appropriate because Lockheed Martin will suffer substantial harm absent a stay, other interested persons and the public interest will not be substantially harmed, and there are substantial questions of fact or law regarding reversal of background concentration levels at the Site, including that background levels of total PCBs cannot be zero, application of the 2018 SQO Amendments as a success criterion in the RAP and PRMP, that the Port of San Diego and General Dynamics should also be named in the CAO, and that the Regional Board acted improperly in unilaterally rescinding the 2017 CAO and reissuing an entirely new CAO.

A. Lockheed Martin Will Suffer Substantial Harm if a Stay Is Not Granted.

Absent a stay, Lockheed Martin is at risk of incurring substantial costs while the State Board reviews this Petition, if the Regional Board meanwhile determines Lockheed Martin is violating Cleanup and Abatement Order No. R9-2022-0007 ("CAO"), including by contending that (1) the background concentration of PCBs is not zero but is instead the previously approved level of 84 ppb and, similarly for mercury, is 0.57 ppm, and (2) a remedy that achieves background concentrations need not also evaluate SQOs as a success criterion. (*See* Ex. 21, Decl. of George Gigounas ¶ 2, attached and incorporated hereto.) The Regional Board may also move to enforce the CAO and implement the RAP pending review by the State Board, which leaves Lockheed Martin vulnerable to additional improper requirements and costs imposed by the Regional Board. (*See id*. ¶ 3.) Further, Lockheed Martin is forced to pursue contribution from the other dischargers given the Regional Board's failure to name all parties in the CAO, which will cause parties to incur substantial costs given the uncertainty of the allowable remedy at the Site. (*See id*. ¶ 4.)

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B. There Will Be No Substantial Harm to Other Interested Persons and to the Public Interest if a Stay Is Granted.

Although improperly named as the implementing party for the CAO, Lockheed Martin is the sole party who will be affected if a stay is granted, and neither the public interest nor other interested parties will suffer substantial harm. But rather, the interested parties would also benefit from the stay as Lockheed Martin would not be forced to simultaneously pursue contribution before knowing the outcome of an allowable remedial design. (*See* Ex. 21 ¶¶ 5-6.)

The public interest will not be harmed by a stay pending the State Board's review. For years, Lockheed Martin has been ready and willing to implement a protective background-based cleanup of the Site, but the Regional Board has required further analysis and development of added elements to the formerly agreed remedy before fully rescinding the 2017 CAO and developing an entirely new CAO. Staying these proceedings for a short period longer so that the State Board may consider Lockheed Martin's Petition will not create any identifiable harm to public interests. An expedient cleanup is in the shared interests of Lockheed Martin and the public, yet the Regional Board's insistence on imposing significant and material changes in the cleanup obligations at the Site will hinder that goal. Staying the implementation of the CAO will not substantially delay cleanup of the Site, and certainly not any more than the delay already imposed by the Regional Board, but rather would allow parties to have some certainty as to the cleanup obligations at the Site before, again, designing a remedy. (*See* Ex. 21 ¶ 6.)

Likewise, other interested parties will not be harmed by a stay pending the State Board's review. Lockheed Martin is the sole implementing party for the CAO. Other parties to the settlement will not suffer substantial harm should the application of the improperly modified background concentrations and the 2018 SQO Amendments be stayed pending the State Board's review. (*See* Ex. 21 ¶5.)

C. There Are Substantial Questions of Fact or Law Regarding the Disputed Action.

As set forth in detail in the Statement of Points and Authorities (see Section VIII, *supra*), there are substantial questions of both fact and law including whether the background cleanup

levels for the Site, based on sound scientific analysis, should be restored to 85 ppb for total PCBs and 0.57 ppm for mercury, and that background levels of total PCBs cannot be zero or not detected.

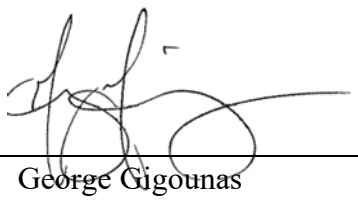
Further, the application of the 2018 Sediment Quality Objectives provisions to the CAO by the Regional Board is improper and beyond its authority: (1) the CAO cannot require that Lockheed Martin perform a cleanup to achieve lower than background levels for the contaminants at issue, and no party disputes that the Site' RAP is designed to achieve a background cleanup and the PRMP, as written, will determine whether background cleanup has been achieved; (2) there is no legal requirement that "all ongoing cleanups" must comply with the 2018 SQO Amendments; (3) Lockheed Martin relied to its detriment on the Regional Board's representations that a background cleanup would not require compliance with the SQOs; and (4) the Regional Board improperly dismissed Lockheed Martin's concerns and concluded without authority or logical explanation that the 2018 SQO Amendments are applicable to the Site.

It is also substantial that all parties must be named in the CAO, including the Port of San Diego and General Dynamics given parties respective liabilities are no longer covered by the Settlement Agreement.

Last, the State Board must decide whether the Regional Board's actions of rescinding the 2017 CAO and reissuing an entirely new CAO is improper and unlawful.

For these reasons, Lockheed Martin respectfully requests a stay, while this petition is pending, of any action by the Regional Board to assert Lockheed Martin is in violation of the CAO for failing to implement.

Dated: September 9, 2022

By: 

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