

In Re Tentative Cleanup and Abatement Order No. R9-2011-001

SAN DIEGO GAS & ELECTRIC
COMPANY

CLOSING ARGUMENT

November 16, 2011



SDG&E Has Positively Contributed to This Process For Several Years

- Its Expert Has Devoted Hundreds of Hours to:
 - Extensive Review and Expert Analysis of Site-Specific Data Regarding Beneficial Use Impairment and Alternative Cleanup Levels
 - Contributing expertise to the Project through 5 written reports
- SDG&E and Its Expert Have Participated in Countless Mediation Sessions to Resolve Differences
- SDG&E Supports:
 - The Remedial Footprint
 - The Ultimate ACL's

SDG&E's Request for Rescindment Should Be Granted

- Opposition Is Only Supported by Inadmissible Attorney Argument, Shielded from Cross Examination
- The *Only* Expert Testimony Offered to the Board Conclusively Establishes:
 - No Basis to Name SDG&E, and
 - Shipyards as Sole Source
- Why this Board Should Reject the Theory that It is Legal to Strip Away the Requirement of Causation from Water Code Section 13304
 - No Liability Without Proof of a Discharge that **“Creates, or Threatens to Create, A Condition of Pollution”**

Cleanup Team's Legal Burden

- Must Produce Evidence Which Establishes That a Discharger Was Responsible for Releasing Contaminates Of Such a Mass and Concentration That The Beneficial Use of the Receiving Water Was Unreasonably Affected; and
- The Evidence Produced Must Meet the Legal Test of “Substantial”
 - Excludes Speculation **AND ATTORNEY ARGUMENT**
 - **Cannot Consider Claims of BAE, City and CUT Counsel as Evidence**
 - **“Testimony” shielded from cross examination**
 - Must be
 - “Reasonable in Nature”;
 - “Credible”; and
 - “Of Solid Value”

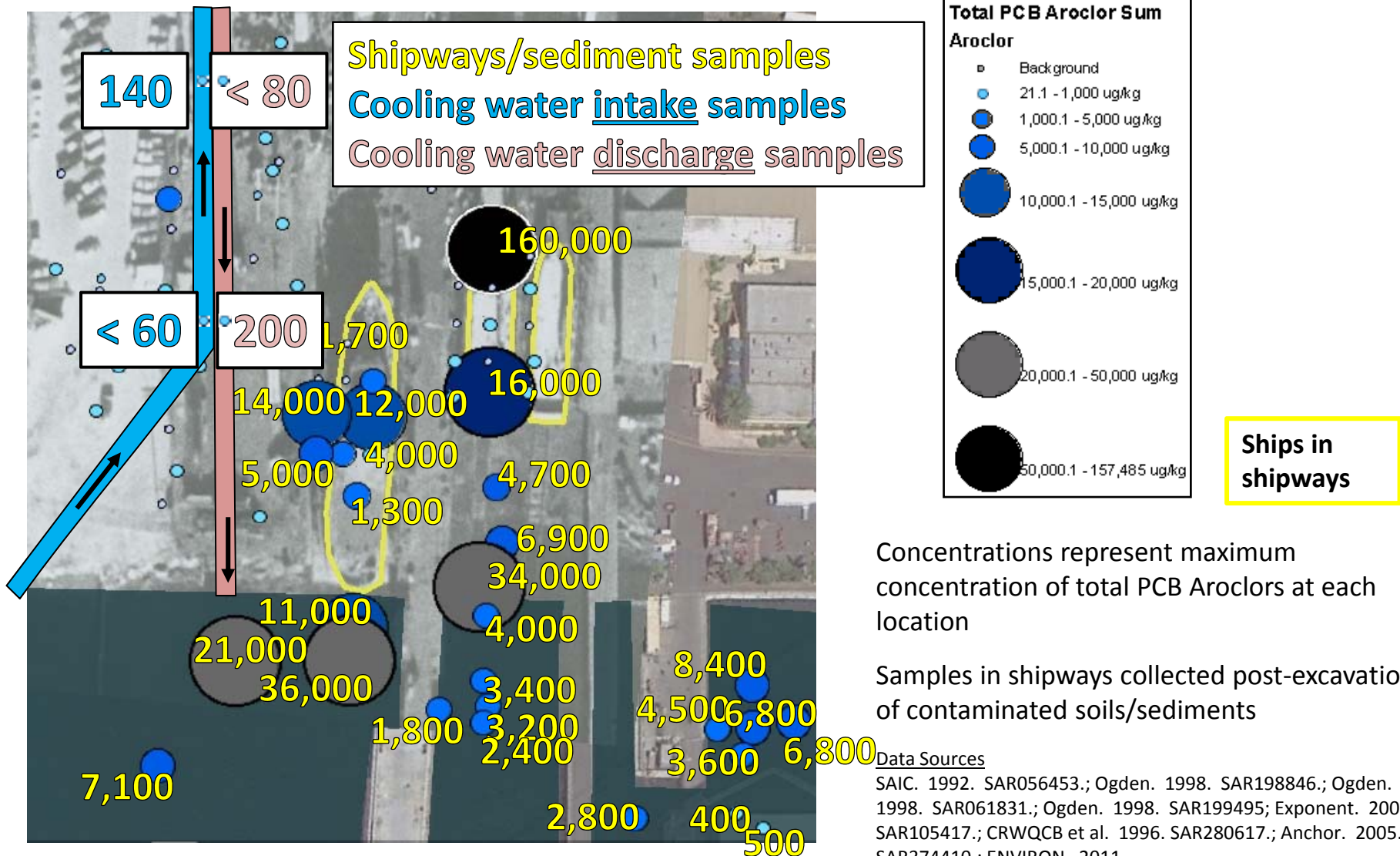
Failure to Substantiate Claims by Expert Evidence Permeates the Record

- BAE, the City and CUT's Failure at this Hearing to Offer the Board Anything but Inadmissible Attorney Argument Repeats What Has Occurred Throughout this Process
- Administrative Record Utterly Devoid of Any Support Of the Allegations Against SDG&E by a Qualified Expert
- BAE, the City and CUT Never Address Either Mass or Concentrations

What is the Actual Evidence?

- Overwhelming Evidence
- Presented by The Only Expert Offered to the Board on Liability Issues, Dr. Jason Conder
- Establishing, That, Unlike the Shipyards:
 - “Potential” SDG&E Sources Argued by Opposition Attorneys
 - **Could Not** Have Discharged Sufficient Mass to Cause a Condition of Pollution or Nuisance in Bay Sediment

Cooling Water Discharge Insufficient to Cause a Condition of Pollution or Nuisance



140

< 80

< 60

200

160,000

1,700

14,000

12,000

16,000

5,000

4,000

4,700

1,300

6,900

34,000

11,000

21,000

36,000

4,000

8,400

1,800

3,400

4,500

6,800

7,100

3,200

2,400

3,600

6,800

2,800

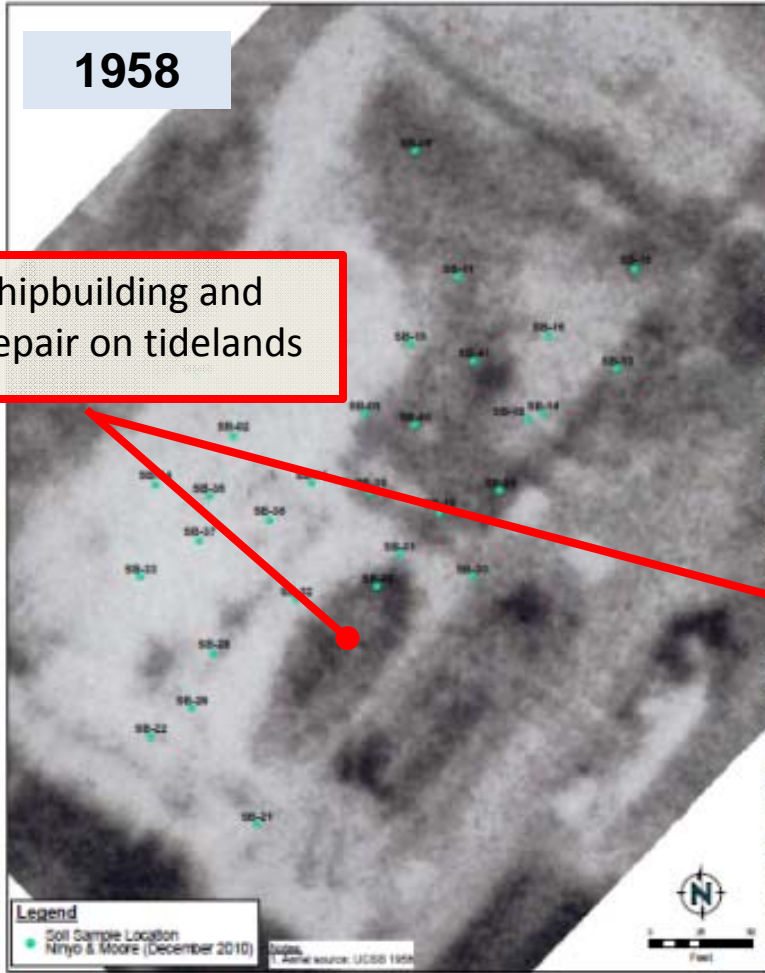
400

500

Shipyard Use of SDG&E Tidelands Began in 1958

1958

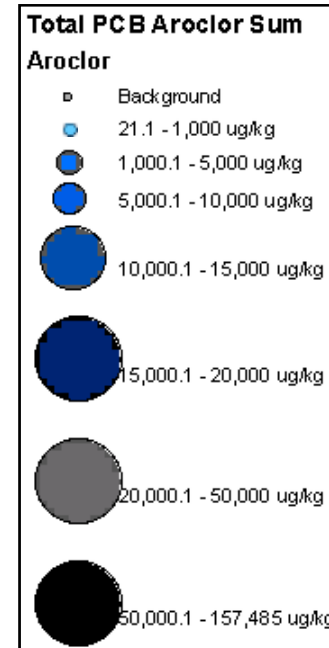
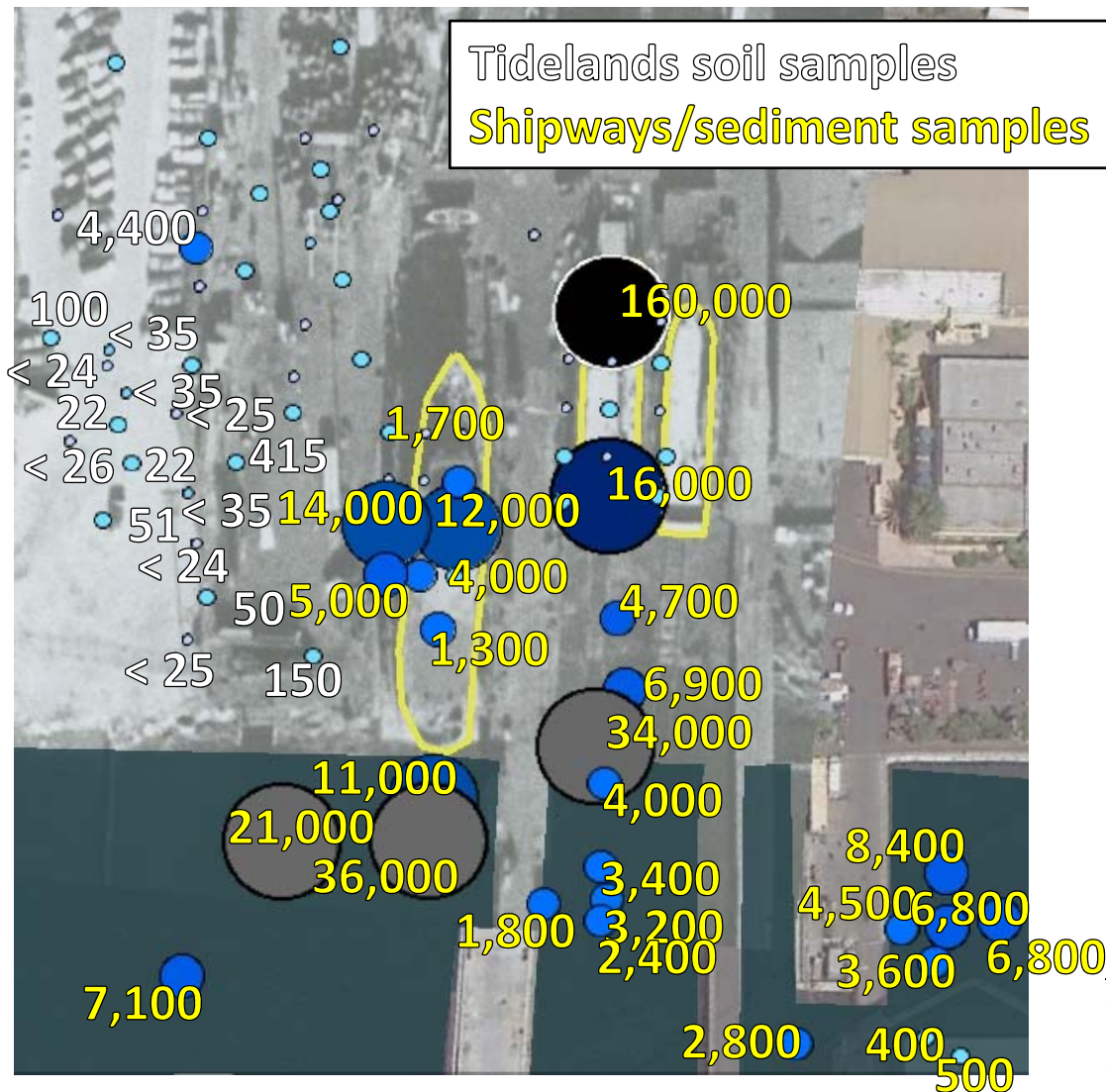
Shipbuilding and repair on tidelands



1978



Runoff from Tidelands Insufficient to Cause a Condition of Pollution or Nuisance



Ships in shipways

Concentrations represent maximum concentration of total PCB Aroclors at each location

Samples in shipways collected post-excavation of contaminated soils/sediments

Data Sources

SAIC. 1992. SAR056453.; Ogden. 1998. SAR198846.; Ogden. 1998. SAR061831.; Ogden. 1998. SAR199495; Exponent. 2003. SAR105417.; CRWQCB et al. 1996. SAR280617.; Anchor. 2005. SAR374410.; ENVIRON. 2011.

Substantial Evidence Refutes Attorney Arguments Re Runoff from Silvergate Substation



- No Evidence That Any Leakage of COC's at the Silvergate Facility Ever Migrated Off-Site
- No Evidence That Any Leaks Were Of Sufficient Mass to Either
 - Escape the Facility's Comprehensive Containment Structure;
 - Or, Could Have Reached the Bay in Sufficient Mass to Cause a Condition of Pollution

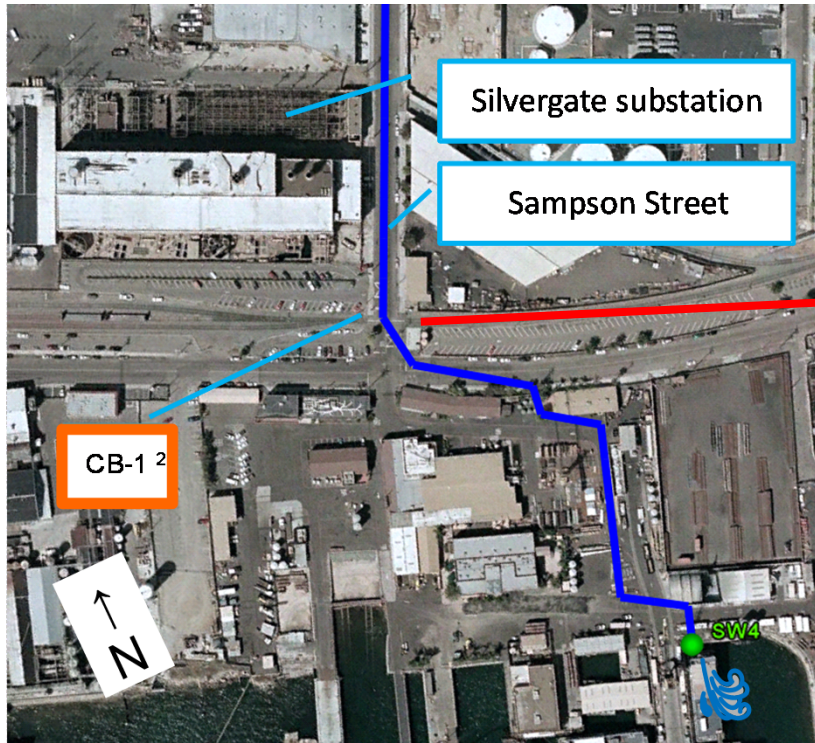
The Silvergate Plant's Comprehensive Containment Structure

- Transformers contained within concrete sumps;
- Eastward grading above the underground storage tanks (UST) away from the Bay;
- Six-inch high curb across the UST area that contained potential transformer spills or potential minor fuel oil tank overflows;
- A ten-inch high ramp across the driveway into the UST/transformer switchyard area that bounded the tank area between the ramp, the power plant building and a two foot high retaining wall;
- A sealed drain valve within the ramp capable of holding up to 25,000 gallons in the contained enclosure;
- Four-inch high curbs along the power house building to contain four small transformers that served generating Unit 2;
- A 12-inch high concrete wall and a 4-inch high doorway around the transformers that serve generating Unit 1;
- Drainage of turbines directed into a sump pump that discharged to wastewater Void 2 via level-actuated automatic pumps;
- High level alarms on wastewater Voids 1 and 2 to prevent overflow; and
- Manual release of water required for the secondary containment areas to ensure only clean water was released.

Runoff from Silvergate Substation Did Not Flow Through CB-1

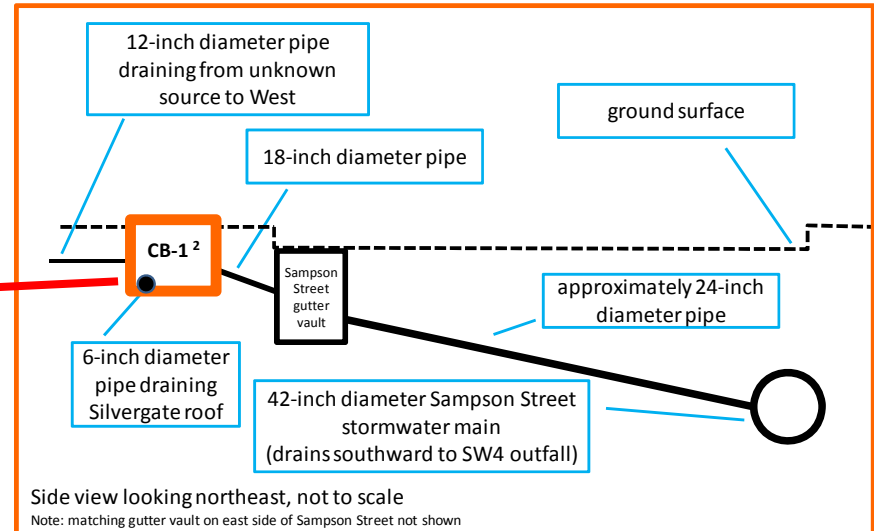
Legend

-  SW4 stormwater outfall location
-  SW4 stormwater main



Notes:

1. December 30, 2004 USGS aerial photo.
2. CB-1 is upgradient of the Sampson Street gutter vault.



Shipyard Marine Paints

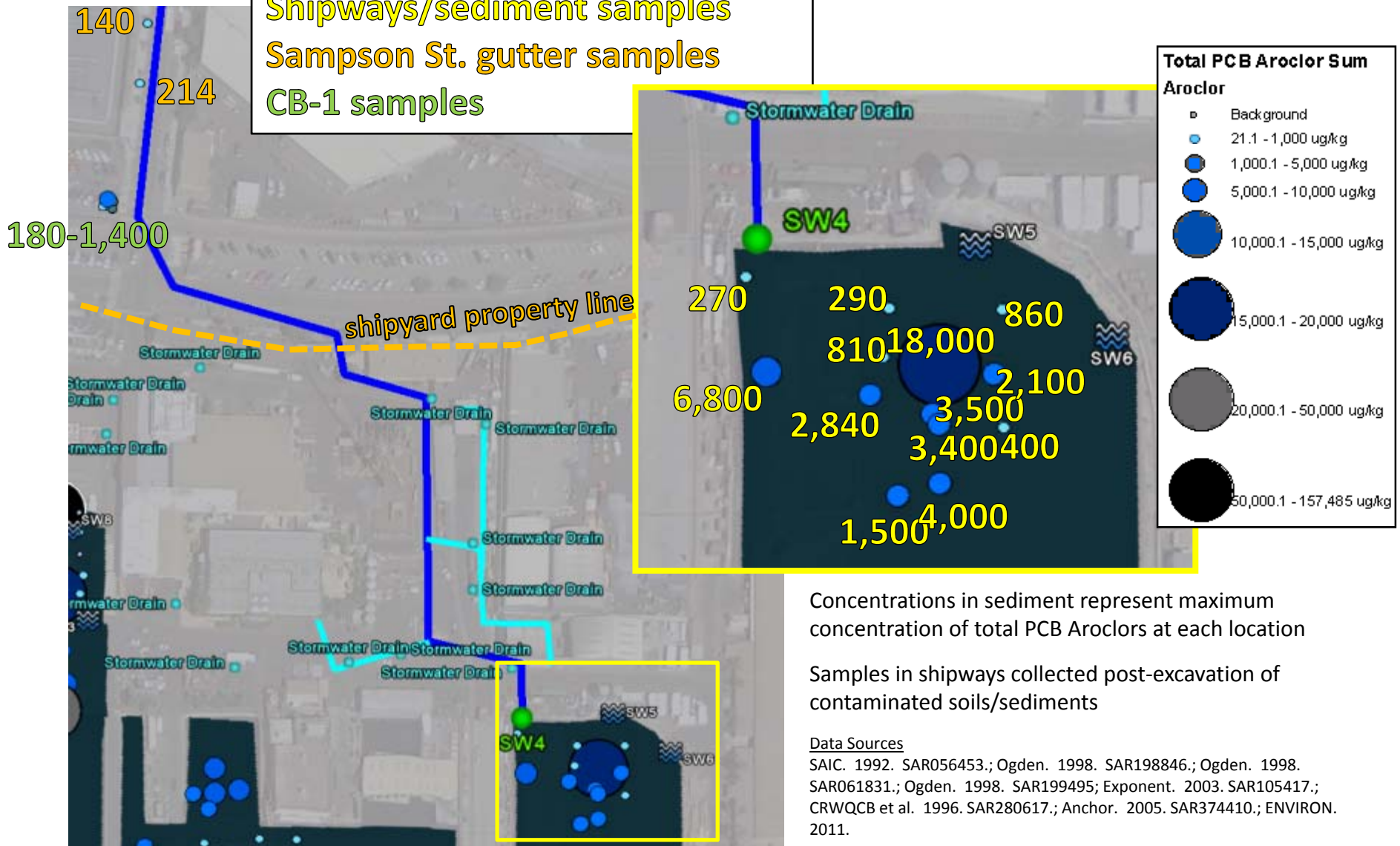
Direct Releases of Paint to Shipyard Site Sediment

- Circa 1971, CRWQCB estimated that 5-10% of sandblasting material discharged to San Diego Shipyard Site, a mass of **~200-300 tons annually** (CRWQCB, 1972)
- During spray painting of ships in San Diego shipyards, 5-30% of paint is lost to the environment (USEPA, 1974)



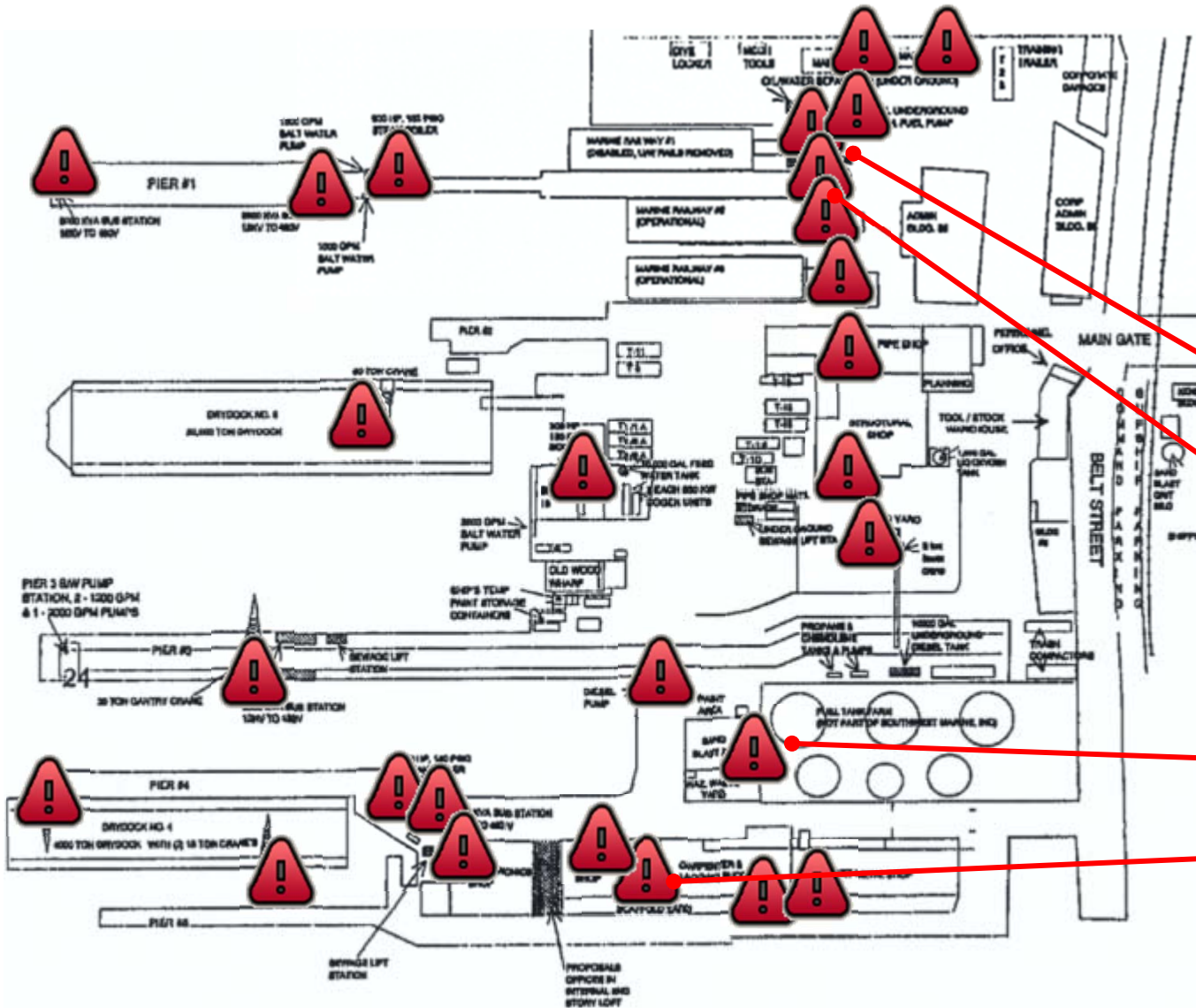
Stormwater Runoff Insufficient to Cause a Condition of Pollution or Nuisance

Shipways/sediment samples
 Sampson St. gutter samples
 CB-1 samples



**WHERE DOES RESPONSIBILITY LIE?
BAE and Its Shipyard Predecessors**

Shipyard COC Sources



Active primary sources associated with shipyard features:



Oil-water separator

Wenches or other sources associated with shipways

Sandblasting Area

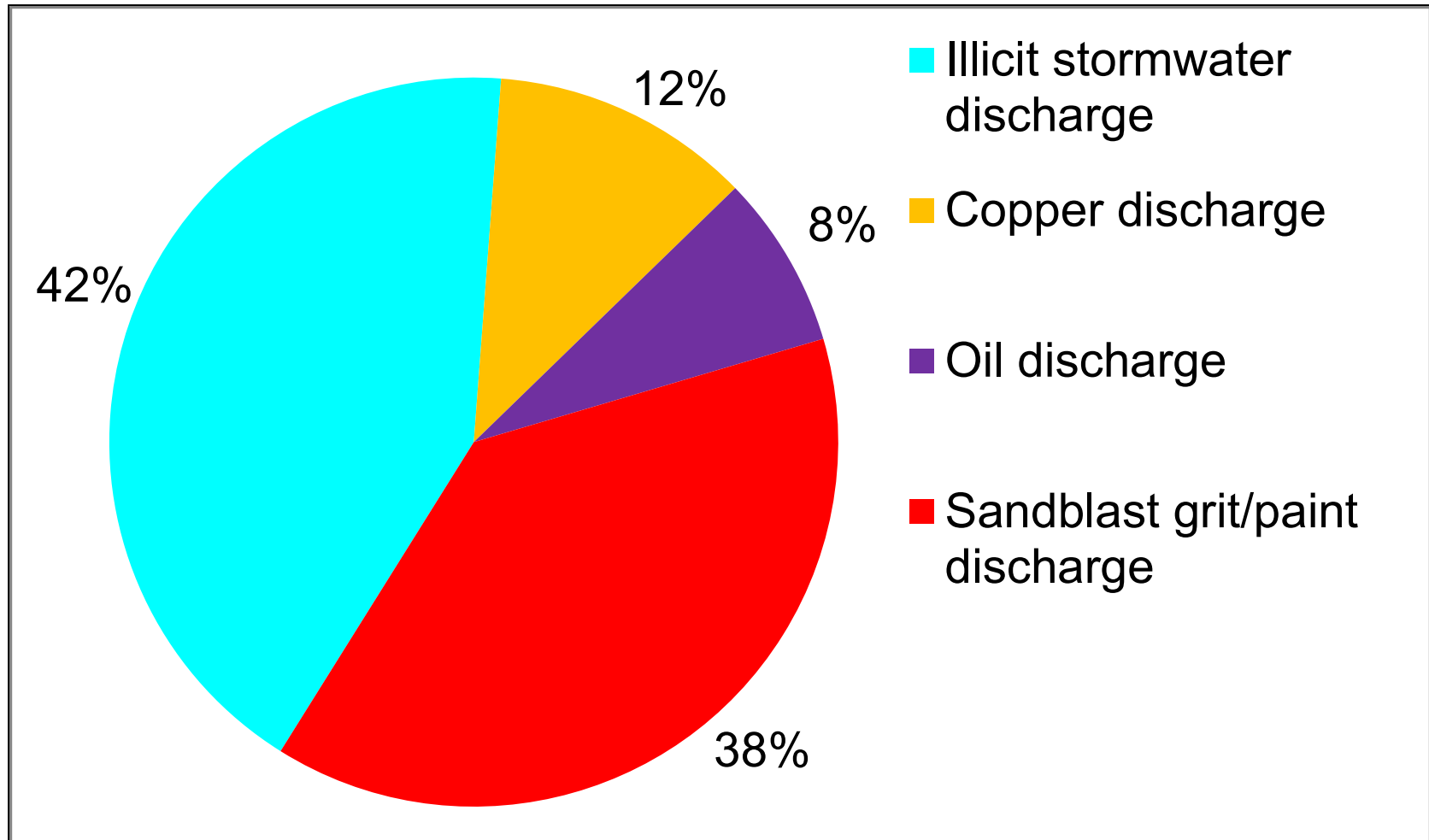
**Building 40.3
Electrical
Transformer**

Shipyard PCB Uses and Sources

Shipyard Features	PCB Sources (<u>OPEN</u> system sources highlighted in yellow)				
	Hydraulic Fluid	Cutting / Machine Oils	Dielectric Fluid	Paint and Sand-blasting	Shipbuilding and Repair Materials
Repair Stations on Shipways	●	●	●	●	●
Stormwater outfalls	●	●	●	●	●
Cranes, Winches, Pumps, and Hydraulics	●	●			
Boiler, Steam Sheds, and Compressors	●	●			
Electric Saw, Electric Shops, Electric Sheds, Electrical Parts and Storage, Machine Shops, Welding Shops	●	●	●		●
Paint Shop, Paint Storage				●	
General Storage, Warehouses, Storage Tanks	●	●	●	●	●
Lumber and Woodworking Sheds	●	●			
Transformers and electrical infrastructure			●		

Active primary sources associated with shipyard features: ●

Over 100 SWM/BAE Violations Noted in Administrative Record and DTR from 1983-2005



Demonstrative Exhibits Summary

Evidence	Shipyards	SDG&E
COC Use	<input checked="" type="checkbox"/> Substantial documented evidence	<input checked="" type="checkbox"/> Substantial documented evidence
Environmental Pathways	Direct releases to/directly adjacent to Bay <ul style="list-style-type: none"> <input checked="" type="checkbox"/> Paint and sandblast material <input checked="" type="checkbox"/> Runoff <input checked="" type="checkbox"/> Waste disposal <input checked="" type="checkbox"/> Direct releases 	Direct releases to Bay <ul style="list-style-type: none"> <input checked="" type="checkbox"/> Cooling water Indirect/incomplete pathways <ul style="list-style-type: none"> <input type="checkbox"/> Tidelands ponds <input type="checkbox"/> CB-1 <input type="checkbox"/> Substation runoff to Sampson St.
High Magnitude of COC Mass Releases	<input checked="" type="checkbox"/> Substantial evidence	<input type="checkbox"/> No evidence
Corresponding Site-specific Chemistry Data	Strong evidence indicating shipyard source <ul style="list-style-type: none"> <input checked="" type="checkbox"/> Concentrations in source areas (shipways) higher than sediment <input checked="" type="checkbox"/> Logical concentration gradient leading to source areas <input checked="" type="checkbox"/> Chemical fingerprint match 	Strong evidence indicating <u>absence of source</u> <ul style="list-style-type: none"> <input type="checkbox"/> Concentrations in source areas and along transport pathways lower than sediment <input type="checkbox"/> Lack of logical concentration gradient leading to source areas <input type="checkbox"/> Chemical fingerprint mis-match

= Evidence supporting condition of pollution or nuisance

The Legal Standard for Water Code
Liability: Is “One Molecule” Enough?

Discharger Liability May Be
Based *Only* on Discharges That
Are Significant Enough to Create
“Pollution”

Water Code Sections 13304(a) and (e)

- (a) Any person who has discharged or discharges waste into the waters of this state in violation of any waste discharge requirement or other order or prohibition issued by a regional board or the state board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state **and creates, or threatens to create, a condition of pollution or nuisance**, shall upon order of the regional board, clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including, but not limited to, overseeing cleanup and abatement efforts.
- (e) "Threaten," for purposes of this section, **means a condition creating a substantial probability of harm**, when the probability and potential extent of harm make it reasonably necessary to take immediate action to prevent, reduce, or mitigate damages to persons, property, or natural resources.

Discharger Liability Can *Not* Be Based Upon *Any* Discharge, Regardless of Mass

- Water Code Establishes the Opposite Standard:
 - Requires Impact Which “Creates or Threatens to Create” an “Unreasonable Affect” on the “Beneficial Use” of the Receiving Waters
- There is No Other Legally Justifiable Standard
- Why?
 - Actual Causation Required by the Clear Terms of the Law
 - Alternative Argued by the Opposition Attorneys – Liability by Merely “Adding” to Pollution Caused by Others – Is Precisely the Kind of Completely Standardless Approach Condemned by the Courts

There is No Way to Define, or
Limit, the Scope of Liability
Created by the “Adding to” or
“Contributed to” Argument

What Would It Be?

- One Molecule?
- Ten?
- Ten Thousand?
- Ten Million?

Conclusions

- SDG&E not properly named as Discharger.
- Opposition “Supported” by Only By Attorney Argument
- Unnecessary and Unjustified Addition of SDG&E Would Weaken the Cleanup Order, Benefitting Only Those Parties Interested in Further Delay
- Request for Rescindment Should be Granted