

SAN DIEGO UNIFIED PORT DISTRICT V. MONSANTO CO., ET AL

*PROACTIVELY ADDRESSING LEGACY PCB
CONTAMINATION IN SAN DIEGO BAY*

AAPA PORT ADMINISTRATION AND LEGAL ISSUES CONFERENCE - FEBRUARY 12, 2019

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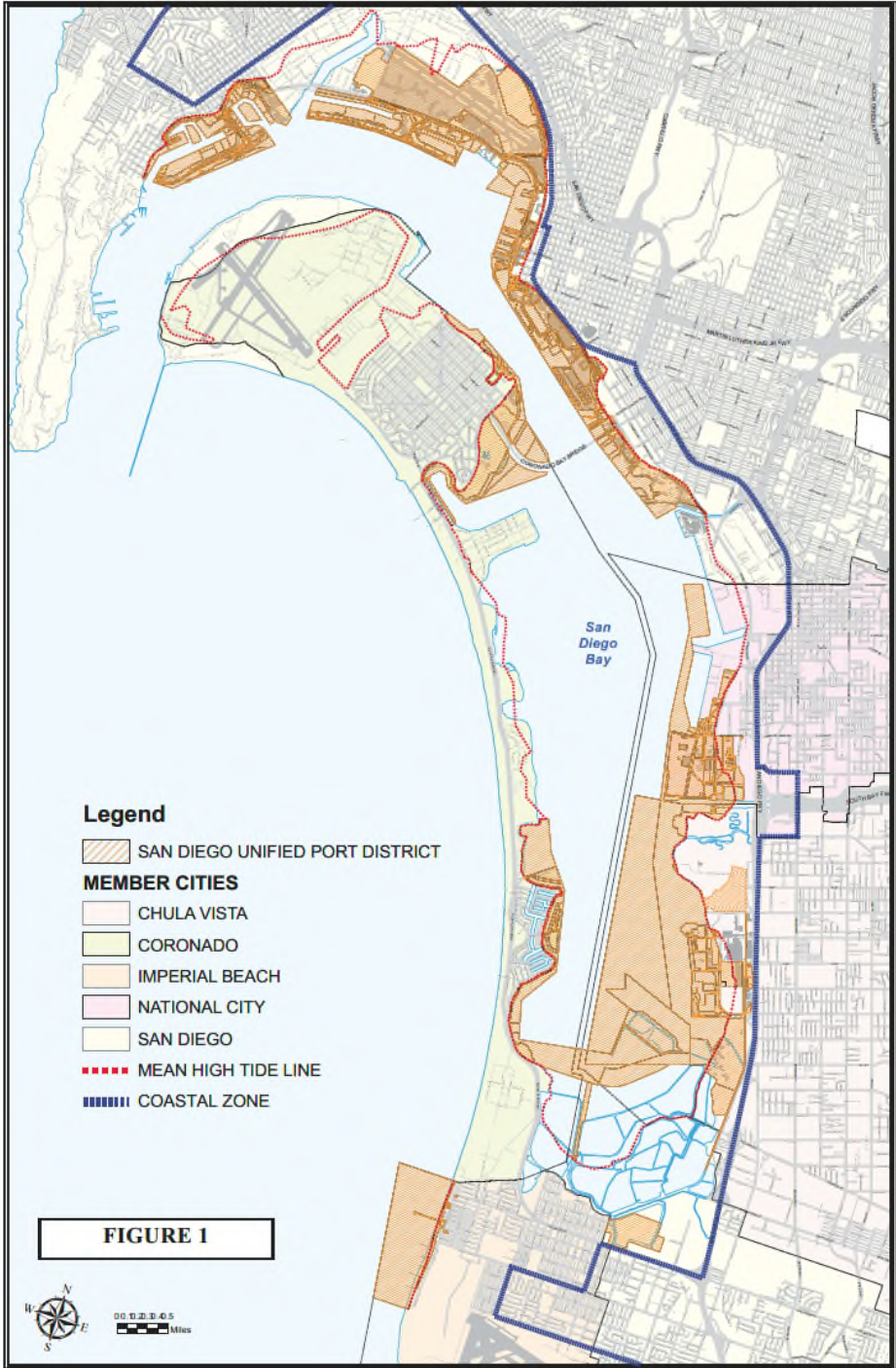
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San Diego Unified Port District

- Established by State legislature in 1962 to manage San Diego Bay and surrounding waterfront
- Member cities: Chula Vista; Coronado; Imperial Beach; National City; and San Diego
- 4th largest of 11 major ports in California
- 2 maritime cargo terminals, 2 cruise ship terminals, 22 public parks, Harbor Police Department
- Hundreds of tenants/subtenants across hospitality and tourism, recreational, and industrial uses



Source: SDUPD Port Master Plan August 2017



Port District Charter - Environment

- Hold and manage tidelands/submerged lands in trust “for the development, operation, maintenance, control, regulation, and management of the harbor of San Diego ... **and for the promotion of commerce, navigation, fisheries, and recreation therein.**” Harb. & Nav. Code App. 1, §§2, 4, 5, 5.5.
- Use its “powers and authority ... **to protect and enhance ... physical access to the bay ... natural resources of the bay, including plant and animal life ... [and] quality of water in the bay.**” *Id.*

Environmental Stewardship

- Pollution Prevention: Stormwater; copper; tributary TMDLs; Climate Action Plan; Green Port Program
- Public Education: Scholarships; educational programs
- Legacy Cleanup: Major sediment remediation projects; litigation
- Restoration and Habitat Enhancement: Mitigation banking; wetlands preservation; coastal resilience; species conservation; debris removal
- Resource Management: Aquaculture and Blue Technology; INRMP (USN); RHMP; SCCWRP

Environmental Stewardship

- Recent examples of environmental awards and recognition...
 - December 2018 – San Diego Association Environmental Professionals Merit Award
 - October 2018 – Industrial Environmental Association Blue Sky Award
 - September 2018 – 3 AAPA Environmental Improvement Awards (Stakeholder Education, Awareness and Involvement; Environmental Enhancement; and Mitigation)

Polychlorinated Biphenyls (“PCBs”)

- Man made compounds, no natural occurrence
- Manufactured and sold in U.S. 1935-1979
- Monsanto sole domestic producer
- Wide range of industrial applications, including electrical infrastructure, caulks, paints, sealants, etc.
- Easily leach from sources into environment
- Ubiquitous global contaminant impacting all U.S. urban areas
- Highly toxic, highly persistent in the environment

PCBs in and around San Diego Bay

- Present in sediments and biota of San Diego Bay
- Tied to particular legacy industrial sources (shipyards, aerospace facilities, etc.), per RWQCB findings
- Continue to enter Bay via MS4s
- Well mixed in Bay sediments
- Bay listed as impaired by PCBs under CWA § 303(d)
- 2013 OEHHA Fish Consumption Advisory
- Primary COC for numerous RWQCB IOs/CAOs



Gold: Port Boundary

Red: Example PCB Sediment Sites per RWQCB Orders



California Legal Standards

- Liability for public nuisance may arise from:
 - “[P]romotion of [PCBs] with knowledge of the hazard that such use would create.” *ConAgra Grocery Prods. Co. v. California*, 17 Cal. App. 5th 51 (2017) (citing *City of Santa Clara v. Atl. Richfield Co*, 137 Cal. App 4th 292 (2006))
 - ◆ Cert denied by California Supreme Court (2/4/18) and SCOTUS (10/15/18)
 - “[I]nstructing users to dispose of wastes improperly.” *City of Modesto Redev. Agency v. Superior Ct*, 119 Cal. App. 4th 28, 41 (2004)

Monsanto Knowledge

- Monsanto...
 - Knew for decades that PCBs were toxic, highly persistent, and certain to be released to environment
 - Had particular knowledge that PCBs would impact marine environments
 - Continued to manufacture and promote PCBs
 - Concealed its knowledge of toxicity and persistence
 - Instructed customers to improperly dispose
- Most manufacture and use of PCBs banned via TSCA in 1979

SDUPD v. Monsanto: Complaint

- August 3, 2015 1st Amended Complaint including causes of action for public nuisance, equitable indemnity, and purpresture, seeking:
 - Judicial determination that Monsanto is liable for all costs to investigate, remediate PCBs in Bay
 - Order establishing abatement fund and compelling Monsanto to abate the nuisance/purpresture
 - Past costs, additional compensatory damages for lost use, diminution in value, injury to natural resources, etc.

SDUPD v. Monsanto: Answer

- April 14, 2017 1st Amended Answer and Counterclaims including causes of action for/under
 - CERCLA & California Hazardous Substances Account Act
 - Common law: unjust enrichment; contribution; negligence/per se; purpresture; public trust doctrine
 - Clean Water Act
- 85 affirmative defenses

Timeline of Key Litigation Events

- **August 3, 2015**: 1st Amended Complaint for Public Nuisance, Equitable Indemnity, Purpresture
- **September 28, 2016**: Order denying Monsanto MTD as to Public Nuisance/Purpresture, granting as to Equitable Indemnity
- **January 30, 2018**: Order granting Port District MTD Monsanto counterclaims
- **August 30, 2018**: Order limiting public nuisance remedy to exclude compensatory damages
- **September 21, 2018**: Order setting trial for February 18, 2020



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