ITEM NO. 6

STAFF REPORT

CITY OF OCEANSIDE

DATE: February 27, 2013

TO: Honorable Mayor and City Councilmembers

FROM: Public Works Department - Harbor and Beaches

SUBJECT: **APPROVAL OF A FIVE-YEAR MEMORANDUM OF UNDERSTANDING BETWEEN THE CITY OF OCEANSIDE, THE CITY OF SAN DIEGO, THE SAN DIEGO UNIFIED PORT DISTRICT AND THE COUNTY OF ORANGE TO FUND THE REGIONAL HARBOR MONITORING PROGRAM AND APPROVAL OF A PURCHASE ORDER NOT TO EXCEED $186,235 TO THE SAN DIEGO UNIFIED PORT DISTRICT**

SYNOPSIS

Staff recommends that the City Council approve the five-year Memorandum of Understanding (MOU) between the City of Oceanside, the City of San Diego, the San Diego Unified Port District and the County of Orange establishing the shared program responsibilities with respect to mandatory participation in the Regional Harbor Monitoring Program (RHMP); authorize the Mayor to execute the MOU; approve a purchase order in an amount not to exceed $186,235 to fund the City's share of the MOU; and authorize the Financial Services Director, or designee, to execute the purchase order.

BACKGROUND

On July 24, 2003, the San Diego Regional Water Quality Control Board (Board) requested, under §13225 of the California Water Code, that the region's harbors begin a coordinated monitoring program. The program was designed to answer the following questions:

1. What are the contributions and spatial distributions of inputs of pollutants to harbors in the San Diego Region and how do these inputs vary over the long term?
2. Are the waters in harbors safe for body contact activities?
3. Are fish in the harbors safe to eat?
4. Do the waters and sediments in the harbors sustain healthy biota?
5. What are the long-term trends in water quality for each harbor?

A three-year pilot monitoring program was designed and the original MOU commenced on July 5, 2005. The pilot program was implemented in August 2005 with plans for the full

program to begin in August 2008. The original MOU expired on June 30, 2008. Council approved a second MOU on April 2, 2008, to cover the period from July 1, 2008 through June 30, 2013. During this timeframe, besides the core monitoring program, the RHMP collected data in conjunction with the Southern California Coastal Water Research Project's Bight 2008 Monitoring Program and conducted a focus study on copper contamination in 2010.

This five-year agreement is for the period from July 1, 2013, through June 30, 2018.

ANALYSIS

The governing agencies of the region's four harbors are required by the San Diego Regional Water Quality Control Board to cooperate in the monitoring program, per Permit Order No. R9-2007-0001.

The pilot program was completed in 2007. Oceanside's cost share for the pilot program was approximately $120,000 for the total three-year period. During the second MOU, from 2008 to 2013, Oceanside's cost share was approximately $132,000.

The program was originally focused on answering five core questions that were aimed to address the safety of harbor waters for human contact, fish consumption, sustainability of marine life, and spatial and temporal trends of pollutants. The original 2008 core monitoring program provided chemical, bacterial and toxicological evidence to suggest that for the most part, the waters and sediments of the region's harbors are indicative of sustaining healthy marine life and are safe for human contact. However, copper (Cu) contamination was found to be a contaminant of concern in all harbors, likely from antifouling paints in boat hulls, urban runoff inputs into harbors, and deposition/re-suspension from contaminated harbor sediments.

Several focus studies conducted in 2011 & 2012 assessed the levels of copper in harbor waters and sediments, and the biological risk associated with the contamination. Additionally, a chemical flux study provided evidence that harbor sediments can both absorb and release ambient copper, with the process further complicated by water quality chemistry affecting the potential toxicity to aquatic life.

The next stage of the RHMP is the formulation of a synthesis report to summarize results of the studies to date, and to analyze long-term trends in data collected both through the core monitoring and Southern California Bight program (managed by SCCWRP). Additionally, the availability of data from the 2008 Bight monitoring effort will add knowledge to the RHMP effort to answer questions regarding levels of contamination in sport fish species that may be found in the region's harbors.

The San Diego Unified Port District has the largest area of the four harbors and administers the program. The Port District will send out a Request for Proposal in May 2013. Based on previous monitoring experience and current pricing on other projects, the Port has estimated the cost for Oceanside Harbor's portion to be no more than $186,235 for the five-year period.

FISCAL IMPACT

The program will be paid for from funds from the Harbor and Beaches operating accounts (624010101.5305). The cost of the contract will be appropriated each year for the term of the MOU under account 624010101.5305 as part of the annual budget processing beginning in FY 13-14. A breakdown of Oceanside's annual costs is shown in Attachment A; Exhibit B, page 14 of the Regional Harbor Monitoring Program Proposed Cost Share Formula in the 2013 RHMP MOU.

COMMISSION OR COMMITTEE REPORT

Does not apply.

CITY ATTORNEY'S ANALYSIS

The City Attorney has reviewed the MOU and approved as to form.

RECOMMENDATIONS

Staff recommends that the City Council approve the five-year Memorandum of Understanding (MOU) between the City of Oceanside, the City of San Diego, the San Diego Unified Port District and the County of Orange establishing the shared program responsibilities with respect to mandatory participation in the Regional Harbor Monitoring Program (RHMP); authorize the Mayor to execute the MOU; approve a purchase order in an amount not to exceed $186,235 to fund the City's share of the MOU; and authorize the Financial Services Director, or designee, to execute the purchase order.

PREPARED BY:

Frank Quan
Harbor and Beaches Coordinator

SUBMITTED BY:

Peter A. Weiss
City Manager

REVIEWED BY:

Michelle Skaggs-Lawrence, Deputy City Manager

Teri Ferro, Financial Services Director

Attachment A: MOU

Attachment B: Cost Sharing Formula

ATTACHMENT A

MEMORANDUM OF UNDERSTANDING
REGARDING THE REGIONAL HARBOR MONITORING PROGRAM

This Memorandum of Understanding, hereinafter called the "Regional Harbor Monitoring Program MOU" is made and entered into in July 2013, between the County of Orange, City of Oceanside and City of San Diego, all municipal corporations ("County & Cities"), and the San Diego Unified Port District, a public corporation ("Port"). The Port and County & Cities shall be referred to hereinafter individually and/or collectively as "Party/ies."

RECITALS

Whereas, the Port and the County & Cities have negotiated this Regional Harbor Monitoring Program MOU to work jointly to implement the Regional Harbor Monitoring Program. The Regional Harbor Monitoring Plan (RHMP) is required by the July 24, 2003, directive from the San Diego Regional Water Quality Control Board (RWQCB) pursuant to §13225 of the California Water Code. The intent of this coordinated program is to develop a coordinated monitoring effort of harbors in the San Diego Region to provide water quality status and trends information, as well as to assess the surface water's abilities to support designated beneficial uses.

Whereas, the Port has agreed to lead the RHMP for the Parties.

Whereas, the Parties recognize that expenditures will be needed to complete the work identified in the RHMP, and that the costs will be shared between the Port and County & Cities.

Whereas, the Parties have reached an agreement on a funding formula as described in Exhibit A, which will be applied to allocate portions of the total RHMP costs to each Party. The funding formula is based upon land (water) area, harbor stratification, and a fixed percentage for data management and reporting.

Whereas, the County & Cities agree to provide funding to the Port for their portion of the costs associated with implementing the RHMP as described in this MOU and for administrative oversight of the RHMP.

Whereas, the Parties intend this MOU to provide for the performance of studies, monitoring and development of programs and funding therefore for a period of five (5) years, through June 30, 2018 after which the Parties recognize that additional agreements may be necessary for further monitoring, studies and load reduction implementation projects over the period covered by the RHMP.

NOW, THEREFORE, in consideration of the mutual promises and covenants set forth herein, the Parties hereby agree as follows:

1. TERM OF MOU

a. The term of this MOU shall commence on July 1, 2013 and is effective through June 30, 2018, unless earlier terminated by the Parties as provided below.

2. DIVISION OF PROGRAM COSTS

a. Exhibit A, attached hereto and incorporated by this reference describes the default cost-share formula agreed upon by the Port and County & Cities. The cost share formula is applicable to any and all consultant costs and work performed under the RHMP. The associated costs shall be divided among participating Parties using the default formula described below, unless a Special Formula is approved by the Parties to which the cost applies.

   i. Fifty percent (50%) of the total RHMP costs shall be allocated for water area in each harbor. Water areas shall be divided among the Parties by dividing the total water area for the harbor of each Party by the combined total water areas for the harbors within the geographic area applicable to the RHMP.

   ii. Thirty-five percent (35%) of the total RHMP costs shall be allocated for harbor stratification. Harbor stratification costs shall be divided among Parties by dividing the number of strata present for each harbor area by the overall number of strata possible for inclusion within each harbor area.

   iii. Fifteen percent (15%) of the total RHMP costs shall be allocated equally amongst all of the Parties for data analysis, data management and reporting.

   iv. Modification of the Default Formula requires the unanimous approval of all Parties signatory to this MOU.

b. The County & Cities shall reimburse the Port for overhead expenses associated with the administrative costs incurred during the role of leading the RHMP in the amount of five percent (5%) of the total RHMP cost. This administrative cost shall be divided evenly among the County & Cities.

c. Exhibit B, attached hereto and incorporated by this reference, indicates the not to exceed costs agreed upon by the Parties and determined according to the cost share formula and five percent (5%) administrative cost for work performed under the RHMP.

d. The obligation of each Party is subject to the availability of funds appropriated for this purpose, and nothing herein shall be construed as

obligating any Party to expend any funds beyond those lawfully appropriated or as involving any Party in any contract or other obligation for the future payment of money in excess of appropriations authorized by law.

e. Special cost-share formulas may be needed to fund special studies or other efforts required for RHMP compliance and conducted jointly by the Parties. The special cost-share formula shall be developed as appropriate to satisfy required efforts. Unanimous approval by all Parties participating in the cost-share formula shall be required prior to its adoption.

3. FUNDING AND PROGRAM BUDGET

a. The Port shall submit a budget for each fiscal year throughout the term of this MOU to the County & Cities by December 1 of each year. The budget shall contain an explanation of any recommended program changes, an estimate of all planned expenditures and an estimate of the payment required from the County & Cities for the following fiscal year. The County & Cities shall be permitted to review and approve the program scope of work and budget for the forthcoming year.

b. The Port shall prepare a fiscal year end accounting within 60 calendar days of the end of each fiscal year. If at the end of each fiscal year the invoiced funds exceed the total costs of work performed during that fiscal year, the excess funds shall be credited to the next fiscal year's allocated costs.

c. The Port shall notify the Parties if it appears that costs may exceed the budget approved by the Parties for any fiscal year. If any fiscal year end accounting results in costs exceeding the sum of the deposits, and the Port has notified the Parties of potential cost overruns, the Port shall seek approval of the excess cost from the Parties in the form of a revised budget and, upon approval, shall invoice each Party for its prorated share of the excess cost up to the amount of the revised approved budget.

d. Upon termination of this Regional Harbor Monitoring Program MOU, if there are any excess funds, the Port shall reimburse the County & Cities their prorated share within 60 calendar days of the final accounting.

4. PAYMENT

a. The Port will invoice County & Cities no later than the beginning of each fiscal year with the agreed upon amount for each upcoming fiscal year.

b. The County & Cities shall pay the Port's invoice within 45 calendar days from the date of the invoice.

5. OBLIGATIONS OF THE PORT

a. Project Administration

i. The Port will provide overall administrative and other professional services required for design and managing the Regional Harbor Monitoring Program. Responsibilities shall include, but not be limited to the coordination of Parties and consultants, setting up and leading RHMP meetings, preparing annual RHMP budgets, invoices, etc., corresponding with the RWQCB regarding work completed, and reviewing and/or preparing documents and reports.

ii. The Port will assign qualified personnel to the RHMP project and be responsible for the general administration of the work performed by the selected consultant(s).

iii. The Port will provide quality assurance services to ensure all required monitoring, submittals, and other contract requirements are met by the consultant(s).

iv. The Port will provide annual invoices, detailed in the aforementioned Section 4, PAYMENT, by July 1 of each year to the County & Cities detailing the nature of the work to be performed and the amount of funding required during the next fiscal year. These invoices will include all monies needed for consultant(s) services for sampling, monitoring etc., and administration of the contract work.

b. Consultant selection

i. The Port will be responsible for the preparation of, advertising for, opening, reviewing bids, award and administration of any consultant contract(s).

c. The Port will develop the terms and conditions that reasonably protect the Parties from liability that may occur as a result of the Port executing the consultant agreement(s) and acting as the contracting agent.

d. The Port will include language in the consultant agreement(s) to include all Parties as additional insured. Language will also be added to the consultant agreement(s) to ensure that consultant(s) agrees to indemnify the County & Cities as well as the Port to the extent permitted by law.

6. OBLIGATIONS OF THE COUNTY & CITIES

a. The County & Cities will attend meetings, promptly return telephone calls and correspondence, participate in discussions, provide review and comments on consultant deliverables, and will share information essential for task development and completion.

b. The County & Cities will coordinate with the Port to review and approve an RHMP budget for each fiscal year that is agreed upon by all Parties.

c. The County & Cities will provide funding for the costs incurred under this MOU, subject to appropriations, based upon the terms and conditions of

this MOU. County & Cities will pay full amount of invoice by 45 calendar days from the date of the invoice.

d. The County & Cities agree to participate in the selection of one or more consultants to perform the work identified for the RHMP. The participation will include but not be limited to review of submitted proposals, interviews with consultants, and determination of final consultant selection.

e. The County & Cities will provide services to review and approve consultant submittals. In the event any change in consultant scope of work is required due to unforeseen conditions, the County & Cities shall review any changes and provide appropriate response.

f. The County & Cities agree to allow the Port and/or its consultants to enter property for work undertaken as a part of the RHMP. Before any such monitoring activities, the County & Cities will be contacted and the appropriate measures will be taken to ensure access.

g. The County & Cities will provide funding to the Port for an additional five percent (5%) of the total consultants cost for overall project management including general administration ("Administrative Cost"). This administrative cost shall be shared equally among the County & Cities.

7. GENERAL CONDITIONS

a. The Parties shall comply with all federal, state, and local laws and ordinances applicable to the work to be performed under the terms of this Regional Harbor Monitoring Program MOU.

b. The Parties will follow the practice of the environmental professional in rendering findings, opinions, factual presentations, professional advice, and recommendations.

c. Administration of this MOU and the associated consultant agreement(s) is under the jurisdiction of the Port herein, and any communication of the terms or conditions or any changes thereto.

d. This MOU shall be effective on and from the date signed by the Parties.

e. Notices required or permitted pursuant to this Regional Harbor Monitoring Program MOU shall be sufficiently given in writing and either served personally or mailed by certified mail; however, invoices, payments, and other communications according to this MOU may be served by first class U.S. mail to:

Karen Holman
Manager, Environmental Program
Environmental and Land Use Management
San Diego Unified Port District
P.O. Box 120488
San Diego, CA 92112-0488

Kris McFadden
Deputy Director, Transportation and Stormwater Department
City of San Diego
9370 Chesapeake Dr. Ste. 100
San Diego, CA 92123

Chris Crompton
County of Orange
2301 North Glassell St.
Orange, CA 92865

Frank Quan
City of Oceanside – Harbors and Beaches
1540 Harbor Drive North
Oceanside, CA 92054

or such other person and address as either party shall advise the other, in writing, in conformity with this section.

f. In the event of litigation with respect to this MOU or the interpretation thereof, and in respect to all disputes or controversies arising hereunder, this MOU shall be construed in accordance with, and governed by, the laws of the State of California. Venue in respect to any suit or proceeding brought under or in connection with this MOU shall be the County of San Diego, State of California.

g. This MOU and all rights and obligations contained herein shall be in effect whether or not any of the parties to this MOU have been succeeded by another entity, and all rights and obligations of the parties signing this MOU shall be vested and binding on their successor of interest.

h. No failure of either the Port or the County & Cities to insist on strict performance by the other of any covenant, agreement, term, or condition of this MOU or to exercise any right or remedy consequent of a breach thereof, shall constitute a waiver of any such breach or of such covenant, agreement, term, or condition. No waiver of any breach shall affect or alter this MOU, but each and every covenant, agreement, term and condition of this MOU shall continue in full force and effect without respect to any other existing or subsequent breach.

i. This MOU represents the entire understanding of the Port and the County & Cities as to those matters contained herein. No prior oral or written understanding shall be of any force or effect with respect to those matters covered herein. This MOU may not be modified or altered except in writing signed by all parties.

j. The Parties agree to mediate any dispute prior to filing suit or prosecuting suit against the other parties. The cost of mediation shall be borne equally by the Parties. In the event suit is brought upon this MOU to enforce its

terms, each party shall be responsible for its own attorneys' fees and costs.

k. The County & Cities agree to defend, indemnify, protect, and hold the Port and its agents, officers and employees harmless from any and all claims asserted or liability established for damages or injuries to any person or property, including injury to the Port's employees, agents, or officers, which arise from or are connected with or are caused or claimed to be caused by the acts or omissions of the County & Cities and its contract agents, officers, or employees resulting from the consultant(s) and all expenses of investigating and defending against same; provided, however, that the County & Cities duty to indemnify and hold harmless shall not include any claims or liability arising from the established sole negligence or willful misconduct of the Port, its agents, officers or employees.

l. The Port agrees to defend, indemnify, protect, and hold the County & Cities and its agents, officers and employees harmless from any and all claims asserted or liability established for damages or injuries to any person or property, including injury to the County & Cities employees, agents, or officers, which arise from or are connected with or are caused or claimed to be caused by the acts or omissions of the Port and its contract agents, officers, or employees resulting from the consultant(s) and all expenses of investigating and defending against same; provided, however, that the Port's duty to indemnify and hold harmless shall not include any claims or liability arising from the established sole negligence or willful misconduct of the County & Cities, its agents, officers or employees.

8. TERMINATION

a. Any Party wishing to terminate its participation in this MOU shall so notify all other Parties in writing by March 1 of any year. Such termination shall be effective the following June 30. The terminating Party shall be responsible for financial obligations hereunder to the extent incurred in accordance with this agreement by the Party prior to the effective date of termination. The balance of the Parties may continue in the performance of the terms and conditions of this MOU on the basis of a revised allocation of cost based on the funding formula in Exhibit A.

b. If any Party fails to meet or fulfill its obligations under this MOU, the Party must be notified immediately and provided the opportunity to cure such breach. If the Party fails to cure the breach within five business days, any Party may terminate this MOU.

c. The indemnification provisions set forth in Section 7, subsection k and l shall survive the termination of this MOU.

IN WITNESS WHEREOF, this "Regional Harbor Monitoring Program MOU," is executed as follows:

SAN DIEGO UNIFIED Port DISTRICT

Date: _____ BY _____

I HEREBY APPROVE the form and legality of the foregoing Regional Harbor Monitoring Program MOU on this _____ day of _____, 2013.

_____
Port Attorney

IN WITNESS WHEREOF, this Regional Harbor Monitoring Program MOU, is executed as follows:

CITY OF SAN DIEGO

Date: _____ BY _____

I HEREBY APPROVE the form and legality of the foregoing Regional Harbor Monitoring Program MOU on this _____ day of _____, 2013.

_____
San Diego City Attorney

IN WITNESS WHEREOF, this Regional Harbor Monitoring Program MOU, is executed as follows:

CITY OF OCEANSIDE

BY _____

I HEREBY APPROVE the form and legality of the foregoing Regional Harbor Monitoring Program MOU on this _____ day of _____, 2013.

_____
Oceanside City Attorney

IN WITNESS WHEREOF, this Regional Harbor Monitoring Program MOU, is executed as follows:

COUNTY OF ORANGE,

BY _____

Chairman, Board of Supervisor
Orange County , California

APPROVED AS TO FORM:
OFFICE OF THE COUNTY COUNSEL
ORANGE COUNTY, CALIFORNIA

By:_____

Deputy

Date:_____

Signed and certified that a copy of this document has been delivered to the Chairman of the Board per G.C. Sec. 25103, Reso 79-1535

ATTEST:

_____

Clerk of the Board of Supervisors
Orange County, California

IN WITNESS WHEREOF, this Regional Harbor Monitoring Program MOU, is executed as follows:

COUNTY OF ORANGE,
a political subdivision of the State of California

BY _____
BRAD GROSS, Director
Dana Point Harbor Division

APPROVED AS TO FORM:
COUNTY COUNSEL,
ORANGE COUNTY, CALIFORNIA

By:_____
Geoffrey K. Hunt, Deputy

Date:_____

EXHIBIT A

Regional Harbor Monitoring Program Proposed Cost Share Formula*

		Acreage		Strata		Fixed Cost	Total	
		50.00%		35.00%		15.00%		
Agency	Harbor	Total Harbor Acreage (mapped)	% of Total Acreage	Total Strata Present in Harbor	% of Total Strata	% Fixed Cost Percentage	% of Total Costs**	Share of Total
County of Orange	Dana Point	159	1.21	4	25.00	15	13%	
City of Oceanside	Oceanside	61	0.47	3	18.75	15	11%	
City of San Diego	Mission Bay	2041	15.59	4	25.00	15	20%	
Port	San Diego Bay	10,831	82.73	5	31.25	15	56%	
TOTALS		**13,092**	**100%**	**16**	**100%**		**100%**	**$0.00**

*Agency costs will be divided according to the following cost allocation formula:

1) Fifty percent (50%) of the total cost shall be divided based upon total acreage in each agency's respective harbor/bay.
2) Thirty-five percent (35%) of the total cost shall be divided based upon number of strata contained in each bay/harbor.
3) Fifteen percent (15%) of the total cost will be divided equally among all participating agencies. This cost share formula does not include the five percent (5%) Administrative Cost to the Port identified in the MOU. The Administrative Cost will be shared equally among the Cities and County and will be applied to annual invoices based on work conducted by a selected consultant(s).

**The total cost percentage is based on applying the 50-35-15 cost percentage to estimated funding required for the RHMP which results in the final percentages identified herein.

ATTACHMENT B

EXHIBIT B

Regional Harbor Monitoring Program Not To Exceed Costs*

Agency	Year 1 Cost Core Monitoring ($1,000,000)			Year 2 Cost ($150,000)			Years 3-5 Annual Cost ($125,000 per year)				Years 1-5 Contract Costs	Years 1-5 Total Costs
	Cost Share Amount	5% Administrative Cost	Year 1 Total Cost	Cost Share Amount	5% Administrative Cost	Year 2 Total Cost	Cost Share Amount	5% Administrative Cost	Total Annual Cost	Years 3-5 Total Cost		
County of Orange	$131,072	$16,667	$147,739	$19,661	$2,500	$22,161	$16,384	$2,083	$18,467	$55,402	$199,885	$225,302
City of Oceanside	$105,455	$16,667	$122,121	$15,818	$2,500	$18,318	$13,182	$2,083	$15,265	$45,795	$160,818	$186,235
City of San Diego	$202,948	$16,667	$219,615	$30,442	$2,500	$32,942	$25,369	$2,083	$27,452	$82,356	$309,496	$334,913
Port	$560,525	$0	$560,525	$84,079	$0	$84,079	$70,066	$0	$70,066	$210,197	$854,800	$854,800
TOTAL	**$1,000,000**	**$50,000**	**$1,050,000**	**$150,000**	**$7,500**	**$157,500**	**$125,000**	**$6,250**	**$131,250**	**$393,750**	**$1,525,000**	**$1,601,250**

*Costs are based on a $1,525,000.00 contract award, determined according to the cost share formula presented in Exhibit A, and include a 5% Administrative Cost shared equally among the County & Cities.