California Regional Water Quality Control Board
San Diego Region

ORDER OF PROCEEDINGS

PRE-HEARING CONFERENCE FOR TENTATIVE CLEANUP AND ABATEMENT ORDER NO. R9-2005-0126.

Date: October 18, 2005

To: Distribution List (designated parties and interested persons)

A Pre-Hearing Conference was held on Monday, September 26, 2005 at the office of the Regional Water Quality Control Board, San Diego Region (Regional Board). Regional Board Chairman John Minan, serving as the Presiding Officer, conducted the hearing on behalf of the Regional Board. The Pre-Hearing Conference was properly noticed and open to and attended by the public. An audio tape recording of the conference proceedings was made.

Additional pre-hearing conferences may be convened.

The primary goal of the Pre-Hearing Conference was to ensure that the future hearing(s) for the Tentative Cleanup and Abatement Order No. R9-2005-0126 (CAO) proceed in an orderly manner. There was no discussion of the merits of any provisions of the Tentative CAO. This Order of Proceedings reflects the nature of the discussions and agreements that occurred at the Pre-Hearing Conference and contains certain procedural decisions by the Presiding Officer. Rulings by the Presiding Officer contained in Paragraphs 1 and 2 and 4 through 11 of this Order are final, subject only to discretionary review by the Regional Board. Written comments pertaining to the contents in Paragraph 3 of his order are requested within 15 working days of the date of this Order.

Attendees at the Pre-Hearing Conference for the recommended and prospective designated parties included the following representatives:

Jim Dragna – Bingham McCutchen LLP (BP West Coast Products)
David Mulliken – Latham and Watkins LLP (NASSCO)
Kelly Richardson – Latham and Watkins LLP (NASSCO)
Vincent Gonzales – Sempra Energy (SDG&E)
Chris McNevin – Pillsbury, Winthrop, Shaw & Pittman LLP (Chevron USA)
Tim Miller – City of San Diego
Chris Zirkle – City of San Diego
Marco Gonzales – Environmental Health Coalition & San Diego Bay-Keeper
David Merk – Port of San Diego
Jim Mathison – Daley & Heft LLP (San Diego)
Shaun Halvax – BAE Systems
Lloyd Schwartz – BAE Systems

David Silverstein – U.S. Navy
Tom Fetter – San Diego Port Tenants Association
Craig Anderson – Industrial Environmental Association
John Richards – Regional Board Cleanup Team

Members of the Public in attendance included:

Gabriel Solmer, Mekoda Mahoney – San Diego BayKeeper
Sonia Rodriguez, Laura Hunter, Georgette Gomez – Environmental Health Coalition
Michelle Russell – Project Navigator
Ed Kimura – Sierra Club
Craig Anderson – Industrial Environmental Association
Brian Wall – Chevron
Barry Snyder – AMEC
Chris Stransky – Nautilus Environmental
Ruth Kolb – City of San Diego
Dean Charles, Ed Modieno – de maximis
David Pohl – Weston Solutions
Russ McCarthy, Lee Wilson – CMSD
Michael Whelan – Anchor Environmental
Carole Farr – Secor
Paul Brown – SDU Port District
Mike Chee – NASSCO
Amy Komatsuzaki – Tetra Tech

The topics addressed in the Pre-Hearing Conference and the respective discussions, agreements, and decisions are as follows:

1. **Executive Officer's Participation on the Advisory Team.**
   The Presiding Officer considered motions objecting to participation by John Robertus, the Regional Board Executive Officer, as a member of the Advisory Team for the Regional Board.

   The Presiding Officer placed Mr. Robertus under oath, permitted the parties to examine Mr. Robertus about his involvement in the development of the tentative CAO, his views regarding the need for cleanup of contaminated sediments, and related matters. Mr. Robertus testified that he would be able to provide advice to the Board in an open, unbiased manner based solely on the record and testimony to be presented. No substantial evidence was presented to warrant disqualifying action.

   As a result of Mr. Robertus' testimony and his response to questions, the Presiding Officer has determined that Mr. Robertus has not been personally involved in the investigation, prosecution, or advocacy roles of the staff to any extent that would preclude his involvement as a neutral advisor to the Regional Board. The Presiding Officer has further determined that Mr. Robertus has not

developed any biases that would prevent him from providing neutral advice to the Regional Board in this matter.

The Presiding Officer, therefore, has determined that Mr. Robertus may continue to participate on the Advisory Team. The Presiding Officer has determined that Mr. Robertus shall provide all technical, scientific, and policy advice to the Regional Board in public meetings or in correspondence copied to all of the parties.

2. **Designation of Parties.**
The Pre-Hearing Conference provided an opportunity for persons seeking designated party status to address the Presiding Officer.

The Presiding Officer determined that the Regional Board Cleanup Team is a Designated Party.

The Presiding Officer also considered requests from five persons requesting Designated Party status. Persons requesting Designated Party status submitted written requests and were provided the opportunity to address the Presiding Officer. All Designated Parties were provided the opportunity to comment on each request by persons seeking Designated Party status.

The Presiding Officer has determined that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the Bay-Keeper, the Environmental Health Coalition, and the San Diego Port Tenants Association to be Designated Parties. Therefore, the San Diego Bay-Keeper, the Environmental Health Coalition, and the San Diego Port Tenants Association are hereby granted Designated Party status.

The Industrial Environmental Association and the Port of San Diego Ship Repair Association are denied Designated Party status. These entities' interests are adequately represented by having some of their members participate as Designated Parties. Moreover, their participation as Designated Parties may impede the orderly and prompt conduct of the hearing. To the extent that the San Diego Port Tenants Association desires to continue to collaborate with these entities, they may, of course, continue to do so. Otherwise, the participation of the Industrial Environmental Association and the Port of San Diego Ship Repair Association is limited to that of interested persons. They may present non-evidentiary policy statements, but may not present evidentiary testimony.

The Advisory Team's proposal to designate the San Diego Bay Council as a Designated Party is hereby rejected. The request for this designation was withdrawn by the Coast Law Group on behalf of the San Diego Bay Council in their correspondence of September 20, 2005.

3. The Proposed Order of Proceeding

The Presiding Officer proposes the following schedule and process. The schedule and process may be revisited by the Presiding Officer in a subsequent Pre-hearing Conference after the Technical Report information in Phase II is distributed by the Cleanup Team.

The following narrative describes the various phases of the schedule and process to be followed. For the convenience of the reader, Appendix A to this Order provides a chronological outline of the phases.

Phase I: Pre-Hearing Conference conducted on Sept. 26, 2005.

Phase II: The Cleanup Team shall make available to all designated parties all available technical information related to the Tentative CAO. The technical information shall include an index of the administrative record for the Tentative CAO, and any proposed revisions to the Tentative CAO. The body of information related to the Tentative CAO shall be referred to as the Technical Report.

In addition, the Cleanup Team, as part of the distribution of the Technical Report, shall provide a specific format for submitted comments to be used by all designated parties throughout the process. The format shall consist of a sequential structure to facilitate the review of submitted comments and the development of responses to comments.

Phase III: The Designated Parties, excluding the Cleanup Team, shall have **90** days after the release and distribution of the Technical Report to conduct any necessary discovery and submit evidence and comments on the Technical Report. All such comments shall be appropriately distributed to all Designated Parties. Also upon the start of the same **90** days of Phase III, the Designated Parties, shall have 30 days to submit to the Advisory Team a nonbinding summary of the areas of disagreement regarding the Tentative CAO.

Phase IV: The Designated Parties shall then have **30** days following the close of the initial 90-day comment period to conduct any discovery, including cross-examination of witnesses, and submission of evidence and comments for the purposes of rebutting evidence and comments submitted under Phase III above. Only rebuttal evidence and related comments will be accepted.

Phase V: The Cleanup Team shall have **60** days to consider all of the evidence and comments submitted under Phases III and IV above, and submit a Response to Comments and any proposed revisions to the Technical Report and/or Tentative CAO. The Cleanup Team should not submit any new evidence in Phase V. In addition, the Cleanup Team shall also provide a summary of all continuing areas of disagreement.

Phase VI: The Cleanup Team shall have **45** days to prepare all necessary documents and make all necessary notifications in preparation of the hearing before the Regional Board.

Phase VII: The Regional Board will then conduct a hearing with the primary purpose to receive comments from the public and summaries of the previously-submitted evidence and comments by the Designated Parties. Cross-examination may be available to the Designated Parties at the discretion of the Regional Board. No new evidence will be admitted at the hearing, subject to the Regional Board's discretion. The public record will be closed at the conclusion of the hearing.

Phase VIII: The Regional Board will subsequently conduct a non-evidentiary meeting to consider whether to adopt, modify, or reject the Cleanup Team's final Tentative CAO. Public comments will be limited to the proposed changes, if any, to the revised Tentative CAO. No new evidence will be admitted at this meeting.

All parties shall provide **12** hard copies of all submissions to the Cleanup Team and shall submit simultaneously distributed electronic versions of all submissions to the complete list of designated parties.

The deadline for the parties to identify any additional potential responsible parties will be **30** days from the distribution of the Cleanup Team's Technical Report.

Written comments pertaining to the contents in Paragraph 3 of this Order are requested within 15 working days of the date of this Order.

4. **Consideration of creating a comprehensive list of contested issues of fact and law.**
   The Presiding Officer directed the designated parties to establish a list of contested material issues of fact and law. This shall occur in accordance with the provisions of Paragraph 3, Phase III above. If the parties are unable to reach agreement, no party will be precluded from raising additional issues.

5. **The length and date of the hearing(s).**
   The Presiding Officer determined that the Designated Parties, the Regional Board, and the public will have a reasonable amount of time to review and comment on the Tentative CAO, the Technical Report and the comments submitted by all parties. Because of the limited time to speak and present information at the hearing and the above limitation on the submission of new evidence at the hearing, the parties should be prepared to focus primarily on advanced written submissions of testimony and evidence.

6. **Location of the hearing.**
   The hearing will likely be conducted in the Regional Board Room; the hearing, however, may be located at a facility in the vicinity of the cleanup site if reasonable arrangements can be made for a suitable site.

7. **Participation by non-English speaking persons.**
   All parties should be aware that non-English speaking persons may be in attendance at the hearing and allowance for translation should be considered.

8. **Logistics for the workshops, tours, and other methods for providing background information to the Board Members and the public.**
   The Presiding Officer does not anticipate any Board Member tours of the proposed cleanup site because of the difficulties inherent in creating a clear record, preventing ex parte communications, and providing for complete public access.

9. **Designated Parties Contacts, Organizations, E-mail Address, and Regular Mail Address.**
   All designated parties shall submit in writing to the Advisory Team any revision to the contact information consisting of the organization representative, email address, and regular mail address.

10. **Service to Regional Board Advisory Team:**

    Michael P. McCann, Supervising Engineer
    San Diego Regional Water Quality Control Board
    9174 Sky Park Court, Suite 100
    San Diego, California 93123
    Mmccann@waterboards.ca.gov

11. **Pre-Hearing Conferences.**
    The Presiding Officer may schedule subsequent pre-hearing conferences as needed.

John H Minan

JOHN H. MINAN
Presiding Officer of the Pre-Hearing Conference and
Chairman, SDRWQCB

Phase I	Phase II	Phase III	Phase IV	Phase V	Phase VI	Phase VII	Phase VIII
Pre-Hearing Conference	Release of Tentative CAO & Technical Report	90-Day Public Comment (formatted sequential structure based upon the tent. CAO & Technical Report) Discovery Submission of Evidence List of Unresolved Issues	30-Day Public Comment on the 90-Day Public Comments Additional Discovery Submission of Rebuttal Evidence	60-Day Cleanup Team Response to "All Public Comments" No new evidence submitted. Revisions to CAO and/or Technical Report Final List of Unresolved Issues	45-Day Preparation & Noticing of CAO Hearing	Hearing on CAO & Proposed Responsible Parties (Record closed at conclusion of hearing.)	Regional Board Meeting Deliberate & Vote on CAO
26 Sep 2005	Nov 2005*	Dec 2005 to Feb 2006*	Mar 2006*	Apr to May 2006*	Jun to Jul 2006*	Aug 2006*	Sep 2006*

Cumulative Days 0 90 120 180 225 227 257

*Proposed chronological schedule

Appendix A
Outline of Schedule and Process