

California Regional Water Quality Control Board
San Diego Region

~~THIRD~~ AMENDED¹

ORDER OF PROCEEDINGS

PRE-HEARING CONFERENCES FOR TENTATIVE CLEANUP AND ABATEMENT
ORDER NO. R9-~~2011-0001~~

Date: ~~May 16, 2011~~

To: Distribution List (designated parties and interested persons)

The ~~First~~ Pre-Hearing Conference was held on Monday, September 26, 2005 at the office of the California Regional Water Quality Control Board, San Diego Region (~~San Diego Water Board~~). The ~~Second~~ Pre-Hearing Conference was held on December 6, 2005 at the ~~San Diego Water Board~~ office. ~~San Diego Water Board~~ Chairman John Minan, serving as the Presiding Officer, conducted the ~~First and Second~~ Pre-Hearing Conferences on behalf of the ~~San Diego Water Board~~. The ~~Third~~ Pre-Hearing was held on April 25, 2008 at the ~~San Diego Water Board~~ office. Regional Board Vice Chair David King, serving as the Presiding Officer, conducted the ~~Third~~ Pre-Hearing Conference. ~~A Fourth Pre-Hearing Conference was conducted by Chair King and the San Diego Water Board during a regular meeting on July 14, 2010.~~ The Pre-Hearing Conferences were properly noticed and open to and attended by the public. Audio tape recordings of the pre-hearing conference proceedings were made. ~~Grant Destache, Chair of the San Diego Water Board, succeeded David King as Presiding Officer for Pre-Hearing Proceedings upon Mr. King's departure in September 2010.~~

Additional pre-hearing conferences may be convened.

The primary goal of the Pre-Hearing Conferences is to ensure that the future hearing(s) ~~in this matter~~ proceed in an orderly manner. At the Pre-Hearing Conferences, there has been no discussion of the merits of any provisions of the ~~tentative cleanup and abatement orders~~.

The ~~Second Amended Order of Proceedings, issued May 2, 2008,~~² reflected the nature of the discussions and agreements that had occurred at the ~~second and third~~ Pre-Hearing Conferences and contained ~~certain procedural decisions~~ by the Presiding Officer. Rulings by the Presiding Officer contained in Paragraphs 1 and 2 and 4 through 13 of ~~both the Second and this Third~~ Order are final, subject to clarification as necessary by the

¹ ~~A redline/strikeout version of the Third Amended Order of Proceedings showing changes from the Second Amended Order of Proceedings is available on the San Diego Water Board's website.~~

² All relevant orders, stipulations and other documents prepared by or received by the Cleanup Team or the Advisory Team are available on the San Diego Water Board's website.

Deleted: SECOND

Deleted: 2005-0126

Deleted: .

Deleted: May 2, 2008

Deleted: 1st

Deleted: Regional Board

Deleted: 2nd

Deleted: Regional Board

Deleted: Regional Board

Deleted: 1st and 2nd

Deleted: Regional Board

Deleted: 3rd

Deleted: Regional Board

Deleted: 3rd

Deleted: for the Tentative Cleanup and Abatement Order No. R9-2005-0126 (CAO)

Deleted: three

Deleted: T

Deleted: CAO

Deleted: is

Deleted: s

Deleted: ve

Deleted: s

Deleted: this

Third Amended Order of Proceedings, May 18, 2011

Presiding Officer and otherwise subject only to discretionary review by the San Diego Water Board,³

Attendees at the First 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

Attendees at the Second Pre-Hearing Conference for the Designated Parties included the following representatives:

David Silverstein – U.S. Navy
Lloyd Schwartz – BAE Systems
Shaun Halvax – BAE Systems
David Mulliken – Latham and Watkins LLP (NASSCO)
Kelly Richardson – Latham and Watkins LLP (NASSCO)
Lance McVey—NASSCO
Mike Chee—NASSCO
Tom Mulder—TN Assoc. (SDG&E)
Barbara Montgomery—SDG&E
Chris Zirkle—City of San Diego
Tim Miller—City of San Diego
Mark Elliot-- Pillsbury, Winthrop, Shaw & Pittman LLP (Chevron USA)
Marco Gonzalez—EHC
Laura Hunter—EHC
Paul Brown—Port of San Diego
Jim Mathison—Daley and Heft LLP (Port of San Diego)

³ Changes for clarification purposes have been made to Paragraphs 2, 4, 5 and 12 as between the First and Second Amended Orders of Proceeding as a result of the Third pre-hearing conference. Further changes for clarification purposes have been made to Paragraphs 1, 2, 4, 5, 8, 9, 12 and 13 as between the Second and Third Amended Orders of Proceedings.

Deleted: Second
Deleted: .
Deleted: .
Deleted: 2
Deleted: 08
Deleted: Regional Board
Deleted: 1st

Deleted: 2nd

Deleted: 3rd

Third Amended Order of Proceedings, May 18, 2011

John Richards—Regional Board Cleanup Team

Attendees at the **Third** Pre-Hearing Conference for the Designated Parties included the following representatives:

BAE Systems Ship Repair Inc.

Shaun Halvax
Lloyd Schwartz
Robert Longstreh, DLA Piper LP
Michael Tracy, DLA Piper LP

BP West Coast Products LLC

Michael McDonough, Bingham McCutchen LLP

Chevron USA, Inc.

Amy Gaylord, Pillsbury Winthrop Shaw Pittman LLP

City of San Diego

Ruth Kolb
Kris McFadden
Frederick Ortlieb
Richard Haimann, MWH

Environmental Health Coalition & San Diego Coastkeeper

Marco Gonzalez, Coast Law Group LLP
Gabe Solmer, San Diego Coastkeeper

Marine Construction and Design Company/Campbell Industries, Inc.

No representatives present.

National Steel and Shipbuilding Company

Christopher Barnes
Mike Chee
Scott Koreski
Ashley Coreen, Latham & Watkins LLP
David Mulliken, Latham & Watkins LLP
Kelly Richardson, Latham & Watkins LLP

San Diego Water Board Cleanup Team

David Barker
Craig Carlisle
Lisa Honma
Alan Monji
Ben Tobler
Erik Spiess, State Water Resources Control Board, Office of Enforcement

Deleted: Second

Deleted: .

Deleted: .

Deleted: 2

Deleted: 08

Deleted: 3rd

Deleted: Regional Board

Third Amended Order of Proceedings **4 May 18, 2011**

San Diego Gas & Electric Company

Jill Tracy

Pete Nyquist, Weston, Benshoof, Rochefort, Rubalcava & MacCuish LLP

San Diego Port Tenants Association

Richard Cloward

San Diego Unified Port District

Leslie FitzGerald

Bill Brown, Brown & Winters LLP

Sandi Nichols, Allen, Matkins, Leck, Gamble, Mallory & Natsis LLP

U.S. Navy

Nate Cushman

David Silverstein

Len Sinfield

Deleted: Second

Deleted: .

Deleted: .

Deleted: 2

Deleted: 08

The following is a summary of notable procedural developments since the Third Pre-Hearing Conference on April 25, 2008 and issuance of the Second Amended Order of Proceedings on May 2, 2008:

Settlement and Mediation

Following the Third Pre-Hearing Conference, the Designated Parties participated in limited settlement discussions with then-Presiding Officer King's participation. On June 9, 2008, Presiding Officer King referred the proceedings to mediation at the request of most Designated Parties and without objection by any party. Initially referred for a 90-day period, mediation and a stay of the proceedings continued based upon successive requests for extension until Mr. King terminated the formal mediation on July 14, 2010. (See Order dated July 16, 2010.) On September 9, 2009, the Environmental Parties withdrew from the mediation.

Formatted: Font: Bold

Updates to Designated Party Identification and Contact

Since the Third Pre-Hearing Conference, there have been numerous updates to the Designated Party Contact list maintained by the Advisory Team. These updates include but are not limited to identification of David Gibson, now San Diego Water Board Executive Officer, and Christian Carrigan of the State Water Board's Office of Enforcement, as members of the Cleanup Team. With the release of the Tentative CAO No. R9-2011-0001 (hereafter TCAO) and Draft Technical Report (hereafter DTR) on September 15, 2010, superseding prior versions of the tentative cleanup and abatement order (CAO) and draft technical report, Star & Crescent Boat Company (Star & Crescent) was first identified by the Cleanup Team as a discharger responsible for cleanup under the proposed order. Star & Crescent became a Designated Party to the proceeding upon the release of the updated TCAO (see Cal. Code Regs., tit. 23, § 648.1(a)) and was

Formatted: Font: Bold

Third Amended Order of Proceedings, May 18, 2011

Deleted: Second

Deleted: .

Deleted: .

Deleted: 2

Deleted: 08

recognized by the Presiding Officer as a Designated Party in October 2010 (see Order dated October 27, 2010). Star & Crescent's representatives are Suzanne Varco and Sarah Brite Evans. The current Designated Party primary contact list maintained by the Advisory Team is available on the San Diego Water Board's website.

TCAO/DTR Iterations

Formatted: Font: Bold

On October 8, 2009, the Presiding Officer issued an order directing the Cleanup Team to release a revised version of tentative CAO No. R9-2005-0126 and associated draft technical report on or before October 30, 2009, with comments to be due on or before January 28, 2010. He also struck "all provisions of the Second Amended Order of Proceedings that conflict with this Order." While the particular conflicting provisions were not specifically identified, it is not necessary to do so at this time because the applicable procedural schedule for the remainder of the proceedings is memorialized in this Third Amended Order of Proceedings

In compliance with directives issued in 2009, the San Diego Water Board Cleanup Team released tentative CAO No. R9-2010-0002 and its associated draft technical report on December 22, 2009 (hereafter December 2009 tentative CAO). The December 2009 tentative CAO was superseded by the TCAO/DTR, released September 15, 2010. A redline/strikeout version of the tentative order and Draft Technical Report were released on October 21, 2010. The Cleanup Team also released a complete electronic update to the Administrative Record and a redline version of the Draft Technical Report showing revisions from the December 2009 DTR on November 5, 2010.

Discovery

Formatted: Font: Bold

While Designated Parties participating in mediation may have engaged in informal discovery, the Presiding Officer notified the parties they could initiate formal discovery on the December 2009 tentative CAO upon its release in late 2009. (See Orders dated October 15 and October 27, 2009.) Discovery on the updated order originally was to be completed on or before February 22, 2010. The Designated Parties and the mediator sought and obtained an extension of the discovery period through August 23, 2010. (See Order dated January 29, 2010.) A Final Discovery Plan, developed through proposals by Designated Parties and memorializing the extension, was issued February 18, 2010.

Approaching the August 23, 2010 discovery cut-off, the Cleanup Team filed a motion to request further extension of the discovery period. The motion included an alternative request for reconsideration by a quorum of the San Diego Water Board. A Fourth Pre-Hearing Conference, which all Designated Parties and the public were invited to attend, was held on July 14, 2010. At the Fourth Pre-Hearing Conference, the San Diego Water Board affirmed the Presiding Officer's decision to deny the request for an additional extension, citing the extensive delays in the proceeding to date. On August 9, 2010, the Designated Parties stipulated among themselves under California Code of Civil Procedure section 2024.060 to a further extension of the discovery period and engaged Timothy Gallagher as Discovery Referee during the extended period, with authority to

Deleted: Second

Deleted: .

Deleted: .

Deleted: 2

Deleted: 08

make final decisions subject to discretionary review, upon request, by the Presiding Officer. Pursuant to the stipulation, Designated Parties agreed, among other things, to extend the written discovery period up to and including September 26, 2010, and all other discovery including depositions and expert reports up to and including October 26, 2010, subject to certain limitations.

On September 15, 2010, the Cleanup Team released the TCAO/DTR, superseding and updating all prior versions. Among other changes, the TCAO/DTR for the first time in the proceeding identifies Star & Crescent Boat Company and the Unified Port District of San Diego (Port District) as responsible parties for the discharges subject to cleanup.

Following a request by the Port District, Presiding Officer Destache reopened and extended the discovery schedule through March 11, 2011, subject to limited scope. Designated Parties were permitted to take additional discovery against the Cleanup Team limited to revisions to eh TCAO/DTR as released September 15, 2010 compared to the December 2009 version of the documents. The Port was permitted to take discovery against former and/or current tenant Dischargers in an attempt to determine whether any or all have sufficient resources to clean up the Shipyard Sediment Site and comply with the order to support an argument that the San Diego Water Board should find the Port District secondarily responsible under a final order.⁴ (See Order dated October 27, 2010.) The discovery period, which began in late December 2009, concluded for all purposes on March 11, 2011.

California Environmental Quality Act Process

In an Order directing release of an updated tentative cleanup order and draft technical report by late 2009, then Presiding Officer King also directed the Cleanup Team to begin the California Environmental Quality Act (CEQA) scoping process concurrent with the draft order's release "[i]f the draft revised Cleanup and Abatement Order proposes San Diego Water Board approval of remedial or other activities requiring evaluation under the [CEQA]" (Order dated October 8, 2009; see also, Orders dated October 15 and October 27, 2009.) Based upon proposed remedial actions first included in the 2009 tentative order and draft technical report, the Cleanup Team concluded that it would be necessary for the San Diego Water Board to certify and environmental impact report (EIR) prior to adoption of the proposed sediment cleanup order. The Cleanup Team held a CEQA scoping meeting in January 2010 and commenced the preparation of a draft EIR.

⁴ The September 15, 2010 DTR states: "Although the Port District is a public government entity, and there is no evidence in the record that the Port District initiated or contributed to the actual discharge of waste to the Shipyard Sediment Site, it is nevertheless appropriate to name the Port District as a discharger in the CAO to the extent that the Port's tenants, past and present, have sufficient financial resources to clean up the Shipyard Sediment Site and comply with the order, then the San Diego Water Board may modify its status to secondarily responsible party in the future." (DTR, p. 11-5.) The Presiding Officer noted that "[t]he Port District is entitled to make such an argument *before*, not only after, adoption of a final Cleanup and Abatement Order in this proceeding." (Order dated October 27, 2010, p. 3.)

Formatted: Font: 10 pt

Third Amended Order of Proceedings, May 18, 2011

Deleted: Second

Deleted: .

Deleted: .

Deleted: 2

Deleted: 08

At its public meeting on September 8, 2010, the San Diego Water Board denied a motion filed by NASSCO requesting a determination that the TCAO is exempt from CEQA. The San Diego Water Board noted that it will make a final CEQA determination when it approves a final Cleanup and Abatement Order for this matter. The San Diego Water Board also endorsed the Cleanup Team's approach of preparing and EIR and directed the Cleanup Team to continue seeking necessary funds from the State Water Board's Cleanup and Abatement Account to begin preparation of the EIR for the Board's later consideration. (See San Diego Water Board Resolution No. R9-2010-0115.) The Cleanup Team has provided regular updates on the development of the draft EIR to the San Diego Water Board through the Executive Officer Summary Reports included with each agenda package for regular board meetings.

Initiation of the parallel CEQA process was not contemplated under the First or Second Amended Orders of Proceeding and so introduces a new set of procedural milestones for inclusion in Paragraph 3 of this Order.

Despite the developments described above, Paragraphs 1, 2, and 4-12, below, as they appeared in the Second Amended Order of Proceedings, are affirmed largely without substantive change, but with certain clarifications and modifications for accuracy and consistency. The deadlines and milestones contained in Paragraph 3 have been modified as a result of successive procedural orders to reflect reconsolidation of the Cleanup Levels and Liability Stages and to incorporate procedural schedules based upon input from the Designated Parties through written comments.

The topics addressed in the Pre-Hearing Conferences 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 San Diego Water Board Executive Officer, as a member of the Advisory Team for the San Diego Water Board. (See memorandum from John Robertus dated June 30, 2005 that describes the separation of staff into an Advisory Team and a Cleanup Team for this proceeding.)

Deleted: Regional Board

Deleted: 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 San Diego

Third Amended Order of Proceedings, May 18, 2011

Water 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 San Diego Water Board in this matter.

The Presiding Officer, therefore, 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 San Diego Water Board in public meetings or in correspondence copied to all of the parties.

David Gibson succeeded Mr. Robertus as Executive Officer in late 2009, but due to his prior involvement in the Cleanup Team, Mr. Gibson does not serve on the Advisory Team. Assistant Executive Officer James Smith succeeded Michael McCann in early 2010 as senior management serving on the Advisory Team. Mr. Gibson prepared an updated Separation of Functions memorandum reflecting changes to the San Diego Water Board staffing of the Cleanup Team and Advisory Team in June 2010.

2. Designation of Parties.

The First Pre-Hearing Conference provided an opportunity for persons seeking designated party status to address the Presiding Officer. The Presiding Officer waived the strict applicability of Government Code Section 11440.50. (See Government Code Section 11440.50(a) and Title 23, California Code of Regulations, Section 648(d).) The Presiding Officer is applying Title 23, California Code of Regulations, Section 648.1.

The Presiding Officer determined that the San Diego Water 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 determined that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the Bay-Keeper (now named San Diego Coastkeeper), the Environmental Health Coalition, and the San Diego Port Tenants Association to be Designated Parties. These entities are representative advocacy groups with a history of involvement in similar types of issues. The interests of their members that may be affected by this proceeding are, to some extent, different from the interests of the other Designated Parties. Therefore, the benefits to be derived from their participation outweighs the burdens. The San Diego Bay-Keeper (now named San Diego Coastkeeper), the Environmental Health Coalition, and the San Diego Port Tenants Association were granted Designated Party status.

Deleted: Second

Deleted: .

Deleted: .

Deleted: 2

Deleted: 08

Deleted: Regional Board

Deleted: Regional Board

Deleted: has

Deleted: Regional Board

Deleted: hereby

Deleted: s

Deleted: Regional Board

Deleted: has

Deleted: are hereby

Third Amended Order of Proceedings, May 18, 2011

The Industrial Environmental Association and the Port of San Diego Ship Repair Association were 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.

Deleted: Second
Deleted: .
Deleted: .
Deleted: 2
Deleted: 08
Deleted: are

The Advisory Team's proposal to designate the San Diego Bay Council as a Designated Party was rejected in the First Amended Order of Proceedings. 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.

Deleted: is hereby

As of April 25, 2008, the Designated Parties for the proceeding are as follows:

1. BAE Systems San Diego Ship Repair, Inc. (formerly Southwest Marine, Inc.)
2. National Steel and Shipbuilding Company (NASSCO)
3. San Diego Gas & Electric Company, a subsidiary of Sempra Energy Company
4. Chevron USA, a subsidiary of Chevron Texaco
5. BP, the parent company of and successor to Atlantic Richfield Co. (ARCO)
6. U.S. Department of the Navy
7. City of San Diego
8. Marine Construction and Design Company / Campbell Industries, Inc.
9. San Diego Unified Port District
10. San Diego Coastkeeper (formerly San Diego Baykeeper)
11. Environmental Health Coalition
12. San Diego Port Tenants Association
13. San Diego Water Board Cleanup Team
14. Star & Crescent Boat Company*

*On September 15, 2010, the Cleanup Team identified Star & Crescent Boat Company as a discharger in the TCAO/DTR. Therefore, Star & Crescent Boat Company is an additional Designated Party for the proceeding.

Deleted: Regional Board
Formatted: Numbered + Level: 1 + Numbering Style: 1, 2, 3, ... + Start at: 1 + Alignment: Left + Aligned at: 36 pt + Tab after: 54 pt + Indent at: 54 pt
Formatted: Indent: Left: 36 pt
Formatted: Indent: Left: 0 pt

3. The Proposed Order of Proceeding

Based upon input solicited from Designated Parties on proposed procedural schedules for the remainder of the proceeding, taking into account earlier determined procedures, the Presiding Officer establishes the following schedule and process. The schedule and process may be revisited whenever the Presiding Officer deems appropriate. Designated Parties and Interested Persons will be timely notified of any modifications to deadlines for submittal of materials. Any Designated Party may request an extension of the schedule or a revision to the

Deleted: The
Deleted: proposes

Third Amended Order of Proceedings 10 May 18, 2011

process. All such requests shall include specific reasons why the existing schedule and process are insufficient and a specific explanation about how the Designated Party intends to take advantage of the requested additional time or revised process. Any extensions or revisions shall be in the sole discretion of the Presiding Officer.

Deleted: Second
Deleted: .
Deleted: .
Deleted: 2
Deleted: 08

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 and now includes the procedural schedule for the remainder of the proceeding.

Phase I: The First Pre-Hearing Conference was conducted on Sept. 26, 2005. The Second Pre-Hearing Conference was conducted on December 6, 2005.

Deleted: 1st
Deleted: 2nd

Phase II: The Cleanup Team was directed to distribute to all Designated Parties a Technical Report that supported the proposed issuance of the first version of the tentative CAO (R9-2005-0126). In addition, the Cleanup Team was directed to identify, index, and make available to all Designated Parties all directly relevant technical information related to the Tentative CAO and Technical Report. The Cleanup Team was also directed to investigate the feasibility of converting the technical information into a digitized, electronic format to facilitate the Designated Parties' review, and report back to the Advisory Team on its proposed course of action.

Deleted: s
Deleted: T

The directives in Phase II were completed and Phase III commenced on April 4, 2008. (See Order dated April 4, 2008.) The Cleanup Team distributed hard drives containing an indexed electronic record for the proceeding to each of the Designated Parties and posted a revised Technical Report and Tentative Cleanup and Abatement Order on the San Diego Water Board website on that date. After providing the Advisory Team with information about various electronic record search mechanisms, the Advisory Team notified the Designated Parties of the selected method by Memorandum dated May 20, 2008. The Cleanup Team released the TCAO/DTR on September 15, 2010, replacing the December 2009 tentative CAO. The Cleanup Team posted to the San Diego Water Board website a redline/strikeout version of the TCAO showing the revisions from the December 2009 tentative order on September 27, 2010 and posted a redline/strikeout version of the DTR on November 10, 2010.

Deleted: Note:
Deleted: was
Deleted: Regional Board
Deleted: The Cleanup Team is further directed to post redline/strikeout versions of the Technical Report and Tentative Cleanup and Abatement Order showing the revisions from the previous versions
Deleted: The Cleanup Team is also directed to provide additional details regarding other entities that were consulted, as described in the Cleanup Team's April 22, 2008 memorandum.
Deleted: The Cleanup Team is directed to work with the Advisory Team to produce and distribute to the Designated Parties an acceptable method for searching the electronic record.

Phase III: The Third Pre-Hearing Conference was conducted on April 25, 2008. The Second Amended Order of Proceedings cited, interest in promoting prompt resolution of this proceeding as a basis for bifurcating Phase III into two stages: the Cleanup Levels Stage and the Liability Stage. Subsequent developments have resulted

Deleted: ¶
Deleted: 3rd
Deleted: In the
Deleted: of
Deleted: .
Deleted: Phase III shall be bifurcated
Deleted: The timing of the two stages will overlap, but the Cleanup Levels Stage will be conducted more expeditiously and will conclude first.

Third Amended Order of Proceedings May 18, 2011

in re-consolidation of the Cleanup Levels and Liability stages.⁵ They are no longer bifurcated and will be considered and decided upon together. Therefore it is no longer necessary to retain Phase III as a separate Phase of the proceeding. The procedural milestones previously covered under Phases III are now subsumed into Phase V. Thus, Phase III is now completed.

Phase IV:

The Designated Parties commenced formal discovery, including depositions, in late 2009. After multiple extensions, all discovery was completed by March 11, 2011. Submittal of evidence and comments previously provided for under Phase IV is now provided for in Phase V, below. Thus, Phase IV is now completed.

Phase V.A: TCAO/DTR Process

On March 30, 2011, the Advisory Team solicited input from the Designated Parties on a proposed procedural schedule, including CEQA compliance, for the remainder of the proceeding. The Presiding Officer considered written comments on all aspects of the proposed procedural schedule and on April 12, 2011, issued a Notice of Opportunity for Designated Parties to Submit Comments, Evidence and Legal Argument and for Interested Persons to Submit Non-Evidentiary Comments on the TCAO/DTR. Noting that the Designated Parties have had access to the TCAO/DTR since their release on September 15, 2010 (and access to earlier versions prior to that), the Notice provides Designated Parties other than the Cleanup Team **44** days from the date of the Notice in which to submit comments, legal argument and evidence (due no later than **5 p.m. on May 26, 2011**). (See Notice dated April 12, 2011).

Designated Parties other than the Cleanup Team have **28** days in which to submit rebuttal evidence, legal argument and reply comments (due no later than **5 p.m. on June 23, 2011**) (see Notice of Extended Comment Period dated May 12, 2011). Interested Persons may submit non-evidentiary policy statements under the time frames applicable to Designated Parties other than the Cleanup Team. Designated Parties and Interested Persons must follow the comment format attached to the May 12, 2011, Notice and included as Appendix B to this Third Amended Order of Proceedings.

The Cleanup Team shall have **61** days to consider all of the evidence and comments submitted under this Phase V.A. and submit a Response to Comments (due no later than **5 p.m. August 23, 2011**). Any proposed revisions to the TCAO/DTR as a result of Response to Comments will be made concurrently with changes made as a result of the Draft Environmental Impact Report (DEIR) comment period, due **45** days following the deadline for written comments on the

⁵ The Presiding Officer also made clear on several occasions that while allocation of responsibility among the Designated Parties is desirable, it is not an issue in which the San Diego Water Board should or intends to involve itself. (See, e.g., Order dated October 8, 2009.)

Deleted: Second
Deleted: .
Deleted: .
Deleted: 2
Deleted: 08

Deleted: ¶
¶
As described in the Notice of Settlement Conference dated April 28, 2008, a Settlement Conference has been scheduled for **May 16, 2008** on the cleanup levels issue. The Designated Parties are required to submit initial briefs and any technical reports addressing the cleanup levels proposed by the Cleanup Team, any other proposed cleanup levels, and directly-related issues by **June 30, 2008**. The Designated Parties are required to submit final briefs by **July 30, 2008**. Limited discovery by the Designated Parties regarding the cleanup levels may be authorized by the Presiding Officer in accordance with Government Code section 11450.05 (et seq.). Any requests for subpoenas or subpoenas duces tecum regarding the appropriate cleanup levels must be filed with the Presiding Officer no later than **July 7, 2008**. The Cleanup Levels Stage will conclude on **July 30, 2008**, at (... [1])

Formatted: Highlight
Deleted: The Designated Parties shall then have **30** days following the cl (... [2])
Formatted: Font: Bold
Deleted: , and submit any evidence and comments for the purposes of rebu (... [3])
Formatted: Underline
Formatted: Font: Bold
Formatted: Font: Bold
Formatted: Font: Bold
Formatted: Font: Bold
Formatted: Font: Not Bold
Formatted: Font: Bold

Deleted: 60
Deleted:
Deleted: s
Deleted: Phases III and IV above,
Formatted: Font: Bold
Deleted: and
Deleted: a
Deleted: Technical Report and/or Tentative CAO
Formatted: Not Highlight

Third Amended Order of Proceedings **May 18, 2011**

DEIR (see Phase V.B., below), no later than 5 p.m. on September 15, 2011. The Cleanup Team should not submit any new evidence in Phase V. If in preparing Response to Comments, the Cleanup Team believes the submittal of new evidence is warranted, it may request the opportunity to do so. If new evidence is permitted, the Presiding Officer will consider whether to allow additional limited comments by other Designated Parties.

- Deleted: Second
- Deleted: .
- Deleted: .
- Deleted: 2
- Deleted: 08
- Formatted: Font: Bold
- Deleted:

In addition, the Designated Parties, including the Cleanup Team, shall collaborate to the extent feasible to provide a written summary of all continuing areas of disagreement no later than 5 p.m. on September 30, 2011.

- Deleted: also
- Formatted: Font: Bold

Phase V.B: CEQA Process

In periodic written and oral updates to the San Diego Water Board, the Cleanup Team stated it intends to release a DEIR for public comment on June 17, 2011. Upon release of the DEIR, the Cleanup Team shall notice a 45 day public comment period (written comments due no later than 5 p.m. on August 1, 2011). The Cleanup Team shall have 45 days from the comment deadline in which to prepare and release the Final EIR (FEIR) (incorporating responses to comments on the DEIR), (on or before September 15, 2011.)

- Formatted: Font: Bold
- Formatted: Font: Bold
- Formatted: Font: Bold

Phase VI: There will be a minimum 45-day public notice prior to the hearing before the San Diego Water Board and a minimum 30 day written public comment period on revisions to the TCAO/DTR and FEIR released by the Cleanup Team. The hearing notice will specify whether the San Diego Water Board will accept hearing briefs from Designated Parties and/or written non-evidentiary policy statements from Interested Persons. No further written materials will be accepted from Designated Parties, excluding the Cleanup Team, or from Interested Persons, except as described in Phases VII and VIII, below. If the public hearing notice provides for Designated Party hearing briefs or Interested Person non-evidentiary policy statements, the Cleanup Team will be permitted to submit a response, which may not contain any new evidence, to these hearing briefs and comments.

- Formatted: Font: Bold
- Deleted: ¶
- Deleted: ¶

Phase VII: The San Diego Water Board will then conduct a hearing on November 15 and 16, 2011. Designated Parties and Interested Persons are on notice that the public hearing notice may also identify November 14, 2011 as an additional hearing date and should plan accordingly. The format of the hearing generally will follow the order set forth in section 648.5 of Title 23 of the California Code of Regulations. However, the primary purpose of the hearing is to receive comments from the public and summaries of the previously-submitted evidence and comments by the Designated Parties. Due to the extensive discovery period afforded the Designated Parties in this matter, including the opportunity to take deposition testimony, and the opportunity for unlimited comments, evidence and legal argument, as well as reply/rebuttal to same, the San Diego Water Board intends to limit live cross-examination by Designated Parties. No new evidence will be admitted at the hearing, subject to the Presiding Officer's discretion. Also, the Presiding officer will not allow the introduction of new or additional evidence following the close of the hearing.

- Deleted: prior to the hearing before the Regional Board
- Deleted: The
- Deleted: Designated Parties may submit hearing briefs and Interested Persons may submit written non-evidentiary comments at the conclusion of this period.
- Deleted: T
- Deleted: may
- Deleted: ¶
- Deleted: Regional
- Formatted: Font: Italic
- Deleted: with
- Deleted: t

- Deleted: Cross-examination may be available to the Designated Parties at the discretion of the Presiding Officer.

Third Amended Order of Proceedings 13 May 18, 2011

Phase VIII: The San Diego Water Board will subsequently conduct a non-evidentiary meeting at its regular meeting on December 14, 2011, to consider certification of the FEIR and whether to adopt, modify, or reject the Cleanup Team's final TCAO. Brief public comments will be allowed on the proposed changes, if any, to the revised TCAO/DTR and FEIR. No new or additional evidence will be admitted at this meeting. However, the San Diego Water Board may direct questions to any of the Designated Parties.

- Deleted: Second
- Deleted: .
- Deleted: .
- Deleted: 2
- Deleted: 08
- Deleted: Regional
- Deleted: entative CAO
- Deleted: entative CAO
- Deleted: Regional

4. General Requirements for the Submittal of Documents

The Advisory Team shall be responsible for receiving and maintaining all documents and electronic submissions submitted by Designated Parties and Interested Persons that comprise the administrative record for this proceeding, and shall, to the extent feasible, post them on the San Diego Regional Board website (<http://www.waterboards.ca.gov/sandiego/>).

In order to facilitate the development of the administrative record, all documents submitted by the Designated Parties shall be provided to the Advisory Team in an electronically digitized, text searchable Adobe PDF file format. The documents shall also follow the specific format contained in Appendix B, to this Order to facilitate the review of submitted comments and the development of responses to comments. In addition, an authorized representative for the Designated Parties shall submit a signed paper copy certification that the electronic submittal is a true and accurate copy of the submitted signed original.

- Deleted: and shall be accompanied by an electronic index entry that follows the format established in Appendix B to this Order
- Deleted: C

The Designated Parties shall also provide 12 hard copies of all submissions to the Advisory Team and shall simultaneously distribute electronic versions of all submissions to the complete list of Designated Parties.

5. Identity of Additional Responsible Parties

It was appropriate to allow identification of additional potential responsible parties as dischargers concurrent with the Cleanup Team's September 15, 2010, release of the TCAO/DTR. The Cleanup Team for the first time identified the Port District and Star & Crescent Boat Company as dischargers. The Port District was previously identified as a Designated Party. The Presiding Officer recognized Star & Crescent as a Designated Party on October 27, 2010 and extended the discovery period to provide an adequate opportunity for Star & Crescent to take discovery and participate in this proceeding. The Port District was also permitted to engage in discovery of financial resources of former and present tenants. All of the Designated Parties (with the exception of the Environmental Health Coalition, the San Diego Coastkeeper, the San Diego Port Tenants Association, and the Cleanup Team) were and are on notice that they may ultimately be found by the San Diego Water Board to be responsible for compliance with the Cleanup and Abatement Order. There will be no final

- Deleted: The deadline for the Designated Parties to identify any
- Deleted: t
- Deleted: will be August 29, 2008.
- Deleted: in order to provide
- Deleted: an adequate opportunity for
- Deleted: any additional potential responsible parties
- Deleted: to participate in this proceeding.
- Deleted: Regional Board

Third Amended Order of Proceedings **14 May 18, 2011**

determination regarding which parties are responsible for compliance prior to the San Diego Water Board's adoption of a final Cleanup and Abatement Order.

- Deleted: Second
- Deleted: .
- Deleted: .
- Deleted: 2
- Deleted: 08
- Deleted: Regiona
- Deleted: Regional

6. Removal of Additional Responsible Parties

In order to conserve the resources of the San Diego Water Board and the remaining Designated Parties, there will not be a separate summary process for Designated Parties to request to be removed from further consideration as a potential responsible party under the Tentative CAO proposed by the Cleanup Team.

7. 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 V.A. above, after the Cleanup Team has responded to comments, evidence and legal argument.

- Deleted: III
- Deleted: . If the parties are unable to reach agreement, no party will be precluded from raising additional issues.

8. The length and date of the hearing(s).

The Presiding Officer determined that the Designated Parties, the San Diego Water Board, and the public have been provided a reasonable and substantial amount of time to review and comment on the TCAO and DTR, as well as on earlier versions, and to review and reply to the comments submitted by all parties. The Designated Parties have engaged in a lengthy discovery process and have had extensive opportunities to take deposition testimony. 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. The parties should similarly expect that the opportunity for live cross-examination during the hearing will be limited, and should therefore take advantage of the discovery process to conduct reasonable cross-examination of witnesses. The San Diego Water Board will schedule two full days of evidentiary hearing on November 15 and 16, 2011. As indicated above in Paragraph 3, Phase VII, Designated Parties and Interested Persons are on notice that the San Diego Water Board may schedule an additional day of hearing on November 14, 2011 and should plan accordingly. The specific dates will be included in the Notice of Hearing and Public Comment Period issued in mid September, 2011.

- Deleted: Regional Board
- Deleted: will have
- Deleted: tentative CAO, the Technical Report

9. Location of the hearing.

The hearing may be conducted at the San Diego Water Board, or at a facility in the vicinity of the cleanup site if reasonable arrangements can be made for a suitable site. The final location for the November hearing dates will be specified in the Notice of Public Hearing and the final location for the December 14, 2011 board meeting will be specified in the agenda notice for that meeting.

- Deleted: Regional Board

10. Participation by non-English speaking persons.

Third Amended Order of Proceedings **15 May 18, 2011**

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

Deleted: Second

Deleted: .

Deleted: .

Deleted: 2

Deleted: 08

11. 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.

12. 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. The Advisory Team shall maintain a current distribution list on the [San Diego Water Board](#) website.

Deleted: Regional Board

13. Service to [San Diego Water Board](#) Advisory Team:

Deleted: Regional Board

[Frank Melbourn, Water Resource Control Engineer,](#)

San Diego Regional Water Quality Control Board
9174 Sky Park Court, Suite 100
San Diego, California 93123

fmelbourn@waterboards.ca.gov

Deleted: Michael P. McCann,
Supervising Engineer

14. Pre-Hearing Conferences.

The Presiding Officer may schedule additional pre-hearing conferences as needed.

Deleted: Mmccann@waterboards.ca.gov

Deleted: ¶

GRANT DESTACHE,

Presiding Officer of the Pre-Hearing Conference and
Chair, SDRWQCB

Deleted: DAVID A. KING

Deleted: Vice-Chairman

Attachments

[Appendix A Procedural Schedule and Timeline](#)

[Appendix B Format for Written Submittals](#)

As described in the Notice of Settlement Conference dated April 28, 2008, a Settlement Conference has been scheduled for **May 16, 2008** on the cleanup levels issue. The Designated Parties are required to submit initial briefs and any technical reports addressing the cleanup levels proposed by the Cleanup Team, any other proposed cleanup levels, and directly-related issues by **June 30, 2008**. The Designated Parties are required to submit final briefs by **July 30, 2008**. Limited discovery by the Designated Parties regarding the cleanup levels may be authorized by the Presiding Officer in accordance with Government Code section 11450.05 (et seq.). Any requests for subpoenas or subpoenas duces tecum regarding the appropriate cleanup levels must be filed with the Presiding Officer no later than **July 7, 2008**. The Cleanup Levels Stage will conclude on **July 30, 2008**, at which time the Presiding Officer intends to notice a second settlement conference and/or an adjudicatory hearing before the Regional Board to determine the cleanup levels.

The Liability Stage of Phase III shall address the liability of the potential responsible parties for compliance with the Cleanup and Abatement Order and any other relevant issues not related to the appropriate cleanup levels. The Liability Stage will commence upon the determination by the Presiding Officer that the Cleanup Team has distributed an acceptable method for searching the electronic record. No later than **30 days** after the commencement of the Liability Stage, the Designated Parties shall submit a proposed comprehensive discovery plan. To the extent some or all of the Designated Parties agree on a proposed discovery plan, they shall so indicate. The Presiding Officer will approve the final comprehensive discovery plan. It is anticipated that the Liability Stage of Phase III shall conclude no later than **November 21, 2008**. The Designated Parties shall submit all evidence and comments and a summary list of the disputed material issues of fact and law, and Interested Persons shall submit all comments, by **November 21, 2008**.

The Designated Parties shall then have **30 days** following the close of Phase III to conduct any discovery, **including cross-examination of witnesses**

, and submit any 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.