

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION**

**In re: Tentative Cleanup and
Abatement Order No. R9-2010-0002
(Shipyard Sediment Cleanup)**

Presiding Officer King

**SAN DIEGO COASTKEEPER'S AND ENVIRONMENTAL HEALTH COALITION'S
MOTION FOR PROTECTIVE ORDER TO QUASH DISCOVERY
BY NASSCO AND BAE AND MEMORANDUM IN SUPPORT**

On July 22, 2010, NASSCO and BAE slammed San Diego Coastkeeper and Environmental Health Coalition with a tsunami of discovery requests. Together, the two potentially responsible parties BAE and NASSCO served an astounding **841 discovery requests** on San Diego Coastkeeper and Environmental Health Coalition at once, nearly eight months into the discovery process, but with only a month remaining before discovery closed. Yet neither San Diego Coastkeeper nor Environmental Health Coalition is a potentially responsible party that might bear liability for the cleanup. Instead, San Diego Coastkeeper and Environmental Health Coalition are participating in these administrative proceedings in order to offer a public-interest perspective on the merits of the Tentative Cleanup and Abatement Order and the Draft Technical Report and providing the only voice the public has in these proceedings.

The sheer volume of discovery requests, in light of San Diego Coastkeeper's and Environmental Health Coalition's limited role in these proceedings, is unreasonable and oppressive. The fact that BAE and NASSCO waited until the 11th hour of the discovery process to serve these requests, along with the content of the requests themselves, suggests that BAE and NASSCO served the discovery to harass San Diego Coastkeeper and Environmental Health Coalition and to punish the public-interest groups for participating in the process—not because the information is key to their claims. Moreover, given that the Cleanup Team plans to

submit a revised Tentative Cleanup Order and Draft Technical Report on August 27, 2010¹—after discovery responses are due—the discovery questions and responses may become moot.

I. The Parties Have Been Unable to Resolve These Issues on Their Own.

Gabriel Solmer, counsel for San Diego Coastkeeper and Environmental Health Coalition, spoke with NASSCO attorney Kelly Richardson on July 30, 2010 to discuss the discovery issues. While Ms. Solmer and Mr. Richardson were not able to reach an agreement on behalf of their clients over the phone, Mr. Richardson offered to sit down with counsel for San Diego Coastkeeper and Environmental Health Coalition on August 2, 2010 to discuss the issue further. However, neither Ms. Solmer nor Mr. Richardson was optimistic that a resolution could be reached on the issues without intervention of the Presiding Officer.

Ms. Solmer also spoke with BAE attorney Matthew Dart on July 30, 2010 in an attempt to resolve the discovery issues. Ms. Solmer and Mr. Dart were likewise unable to reach an agreement on behalf of their clients over the phone. Mr. Dart offered to meet with counsel for San Diego Coastkeeper and Environmental Health Coalition next week to discuss the issue further. However, neither attorney was optimistic that a resolution could be reached on the issues without intervention of the Presiding Officer.

For these reasons, San Diego Coastkeeper and Environmental Health Coalition respectfully request the Presiding Officer issue a protective order quashing all discovery NASSCO and BAE served on San Diego Coastkeeper and Environmental Health Coalition on July 22, 2010.

II. NASSCO and BAE Have Served San Diego Coastkeeper and Environmental Health Coalition with an Oppressive Amount of Discovery Requests.

Taken as a whole, the incredible volume of requests NASSCO and BAE served on San Diego Coastkeeper and Environmental Health Coalition is unreasonable, oppressive, and

¹ See Cleanup Team's Motion to Extend Discovery, June 15, 2010 at 5.

harassing. One look at a summary of the types and number of requests NASSCO and BAE served on July 22, 2010 illuminates the absurd enormity of the discovery requests:

Party Requesting	Type of Request	Answering Party	Total Requests
NASSCO	Special Interrogatories	San Diego Coastkeeper	85
NASSCO	Special Interrogatories	EHC	85
NASSCO	Requests for Production	San Diego Coastkeeper	44
NASSCO	Requests for Production	EHC	45
NASSCO	Requests for Admission	San Diego Coastkeeper	28
NASSCO	Requests for Admission	EHC	28
NASSCO	Form Interrogatories—provide information for each request for admission	San Diego Coastkeeper	28
NASSCO	Form Interrogatories—provide information for each request for admission	EHC	28
NASSCO	Depositions	San Diego Coastkeeper and EHC	1
NASSCO	Document Requests for Deposition	San Diego Coastkeeper and EHC	22
BAE	Special Interrogatories	EHC	92
BAE	Special Interrogatories	San Diego Coastkeeper	91
BAE	Requests for Production	EHC	52
BAE	Requests for Production	San Diego Coastkeeper	52
BAE	Depositions	San Diego Coastkeeper	3
BAE	Depositions	EHC	4
BAE	Total Document Requests for Depositions (22 each deposition)	San Diego Coastkeeper	66
BAE	Total Document Requests for Each Deposition (22 each deposition)	EHC	88
TOTAL			841

By burying any potentially legitimate questions in a landslide of irrelevant, overbroad, duplicative, and unduly burdensome questions, NASSCO and BAE have ensured that it will be expensive and time-consuming for San Diego Coastkeeper and Environmental Health Coalition to wade through the flood of discovery to even determine which requests are legitimate and which are not. This calculated attempt to drain the limited resources of public interest groups involved in the process because of their unique and otherwise unrepresented perspective is a blatant abuse of the discovery process, especially in this administrative proceeding.

III. NASSCO and BAE Served Excessive and Harassing Discovery.

A review of the discovery requests reveals that the questions are not focused, pointed questions necessary to NASSCO's or BAE's claims, but rather are overbroad, unduly

burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.² Discovery includes a mountain of requests focused on communications, duplicative requests, and requests that are laughably overbroad.

A. Requests for Details about Communications are Overbroad, Excessively Time-Consuming, and Harassing.

The vast majority of the interrogatories and request for production focus on “communications” San Diego Coastkeeper and Environmental Health Coalition have had with various people about the Tentative Order, Draft Technical Report, or the cleanup site. BAE broadly defines “communications” to include “any and all contact whatsoever, whether by oral, written, or electronic means, whether directly or indirectly, in any nature whatsoever, including, but not limited to, any correspondence, face-to-face conversation, telephonic conversation, . . . electronic transmission, . . . Internet, on-line service, electronic mail, letters, memoranda, reports, or other media.”³ NASSCO’s definition of “communications” is similarly far-reaching.⁴

Not only are these requests impossible to answer accurately, completely, and truthfully under oath,⁵ but they are inordinately time-consuming and not reasonably calculated to lead to the discovery of admissible evidence about the merits of the order and the report.

Those communication-focused interrogatories include questions such as:

- IDENTIFY all COMMUNICATIONS between YOU and any PERSON relating to the SITE, TENTATIVE ORDER or TECHNICAL REPORT.⁶
- IDENTIFY all COMMUNICATIONS between YOU and John Robertus relating to the SITE, TENTATIVE ORDER or TECHNICAL REPORT.⁷

² For the Presiding Officer’s reference, all discovery NASSCO and BAE served on Environmental Health Coalition and San Diego Coastkeeper on July 22, 2010 is attached as an exhibit to this pleading.

³ See Requests for Production, definition of “Communication,” BAE to San Diego Coastkeeper.

⁴ See Special Interrogatories, definition of “Communication,” NASSCO to San Diego Coastkeeper (defining “Communications” as “written or verbal exchange of information by any means, including, without limitation, telephone, telecopy, facsimile, or other electronic medium (including e-mail), letter, memorandum, notes or other writing method, meeting, discussion, conversation, or other form of verbal expression.”).

⁵ See Cal. Code Civ. Pro. 2030.250

⁶ Special Interrogatory 55, NASSCO to San Diego Coastkeeper.

⁷ Special Interrogatory 50, NASSCO to San Diego Coastkeeper.

- Identify all Communications between You and the RWQCB Relating to the Tentative Order and/or Draft Technical Report.⁸
- Identify all Documents Relating to the Communications You Identify in the response to the preceding Special Interrogatory.⁹
- For every Communication You Identify in response to Special Interrogatory No. 53, Identify the Person on the RWQCB who You Communicated with Relating to the Tentative Order and/or Draft Technical Report.¹⁰
- For every Communication that You Identify in response to Special Interrogatory No. 53, please specify to which finding(s) in the Tentative Order and/or Draft Technical Report such Communication relates.¹¹

The following list enumerates the discovery requests that are communications-related, either asking to identify communications or produce documents relating to communications:

1. NASSCO's Special Interrogatories Nos. 40-58 for both San Diego Coastkeeper and Environmental Health Coalition;
2. NASSCO's Request for Production Nos. 20-44 for San Diego Coastkeeper;
3. NASSCO's Request for Production Nos. 19-45 for Environmental Health Coalition;
4. NASSCO's document requests for the Donald MacDonald Deposition Nos. 5-22;
5. BAE's Special Interrogatories Nos. 1-43, 45-47, 50, 53-65, 67-68, 70, 73-92 for Environmental Health Coalition;
6. BAE's Special Interrogatories Nos. 1-43, 45-47, 50-61, 63-64, 66, 69-87, 89, for San Diego Coastkeeper;
7. BAE's Request for Production Nos. 1, 2, 6-8, 10-34, 39, 41, 43, 45-46, 48, 50-51 for San Diego Coastkeeper;
8. BAE's Request for Production Nos. 1, 2, 6-8, 10-34, 39, 41, 43, 45-46, 48-49 for Environmental Health Coalition; and
9. BAE's Document Requests for the Depositions of Bruce Reznik, Jen Kovacs, Clay Clifton, Laura Hunter, Joy Williams, Diane Takvorian, Sonia Rodriguez No. 1-18.

The sheer volume of discovery requests regarding communications is harassing and unwarranted and provides grounds for the Presiding Officer to step in to the discovery process.

B. Many of the Discovery Requests are Duplicative.

Not only are most of the communications-related discovery requests irrelevant, but many of them are duplicative. BAE already asked the Cleanup Team to produce "All Documents Relating to any Communications between You and Environmental Groups regarding the

⁸ Special Interrogatory 53, BAE to San Diego Coastkeeper.

⁹ Special Interrogatory 54, BAE to San Diego Coastkeeper.

¹⁰ Special Interrogatory 55, BAE to San Diego Coastkeeper.

¹¹ Special Interrogatory 56, BAE to San Diego Coastkeeper.

Tentative Order or the Draft Technical Report.”¹² Why, then, ask for the same information from San Diego Coastkeeper and Environmental Health Coalition, other than to harass?

Similarly, BAE often requested the same information from San Diego Coastkeeper and Environmental Health Coalition more than once. In its deposition notice for San Diego Coastkeeper Executive Director Bruce Reznik, BAE demanded he bring: “ALL DOCUMENTS RELATING TO COMMUNICATIONS between YOU¹³ and the CLEANUP TEAM RELATING TO the TENTATIVE ORDER and/or TECHNICAL REPORT.”¹⁴ This mirrors the language in BAE’s Request for Production of Documents from San Diego Coastkeeper seeking “All Documents Relating to any Communications with the Cleanup Team Relating to the Tentative Order and/or Draft Technical Report.”¹⁵

In fact, BAE asked for that same information from **all** San Diego Coastkeeper and **all** Environmental Health Coalition witnesses.¹⁶ By demanding that San Diego Coastkeeper and Environmental Health Coalition produce that information at each deposition and then scheduling the first deposition for August 12, 2010—only 21 days after serving the discovery—BAE ensured San Diego Coastkeeper Environmental Health Coalition would have even less time to answer overbroad, excessive, time-consuming discovery requests.

C. The Discovery Requests are Designed to Harass and Punish San Diego Coastkeeper and Environmental Health Coalition for Participating in these Proceedings.

As a whole, the document requests are overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. The most blatantly overbroad requests include:

¹² Request for Production No. 11, BAE to Cleanup Team (subject to Motion to Compel).

¹³ BAE defined “YOU” as the “Deponent, including without limitation, the Deponent’s employer...agents, employees, representatives, attorneys,... and anyone else acting on your behalf”—meaning they ask for all communications between the Cleanup Team and San Diego Coastkeeper.

¹⁴ BAE Deposition Notice of Bruce Reznik, Document Request No. 3.

¹⁵ Request for Production No. 6, BAE to San Diego Coastkeeper.

¹⁶ BAE Deposition Notice of Clay Clifton, Document Request 3; BAE Deposition Notice of Jen Kovecses, Document Request 3; BAE Deposition Notice of Laura Hunter, Document Request 3; BAE Deposition Notice of Joy Williams, Document Request 3; BAE Deposition Notice of Diane Takvorian, Document Request 3; BAE Deposition Notice of Sonia Rodriguez, Document Request 3.

- All Documents Relating to any Communications between You and any Person Relating to BAE Systems.¹⁷
- All Documents Relating to the Tentative Order and/or Draft Technical Report.¹⁸
- All Documents Relating to the Tentative Cleanup Levels proposed in the Tentative Order.¹⁹
- ALL DOCUMENTS RELATING TO COMMUNICATIONS BETWEEN YOU and any PERSON RELATING TO the TENTATIVE ORDER and/or TECHNICAL REPORT.²⁰
- IDENTIFY the PERSON most knowledgeable regarding aquatic-dependent wildlife.²¹
- IDENTIFY the PERSON most knowledgeable regarding aquatic wildlife.²²
- IDENTIFY the PERSON most knowledgeable regarding human health risks.²³

These requests illustrate that neither NASSCO nor BAE carefully crafted targeted discovery questions for San Diego Coastkeeper and Environmental Health Coalition that would contribute to the key question in these proceedings: is the Tentative Cleanup and Abatement Order a valid, scientifically supportable cleanup for contaminated sediments in San Diego Bay? These overbroad questions show that that BAE and NASSCO are using this discovery process to drain San Diego Coastkeeper's and Environmental Health Coalition's resources in an attempt to cripple their ability to effectively participate in these proceedings on a going-forward basis.

IV. Justice Requires Issuance of a Protective Order.

In egregious cases of discovery abuse like this one, a presiding officer has several tools at his disposal to remedy the problem. A presiding officer may issue a protective order where "justice requires to protect any party or other natural person or organization from unwarranted annoyance, ... or oppression, or undue burden and expense."²⁴ The presiding officer may declare that "the set of interrogatories, or particular interrogatories in the set, need not be

¹⁷ Request for Production No. 39, BAE to Environmental Health Coalition.

¹⁸ Request for Production No. 3, BAE to Environmental Health Coalition.

¹⁹ Request for Production No. 5, BAE to Environmental Health Coalition.

²⁰ BAE Deposition Notice of Bruce Reznik, Document Request 11; BAE Deposition Notice of Clay Clifton, Document Request 11; BAE Deposition Notice of Jen Kovecses, Document Request 11; BAE Deposition Notice of Laura Hunter, Document Request 11; BAE Deposition Notice of Joy Williams, Document Request 11; BAE Deposition Notice of Diane Takvorian, Document Request 11; BAE Deposition Notice of Sonia Rodriguez, Document Request 11.

²¹ Special Interrogatory No. 67, NASSCO to Environmental Health Coalition.

²² Special Interrogatory No. 65, NASSCO to Environmental Health Coalition.

²³ Special Interrogatory No. 69, NASSCO to Environmental Health Coalition.

²⁴ CAL. CIV. PRO. CODE § 2030.090(b).

answered”²⁵ or he may find that the “number of specially prepared interrogatories is unwarranted.”²⁶

The California Code of Civil Procedure also mandates that a court or presiding officer “shall restrict the frequency or extent of use of a discovery method... if [he] determines” that:

(1) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive.

(2) The selected method of discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, and the importance of the issues at stake in the litigation.²⁷

Courts have recognized “the potential for promiscuous discovery imposing great burdens, even though ultimately the probative value of the discovered material may be questionable,” and noted that “trial judges must carefully weigh the cost, time, expense and disruption of normal business resulting from an order compelling the discovery against the probative value of the material which might be disclosed if the discovery is ordered.”²⁸

Here, the discovery requests NASSCO and BAE submitted to San Diego Coastkeeper and Environmental Health Coalition are cumulatively unreasonable and duplicative. NASSCO’s and BAE’s “carelessly drafted discovery” leaves San Diego Coastkeeper and Environmental Health Coalition facing “cost and inconvenience far outweighing the potential usefulness of the material ordered to be produced.”²⁹ The California Supreme Court has recognized that “fishing expeditions” like this that place “more burden upon the adversary than the value of the information warrants” are “entirely improper.”³⁰

Further, the sheer volume of requests is unduly burdensome and expensive particularly given that: **(1)** this is not litigation, **(2)** neither San Diego Coastkeeper nor Environmental Health

²⁵ CAL. CIV. PRO. CODE § 2030.090(b)(1).

²⁶ CAL. CIV. PRO. CODE § 2030.090(b)(2).

²⁷ CAL. CIV. PRO. CODE § 2019.030.

²⁸ *Calcor Space Facility, Inc. v. Superior Court*, 61 Cal. Rptr. 2d 567, 571 (Cal. Ct. App. 1997).

²⁹ *Id.*

³⁰ *Greyhound Corp. v. Superior Court In & For Merced County*, 364 P.2d 266, 280 (1961).

Coalition are potentially responsible parties, and **(3)** San Diego Coastkeeper and Environmental Health Coalition are not pursuing enforcement action against BAE or NASSCO.

Notably, NASSCO and BAE only submitted discovery to San Diego Coastkeeper, Environmental Health Coalition, and the Cleanup Team. By targeting only San Diego Coastkeeper and Environmental Health Coalition with a barrage of overwhelming, irrelevant, expensive, and overly burdensome discovery, NASSCO and BAE are abusing the discovery process to harass San Diego Coastkeeper and Environmental Health Coalition.

V. The Protective Order Should Quash All Discovery Requests NASSCO and BAE Submitted to San Diego Coastkeeper and Environmental Health Coalition.

Justice requires a protective order that quashes all discovery requests NASSCO and BAE submitted to San Diego Coastkeeper and Environmental Health Coalition on July 22, 2010. The amount of time and expense it would take just to wade through the flood of discovery to search for legitimate discovery questions or to craft individual objections to each of the **841 requests** is not just “unwarranted annoyance,” it is downright “oppressi[ve]...”³¹

This remedy is particularly suitable because these discovery requests could become moot when the Cleanup Team issues a revised Tentative Cleanup and Abatement Order and Draft Technical Report at the end of August. Requiring San Diego Coastkeeper and Environmental Health Coalition to respond to these excessive and harassing requests NASSCO and BAE propounded merely because the discovery period was closing—and possibly as “punishment” for objecting to the request for an extended discovery period—does not serve justice.

Given NASSCO and BAE’s abuse of the discovery process up to this point, neither party is entitled to avail itself of the privilege of taking additional discovery against San Diego Coastkeeper or Environmental Health Coalition. NASSCO’s and BAE’s procedural rights could be protected by the Presiding Officer issuing an order setting a date for all parties to exchange

³¹ CAL. CIV. PRO. CODE § 2030.090(b).

expert reports after the revised Tentative Cleanup and Abatement Order and Draft Technical Report are released and then allow the parties a reasonable time to depose the authors of the expert reports.³² This would allow NASSCO and BAE an opportunity to vet any information that San Diego Coastkeeper and Environmental Health Coalition put forward about the merits of the revised Tentative Cleanup and Abatement Order and Draft Technical Report, while ensuring that all discovery remain relevant and focused on the issues in these proceedings.

However, in the event the Presiding Officer determines that NASSCO and BAE should receive a second attempt to propound legitimate discovery on San Diego Coastkeeper and Environmental Health Coalition, we urge the Presiding Officer to set strict limits on the number and topic of any additional discovery. Discovery should be limited to information that San Diego Coastkeeper and Environmental Health Coalition will put forward at the hearing about the merits of the revised Tentative Cleanup and Abatement Order and Draft Technical Report. If allowing additional discovery, the Presiding Officer should also require NASSCO and BAE to justify the number of any additional interrogatories they propound.³³

CONCLUSION

For the foregoing reasons, San Diego Coastkeeper and Environmental Health Coalition respectfully request that the Presiding Officer issue a Protective Order quashing all discovery BAE and NASSCO served on San Diego Coastkeeper and Environmental Health Coalition on July 22, 2010.

³² See CAL. EVID. CODE § 2034.230(b).

³³ See CAL. CIV. PRO. CODE § 2030.040(b).

Respectfully Submitted on July 30, 2010 by:



Jill M. Witkowski, Cal. Bar No. 270281
Staff Attorney
San Diego Coastkeeper
2825 Dewey Rd, Suite 200
San Diego, CA 92106
619-758-7743
jill@sdcoastkeeper.org

On behalf of San Diego Coastkeeper and
Environmental Health Coalition