

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION

In the matter of Tentative Cleanup
and Abatement Order No. R9-2010-
0002 (Shipyard Sediment Cleanup)

San Diego Water Board Cleanup
Team's (1) Notice Of Motion And
Motion For Relief From Discovery
Deadline For Cleanup Team and
San Diego Water Board Staff
Depositions Only; and (2) Regional
Board Cleanup Team's
Memorandum Of Points And
Authorities In Support Thereof

**NOTICE OF MOTION AND MOTION FOR RELIEF FROM DISCOVERY
DEADLINE FOR DEPOSITIONS ONLY¹**

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN;

PLEASE TAKE NOTICE that on August 6, 2010, or as soon thereafter as the matter may be heard, Designated Party in the above-captioned matter the Cleanup Team for the California Regional Water Quality Control Board, San Diego Region ("Cleanup Team") will, and hereby does, move for relief from the discovery deadline to complete the depositions of Cleanup Team members and San Diego Water Board staff only. Through this Motion, the Cleanup Team seeks an additional 60 days to complete Cleanup Team and San Diego Water Board staff depositions only from the discovery cut off set

¹ Because Cleanup Team and San Diego Water Board staff depositions are noticed to begin on August 12, 2010, the Cleanup Team respectfully requests a ruling on the Motion as soon as practicable.

forth in Presiding Officer for Prehearing Proceedings Mr. David King's February 18, 2010 Order Issuing Final Discovery Plan For Tentative Cleanup And Abatement Order No. R9-2010-0002 And Associated Draft Technical Report (the "Order"). No other modifications to discovery or the Order are being sought. The Cleanup Team's Motion is based on the Presiding Officer's statutory authority to regulate the course of this proceeding under Government Code section 11445.40 and all applicable law. The Motion should be granted because the Cleanup Team's attorneys would suffer undue hardship defending the Cleanup Team and San Diego Water Board employee witnesses for the CAO Proceeding due to the current bar on travel expense reimbursement for State employees, because the Cleanup Team and San Diego Water Board staff witnesses to be deposed would suffer undue hardship if compelled to testify on their days off without pay, and because it could prejudice the public interest if Cleanup Team and San Diego Water Board employees are not properly prepared for and defended in their depositions. The Motion is supported by this Notice, the attached Memorandum of Points and Authorities, the Declaration of Christian M. Carrigan and attachments thereto, submitted concurrently herewith, and any other matters the Presiding Officer may deem just and proper.

Dated: August 6, 2010

Respectfully submitted,

CALIFORNIA REGIONAL WATER
QUALITY CONTROL BOARD, SAN
DIEGO REGION CLEANUP TEAM

By: /s/

Christian Carrigan

MEET AND CONFER EFFORTS

Counsel for the Cleanup Team met and conferred with all Designated Parties beginning on August 3, and continuing through August 6, 2010. (See Declaration of Christian M. Carrigan (“Carrigan Decl.”), ¶¶ 14-19.) In light of the communications from counsel for all the Designated Parties, the Cleanup Team does not expect any Designated Party to oppose the Motion. (Carrigan Decl., ¶19.)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR RELIEF FROM DISCOVERY DEADLINE FOR DEPOSITIONS ONLY

Under California’s Administrative Procedure Act (Gov. Code, § 11370 et seq.), the presiding officer in an informal adjudicative hearing “shall regulate the course of the proceeding.” (Gov. Code, § 11445.40.) Indeed, the Presiding Officer in this matter has done so on numerous occasions, including when he issued the Order setting forth the discovery deadline which is the subject of the instant Motion. In fact, as recently as today, the Presiding Officer reiterated his authority to rule on procedural matters in the CAO Proceeding. (See 8/6/10 Order Denying Motion of NASSCO Requesting a Determination that TCAO R9-2010-0002 is Exempt from CEQA, p. 2 [“The role of the Presiding Officer is to decide procedural matters.”].)

**THE CLEANUP TEAM'S COUNSEL WILL SUFFER UNDUE HARDSHIP
IF THE DISCOVERY DEADLINE TO COMPLETE CLEANUP TEAM AND
SAN DIEGO WATER BOARD STAFF DEPOSITIONS IS NOT
EXTENDED**

To complete discovery within the current August 23, 2010 cut off, Designated Parties served deposition notices, and subpoenas where relevant, on thirteen members of the Cleanup Team, San Diego Water Board staff members and its Executive Officer. (Carrigan Decl., ¶ 2.) All but one of these persons may have relevant testimony to offer the Board and/or may have helped to develop the written documents upon which the Board may rely in determining whether to adopt the Tentative CAO. (*Ibid.*) Accordingly, the Cleanup Team believes the depositions of these witnesses may lead to the discovery of admissible evidence in the CAO Proceeding and their deposition testimony is a proper subject for discovery.

The State Water Resources Control Board's Office of Enforcement will provide counsel to defend all of the Cleanup Team and San Diego Water Board staff depositions. (Carrigan Decl., ¶ 3.) Because of current limitations on travel expense reimbursement, however, Office of Enforcement attorneys would be required to expend over \$1,000 each for two of them from their own personal finances to attend and defend the Cleanup Team and San Diego Water Board staff depositions unless and until California passes a budget. (Carrigan Decl., ¶¶ 4-9.) This estimate does not include travel for deposition preparation, nor for travel to attend the depositions of other Designated Parties' designated witnesses, both of which are advisable and would be undertaken but for the current budget crisis and bar on travel expense reimbursement. (Carrigan Decl., ¶¶ 6, 7.)

Despite pleas for a special exception to obtain travel expense reimbursement for this particular matter, counsel for the Cleanup Team was unable to obtain authorization for expense reimbursement. (Carrigan Decl., ¶ 8.)

Should the Presiding Officer approve the Cleanup Team's Motion, Cleanup Team and San Diego Water Board staff depositions would proceed over the course of 60 additional days without the need for overnight stays, and without counsel personally incurring approximately 80% of total travel expenses associated with travel to and from San Diego. (Carrigan Decl., ¶ 9.) Reducing the Office of Enforcement attorneys' obligation to fund State business at their own expense for these depositions from over \$1,000 each to approximately \$200 each changes an undue hardship into a considerably more bearable hardship. (*Ibid.*) It does not appear that any Designated Party opposes the Motion, and the depositions will be concluded well before the Regional Board hearing on the Tentative CAO. If the Motion is not granted, the Office of Enforcement attorneys will be placed in the untenable position of having to choose between paying substantial sums of money out of their own pockets to fund State business and potentially committing malpractice by allowing their clients to go undefended at depositions.

THE CLEANUP TEAM AND SAN DIEGO WATER BOARD STAFF MEMBERS WILL SUFFER HARDSHIP IF THE DISCOVERY DEADLINE IS NOT EXTENDED TO ALLOW COMPLETION OF THEIR DEPOSITIONS

After the relevant deposition notices were served, the Governor issued an Executive Order mandating, in relevant part, that San Diego Water Board staff members take compulsory furlough days without pay on the second, third and fourth Fridays of each month, unless and until a budget is adopted. (Carrigan Decl., ¶ 10.) Some of the Cleanup Team and San Diego Water Board staff depositions are set on furlough days. (*Ibid.*) San Diego Water Board staff is also prohibited by an Executive Directive of the Governor from working overtime unless it is an emergency and “required to protect the public health and safety.” Carrigan Decl., ¶ 11.) Given these two constraints, and that the furlough constraint came only recently and was not accounted for by supervisory staff in workload planning, Cleanup Team members and San Diego Water Board staff are faced with the untenable choice between preparing for and appearing at a deposition without compensation and forgoing the work they have committed to perform. (Carrigan Decl., ¶ 12.) Extending the discovery cut off by 60 days for the limited purpose of completing these depositions will eliminate the hardship to staff by allowing for time to make workload adjustments over the 60 days, by obviating the need to appear on furlough days or work overtime, and by allowing for the witnesses to prepare for and appear at the depositions as part of their work duties.

**EXTENDING THE DISCOVERY DEADLINE TO COMPLETE THE
CLEANUP TEAM AND SAN DIEGO WATER BOARD STAFF
DEPOSITIONS WILL SERVE THE PUBLIC INTEREST**

Because of the California Water Boards' development of the separation of functions doctrine for adjudicatory proceedings, information, communications from the public and important evidence relating to the proceeding is often not available to the Regional Board Members and their Advisory Team until the hearing for an adjudicatory proceeding is underway. Certainly, at this stage of the CAO Proceedings, where relevant evidence and the administrative record is still being developed, the Regional Board Members do not have a "complete picture" from which to formulate an opinion about what decision will best serve the public interest. Because of this, the Cleanup Team strongly believes that, until the Regional Board Members themselves open the public hearing and begin to deliberate on this matter, it is the Cleanup Team that bears the responsibility of protecting the public interest. To adequately do so, the members of the Cleanup Team (as the public's representatives) are entitled to competent counsel to adequately prepare them for and to defend them at their depositions.

CONCLUSION

No Designated Party opposes the Cleanup Team's Motion. Extending the time to complete the Cleanup Team and San Diego Water Board staff depositions will significantly reduce the personal hardship on the Office of Enforcement attorneys, potentially eliminate any hardship on the San Diego Water Board staff and serve to better protect the public interest. Finally,

extending the discovery cut off for sixty days solely for the purpose of completing these depositions will not delay the CAO Proceedings. Accordingly, the Presiding Officer should grant the Cleanup Team's Motion for Relief from Discovery Deadline for Cleanup Team and San Diego Water Board Staff Depositions Only. Because Cleanup Team and San Diego Water Board staff depositions are noticed to begin on August 12, 2010, the Cleanup Team respectfully requests a ruling on the Motion as soon as practicable.

Dated: August 6, 2010

Respectfully Submitted

CALIFORNIA REGIONAL WATER
QUALITY CONTROL BOARD, SAN
DIEGO REGION CLEANUP TEAM

By: /s/

Christian Carrigan

DECLARATION OF CHRISTIAN M. CARRIGAN

I, Christian M. Carrigan, hereby declare as follows:

1. I am an attorney at law, duly licensed to practice law in the State of California and its courts, and admitted to all of the federal District Courts in this state, the United States Court of Appeals for the Ninth Circuit, the United States Court of Federal Claims and the Supreme Court of the United States. I am counsel of record for Designated Party the Cleanup Team of the California Regional Water Quality Control Board, San Diego Region (“San Diego Water Board”), in the matter of Tentative Cleanup and Abatement Order Number R9-2010-0002 (the “CAO Proceeding”). The following is true of my own personal knowledge and, if called as a witness, I could and would testify competently thereto except where my statement is specifically made on information and belief, in which case I am informed and believe it to be true.

2. Since deposition notices were served on thirteen staff persons and the Executive Officer of the San Diego Water Board on or about July 22nd and July 23rd by various other Designated Parties to the CAO Proceeding, I have been diligently working to investigate whether and the extent to which each of these persons may have relevant testimony to offer to the Board. I determined that all but one may. I am informed and believed that the deposition notice and subpoena for that person, Mr. Chad L. Loflen, will be withdrawn.

3. Since the deposition notices and subpoenas were issued, I have also worked diligently to arrange for additional attorney support from the Office of Enforcement of the State Water Resources Control Board to defend the San Diego Water Board staff and its Executive Officer at their depositions. Since depositions were often “double” and “triple” set on the same days, I could not defend all of the depositions myself. My efforts have been successful and the Office of Enforcement is able to provide attorneys to defend all of the San Diego Water Board staff’s and the Executive Officer’s depositions.

4. Since the end of June, 2010, travel restrictions have been placed on all State Water Board employees, including those at the Office of Enforcement. The State Water Board Divisions of Administrative Services, Accounting Branch (“DAS”), notified all State Water Employees that as of July 1, 2010, it would not reimburse employees for personally-incurred travel expenses unless and until a budget is passed. At the same time, DAS notified State Water Board employees that, with the authorization of their supervisors, they could book airline tickets and rental cars without paying for them personally through the State’s new travel vendor.

5. In light of travel restrictions on State employees, I cannot be reimbursed by the State for many of the expenses I regularly incur on trips to the San Diego Region, including expenses incurred for: (1) overnight lodging; (2) meals and incidentals; (3) rental car fuel; or (4) parking.

6. Cleanup Team and San Diego Water Board staff depositions are currently noticed for August 12 (2 depositions), August 13 (2 depositions), August 16 (2 depositions), August 17 (1 deposition), August 18 (2 depositions), August 19 (2 depositions), and August 23 (2 depositions). This schedule is based on a “single day” assumption for each deposition, and does not include additional days that might be needed to conclude some of them. It also assumes that the Cleanup Team’s attorneys will not attend any of the depositions of the other parties’ designated witnesses.

7. In my professional opinion, it would materially prejudice the Cleanup Team and San Diego Water Board if the attorneys defending their depositions were required to travel to and from San Diego every day without staying overnight to defend these depositions, even if that were logistically possible given the time it will take to complete the noticed depositions each day. To adequately defend the noticed depositions, two Office of Enforcement attorneys would need to arrange for overnight stays on the nights of August 11, August 12, August 15, August 16, August 17, August 18 and August 22, totaling 7 nights for each attorney. The 7 night total does not account for any

face-to-face deposition preparation for the Cleanup Team and San Diego Water Board staff witnesses, which would otherwise be recommended. Nor does it account for Cleanup Team attorneys' attendance at the depositions of any of the Designated Parties' witnesses, which would also otherwise be recommended for some of the key witnesses, including, but not limited to, Donald MacDonald, Katherine Zeeman and Steve Bay.

8. On three occasions, including as recently as August 3, 2010, the Director of the Office of Enforcement advised in response to my inquiry that there is no way to arrange to have travel expense reimbursement approved for the CAO Proceeding as a one time exception to the DAS directive.

9. Based on my past experience with travel to San Diego, and assuming 7 overnight stays are required, each of the two Office of Enforcement attorneys, including me, who defends the noticed depositions in this case, will incur over \$1,000 in expenses that will not be reimbursed unless and until a State budget is passed. Since the State rate for overnight lodging in San Diego County is \$105, not including tax, approximately \$800 of the \$1,000 per attorney would be incurred in hotel bills alone. Paying \$800 out of my own pocket for an indefinite period of time in order to competently defend the San Diego Water Board staff and Cleanup Team witnesses would cause me hardship. In my professional opinion, if the Cleanup Team and San Diego Water Board staff depositions could be spread out over an eight week period, Office of Enforcement attorneys could defend them without the need for overnight stays, reducing my and the other Office of Enforcement attorneys hardship to an acceptable level.

10. Since the deposition notices were served, the Governor of California entered an Executive Order directing that the second, third and fourth Fridays of each month are to be mandatory furlough days. Friday, August 13, a date upon which two Cleanup Team members' depositions are scheduled, is a mandatory furlough day for state workers.

11. On August 3, 2010, I received a reminder of the Governor's Executive Directive concerning overtime. In pertinent part, the Governor's Directive requires all overtime to be pre-approved in writing by the organization's Executive Officer/Deputy Director and a copy of the written approval must be copied to the Governor's aid. Under the Governor's Overtime Directive, Executive Officers and Deputy Directors are only authorized to approve overtime "in response [to] emergencies and for work required to protect public health and safety."

12. I am informed and believe that members of the Cleanup Team are fully occupied with preparing the revised Tentative Cleanup and Abatement Order and Draft Technical Report that they intend to release on August 27, 2010, and their additional matters and duties. The unexpected announcement that all San Diego Water Board staff are required to take three unpaid furlough days each month has caused additional workload pressure on the Cleanup Team and staff members to accomplish their respective work assignments without working overtime. Compelling San Diego Water Board staff to appear at a deposition on a mandatory unpaid leave day for which they cannot claim overtime imposes an undue hardship on them. If the noticed depositions can be spread out over an eight week period, there would be no hardship to Cleanup Team members or San Diego Water Board staff.

13. Given the California Water Boards' development of policies concerning the separation of functions, it is my professional opinion that enforcement teams, generally, and the Cleanup Team, specifically in this matter, act as the protector of the public interest until such time as the adjudicatory proceeding is actually heard by the Regional Board members and they take action on behalf of the people of the State of California in the public interest. This is because separation of functions protocols prohibit the Regional Board itself from receiving ex parte communications, including arguments and evidence, and because the Regional Board is prohibited from assessing the evidence and actually adjudicating issues on behalf of the public interest until a public hearing commences. Accordingly, it is my professional opinion that allowing the Cleanup Team and San

14. On August 3, 2010, I caused a meet and confer letter concerning the Cleanup Team's Motion for Relief from Discovery Deadline to be sent to counsel for all Designated Parties to the CAO Proceeding, a true and correct copy of which is attached hereto as Exhibit A. In the meet and confer letter, I specifically requested that all Designated Parties agree to stipulate to allow the San Diego Water Board witnesses to be produced for deposition in an orderly fashion after the current August 23, 2010 discovery cut off.

15. By early morning on August 4, I had received confirmation from all Designated Parties except for Coastkeeper and Environmental Health Coalition ("EHC") that each would agree to the requested stipulation.

16. At 10:01 and 10:07, respectively, I left voicemail messages with Gabe Solmer and Jill Witkowski, counsel of record for Coastkeeper and EHC, asking for a response to my meet and confer letter. I spoke with Ms. Solmer shortly thereafter. Ms. Solmer advised that she was inclined to agree to the stipulation, but suggested that there were some additional issues that Coastkeeper and EHC wanted to resolve with respect to discovery and that, if they could be resolved, all parties might reach an agreement to extend the time to complete certain discovery under Code of Civil Procedure section 2024.060.

17. On the morning of August 5, 2010, I sent an email to counsel for all Designated Parties outlining Ms. Solmer's proposal, including the additional issues, a true and correct copy of which is attached hereto as Exhibit B. After advising that I would be unavailable that day due to a previous commitment, I requested a response to the revised meet and confer by email by the end of the day.

18. On August 6, 2010, I reviewed the Designated Parties' various responses to the second meet and confer letter containing Ms. Solmer's additional issues. Some of the Designated Parties could not agree to Ms. Solmer's additional issues. I contacted counsel for the Designated Parties who expressed concern about the additional issues, but was unable to persuade them to reach agreement on the additional issues. I am informed and believe that some of the Designated Parties are continuing to meet and confer over the additional issues, but the Cleanup Team does not have a position at this time on the additional issues. Because time is of the essence and the hardships outlined above will begin to accrue within the next three business days, I determined I needed to file the Cleanup Team's Motion for Relief from Discovery Deadline.

19. Based on the forgoing, I am informed and believe that none of the Designated Parties will oppose the Cleanup Team's Motion.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 6th date of August, 2010, at Walnut Creek, California.

_____/s/_____
Christian M. Carrigan



Linda S. Adams
Secretary for
Environmental Protection

California Regional Water Quality Control Board San Diego Region

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August 3, 2010

VIA EMAIL ONLY

All Counsel
Tentative Cleanup and Abatement
Order R9-2010-002 (Shipyard Site)

Counsel:

RE: MEET AND CONFER LETTER ON CLEANUP TEAM'S PROPOSED
MOTION FOR RELIEF FROM DISCOVERY DEADLINE FOR DEPOSITIONS
ONLY

As you are all well aware, Presiding Officer King has set a discovery cut off of August 23, 2010 for the above-referenced Tentative Cleanup and Abatement Order proceeding. As you are also aware, some of the Dischargers named in the CAO have noticed the depositions of the members of the San Diego Water Board Cleanup Team, and other members of the San Diego Water Board staff, for August 12, through August 23, inclusive. This is to request that all Designated Parties agree to stipulate to allow the San Diego Water Board witnesses to be produced for deposition in an orderly fashion after August 23, 2010, and after the California Legislature passes a budget that will allow for attorney travel from the Office of Enforcement to the San Diego Region to defend these depositions.

Because time is of the essence, please provide your written response to the undersigned by no later than 5 p.m. on Thursday, August 5, 2010. We intend to submit our Motion to Presiding Officer King the following day, and will include your response with our moving papers.

The Cleanup Team's Motion for Relief from the Discovery Deadline for Depositions Only will be based on hardship to the San Diego Water Board attorneys, hardship to the San Diego Water Board witnesses, and potential harm to the public interest. While the Cleanup Team understands the need, and intends to produce each of the San Diego Water Board witnesses, for the noticed depositions¹, attorneys from the Office of Enforcement assigned to defend these

¹ The Cleanup Team intends to move to quash the Deposition Notice and subpoena of Mr. Chad Loflen on the ground that he has never worked, in any capacity, on any iteration of the Shipyard Tentative CAO or DTR. The Cleanup Team will meet and confer on this Motion under separate cover.

depositions cannot be reimbursed for travel expenses from Sacramento to San Diego unless and until a budget is passed. This leaves the Office of Enforcement attorneys in the untenable position of either allowing these witnesses to be deposed without representation by counsel, or bearing the hardship of paying travel expenses to San Diego out of their own pockets. Accounting for only actual attendance at depositions, same day travel where possible, and not including any preparation time, the deposition schedule indicates a need for at least two attorneys to spend five nights in San Diego. All told, personal expenses for the Office of Enforcement attorneys will be well over \$1,000 each.

San Diego Water Board staff will also experience undue hardship should the Cleanup Team's Motion not be granted because the depositions, which are "triple set" on some of the dates between August 12 and August 23, include depositions noticed for August 13 and August 20, which have now been designated furlough days by Executive Order of the Governor. San Diego Water Board staff is directed not to work on these furlough days, and not to work overtime. Compelling San Diego Water Board staff to appear at a deposition on a mandatory unpaid leave day for which they cannot claim overtime imposes an undue hardship on them.

Finally, the Cleanup Team strongly believes that granting this Motion will help protect the public interest. Given the Water Boards' policies concerning separation of functions, it is our position that the Cleanup Team acts as the protector of the public interest on behalf of the San Diego Water Board until the matter is presented to the Regional Board itself for an ultimate decision on behalf of the public. Allowing the San Diego Water Board witnesses' depositions to take place without legal defense could seriously compromise the public interest.

Please do not hesitate to contact me directly if you have any questions, comments or concerns and thank you in advance for the anticipated courtesy of your prompt response to this important matter.

Sincerely,

/s/

Christian Carrigan
Counsel for the Cleanup Team
San Diego Regional Water Quality Control Board

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