



California Regional Water Quality Control Board

San Diego Region



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TO: Designated Parties and Interested Persons

FROM: David King, Presiding Officer for Prehearing Proceedings
Tentative Cleanup and Abatement Order No. R9-2005-0126
SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD

DATE: February 18, 2010

SUBJECT: ORDER ISSUING FINAL DISCOVERY PLAN FOR TENTATIVE
CLEANUP AND ABATEMENT ORDER NO. R9-2010-0002 AND
ASSOCIATED DRAFT TECHNICAL REPORT

In my Order dated January 29, 2010, I extended the discovery period for Tentative Cleanup and Abatement Order No. R9-2010-0002 (TCAO) and the associated Draft Technical Report (DTR) until August 23, 2010, to run parallel with the California Environmental Quality Act (CEQA) process underway for the TCAO and DTR. I requested that the designated parties submit a discovery plan for my review and that any parties unwilling or unable to reach a joint stipulation submit a separate plan. The discovery plan was to account for all anticipated discovery on the tentative CAO, whether relative to cleanup levels or liability (determination of responsible parties, not allocation of that responsibility) and any necessary discovery on CEQA-related issues.

By close of business February 11, 2010, I received a plan submitted by the "mediation parties," which I infer has the support of all designated parties remaining in the mediation except for the City of San Diego, which submitted its own plan. The City of San Diego's plan differs from the "mediation parties" plan only in that it proposes that the scope of discovery on liability issues include successor liability issues. As reflected in the attached Final Discovery Plan, I agree with the City of San Diego that successor liability issues are appropriately included within the scope of discovery for this matter.

San Diego Coastkeeper and Environmental Health Coalition (Environmental Groups) did not submit a new proposal, having submitted a discovery alternative in their January 27, 2010, letter concerning extension of the schedule. The San Diego Unified Port District (Port District) notified the San Diego Water Board and all designated parties that like the Environmental Groups, it has withdrawn from the mediation. It has not agreed to the "mediation parties" proposed discovery plan but reserves its right to conduct appropriate discovery.

California Environmental Protection Agency

Having reviewed the designated parties' submittals, this Order approves the attached plan as the Final Discovery Plan (Plan) for the above proceedings. The Plan largely approves the mediation parties' plan, with inclusion of successor liability within the scope of discovery as proposed by the City of San Diego and with other discrete changes. The Plan governs discovery to be conducted by all designated parties to the proceeding, whether or not they continue to be participants in the mediation.

The Port District is incorrect when it states that I previously determined that no discovery is appropriate on allocation. To the contrary, the designated parties are free to conduct concurrent discovery on allocation issues and to agree to procedures governing that discovery process. This Plan, however, applies only to discovery on cleanup levels and liability (determination of responsible parties and successor liability issues). Determination of the allocation of responsibility among the responsible parties is not necessary prior to the consideration of the TCAO for adoption by the full Board.

The Plan clarifies that the San Diego Water Board has designated the Cleanup Team as a party to this proceeding and that the Cleanup Team has responsibility for responding to discovery directed to the San Diego Water Board or the Cleanup Team unless it is unqualified or ineligible to respond. Discovery that seeks to inquire into the thought processes of the San Diego Water Board's decision-makers or their advisors with regard to this pending proceeding is not appropriate. The Plan also explicitly notes the Presiding Officer for Prehearing Proceedings' authority to issue protective orders and to quash subpoenas in appropriate cases. Finally, the Plan specifies that all designated party witnesses, whether expert or non-expert, must be disclosed by June 22, 2010.

As previously indicated, a hearing schedule and comment deadline for the TCAO and DTR will be established in a future communication.

Attachment

SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD
TENTATIVE CLEANUP AND ABATEMENT ORDER NO. R9-2010-0002 AND
DRAFT TECHNICAL REPORT
FINAL DISCOVERY PLAN FOR CLEANUP LEVELS AND LIABILITY ISSUES

I. TYPES OF PERMISSIBLE DISCOVERY

Procedures for written discovery and expert witness disclosures shall generally be governed by applicable Code of Civil Procedure (“CCP”) sections, as modified herein and subject to the Discovery Schedule set forth in Section III.I., *infra*. See CCP §§ 2030.010 *et seq.* (Interrogatories); 2031.010 *et seq.* (Inspection and Production of Documents); 2033.010 *et seq.* (Requests for Admission); 2034.010 *et seq.* (Expert Witness Information).

Depositions and subpoenas duces tecum to be governed by Chapter 4.5, Article 11 (Subpoenas), of the California Administrative Procedures Act, which authorizes the use of subpoenas and subpoenas duces tecum (for production of documents) in administrative adjudications. Gov. Code § 11450.10(a).

A. Form Interrogatories

1. 30 days to respond, unless the Presiding Officer (or designated Discovery Referee) lengthens or shortens time for response, or parties agree in writing to extend time. CCP § 2030.260 – 2030.270.

B. Special Interrogatories

1. 30 days to respond, unless the Presiding Officer (or designated Discovery Referee) lengthens or shortens time for response, or parties agree in writing to extend time. CCP § 2030.260 – 2030.270.
2. The number of interrogatories is not limited at this time:
 - a. CCP limits parties to 35 special interrogatories, unless a greater number of interrogatories is warranted because of: (1) the complexity or quantity of the existing and potential issues in the case; (2) the financial burden of conducting the discovery entailed by oral deposition; (3) expedience to provide responding party time to conduct investigation. CCP § 2030.30 – 2030.50.
 - b. Such circumstances under (1) and (3) above exist in the present case.

C. Requests For Document Production

1. Requests for documents pertaining to the Tentative Cleanup and Abatement Order (“CAO”), Draft Technical Report (“DTR”), and these proceedings (including relevant e-mails and other electronic data from Regional Board staff that have been involved in the sediment investigation or the development of the Tentative CAO and DTR).
2. Includes electronically-stored information.
3. 30 days to respond, unless the Presiding Officer (or designated Discovery Referee) lengthens or shortens time for response, or parties agree in writing to extend time. CCP § 2031.260 – 2031.270.

D. Requests For Admission

1. 30 days to respond, unless the Presiding Officer (or designated Discovery Referee) lengthens or shortens time for response, or parties agree in writing to extend time. CCP § 2033.250 – 2033.260.
2. Requests for Admission should not be limited:
 - a. CCP limits parties to 35 RFAs that do not relate to the genuineness of documents, unless the greater number is warranted by the complexity or quantity of existing and potential issues in the case. CCP § 2033.030 – 2033.050.
 - b. The complexity and quantity of issues in this case warrant exceeding 35 RFAs.

E. Depositions and Subpoenas Duces Tecum

1. Deposition subpoenas to be issued by Presiding Officer or designated Discovery Referee for witnesses who submit evidence in the proceedings or have knowledge of the proceedings. This should include non-designated parties that present more than “policy” statements. Cal. Code Regs. tit. 23, § 648.1(d). Deposition notices shall be sufficient for designated party witnesses. Subpoenas must be issued for non-designated party witnesses, including experts, former employees, third parties, etc.
2. Right to depositions includes right to take “person most knowledgeable” depositions.
3. Deposition subpoenas for non-designated party witnesses shall be issued by the Presiding Officer or designated Discovery Referee

and, if denied, reasons for denial shall be provided in writing to the requesting party.

4. Deposition notices and subpoenas are subject to motions for protective order, including motions to quash, and the Presiding Officer may quash deposition notices or subpoenas on motion by a party or on Presiding Officer's own motion to protect witnesses from unreasonable or oppressive demands. (Gov. Code § 11450.30.) .

F. Other

1. August 23, 2010 is the last day to complete discovery; hearing date to be scheduled by the Presiding Officer at least 30 days following discovery cutoff.
2. Timing and process for discovery motions shall be established as needed by the Presiding Officer (or designated Discovery Referee) at the request of any designated party.

II. PRESERVATION OF PROCEDURAL AND DUE PROCESS RIGHTS

A. General Principles Underlying the Discovery Plan

1. The Designated Parties are entitled to the procedural and due process safeguards provided in Title 23 of the California Code of Regulations ("CCR"), Division 3, Chapter 1.5, Sections 648, *et seq.*, in Chapter 4.5 of the California Administrative Procedure Act ("APA") (Cal. Gov't Code § 11400, *et seq.*), in Section 11513 of Chapter 5 of the APA (Cal. Gov't Code § 11513), and in the State and federal constitutions.
2. The Regional Board Cleanup Team is designated by the Regional Board as a party for purposes of this proceeding, and the procedural requirements of the Discovery Plan apply to it as well. Cal. Govt. Code § 11405.60 (defining a "party" to include "the agency that is taking action"). The Cleanup Team is responsible for responding to all discovery directed to the Cleanup Team and/or the Regional Board except for matters for which the Cleanup Team is ineligible or unqualified to respond.

B. Certain Key Rights Must Be Preserved

1. Retention of right to depose authors of any scientific or expert reports submitted into the record. Public comment in the form of policy statements can be accepted as long as public comment is open, but submission of expert evidence must adhere to discovery schedule to preserve all parties' procedural and due process rights.
2. Retention of right to cross-examine anyone who is permitted to

submit comments containing evidence beyond policy-statements.
Parties shall retain the right to cross-examine anyone who is permitted to submit comments containing evidence beyond policy-statements.

C. Discovery Referee

1. Presiding Officer appoints Timothy Gallagher as designated Discovery Referee.
2. Decisions by the Discovery Referee may be appealed to the Presiding Officer.

III. DISCOVERY PLAN

- A.** Discovery on liability issues are strictly limited to the naming of PRPs as dischargers and successor liability (liability) issues. Discovery regarding cleanup levels shall include any issues upon which the Cleanup and Abatement Order and Draft Technical Report are based. Discovery on allocation of responsibility issues is not prohibited nor is it governed by this Discovery Plan. Designated parties are free to agree to procedures to govern discovery on allocation of responsibility issues.
- B.** Parties may propound written discovery related to liability and cleanup levels issues no sooner than ten (10) days after the Presiding Officer approves a discovery plan, or March 8, 2010, whichever is later.
- C.** Parties will have thirty (30) days to respond to written discovery requests.
- D.** Parties may commence depositions forty-five (45) days after written discovery has commenced.
- E.** Expert and non-expert witness designations by all designated parties are due no later than 5 p.m. on June 22, 2010.
- F.** Expert counter-designations are due within fifteen (15) days after expert designations are exchanged.
- G.** Discovery shall be concluded no later than 5 p.m. on August 23, 2010.
- H.** Service shall be by electronic mail and deemed served the next business day.
- I.** Schedule

Timeframe	Event
February 11, 2010	All proposed discovery plans submitted to the Presiding Officer
February 18, 2010	Presiding Officer approves final discovery plan
March 8, 2010	First day for parties to propound written discovery requests on cleanup levels and liability
April 22, 2010	Commencement of deposition period on cleanup levels and liability
June 22, 2010	Deadline for expert and non-expert witness designations due for cleanup levels and liability issues
July 7, 2010	Expert counter-designations due for experts' opinion on cleanup levels and liability
August 23, 2010	Last day to take discovery on cleanup and liability issues