

SAN DIEGO REGIONAL  
WATER QUALITY  
CONTROL BOARD

2005 AUG -4 P 3: 37

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8 CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

9 REGION 9

10 IN THE MATTER OF: ) Case No. ORDER NO. R9-2005-0126  
11 CLEANUP AND ABATEMENT ORDER NO. ) OBJECTIONS TO PROPOSED  
R9-2005-0126; CITY OF SAN DIEGO, ET AL, ) PROCEDURES  
12 )  
13 ) Public Hearing Date: August 10, 2005  
14 )

15 INTRODUCTION

16 The City of San Diego has reviewed the procedures proposed by the Cleanup Team in  
17 their submittal dated July 14, 2005, and the Statement of Objections submitted by NASSCO on  
18 August 3, 2005. While the Cleanup Team’s proposal provides a useful framework for the  
19 procedures to be applied in this proceeding, we generally agree with NASSCO that the proposed  
20 procedures are flawed. The areas that are especially problematic are addressed below.  
21

22 OBJECTIONS

23 As a preliminary matter, the proposed procedures are submitted under the signature of  
24 David Barker, who is purportedly supervising the “Cleanup Team.” The proposed procedures,  
25 however, do not read as a proposal but as a foregone conclusion as to what will occur at the pre-  
26 hearing conference. The City generally objects to the procedures to the extent that it appears the  
27 Cleanup Team is writing procedures for the Board’s use.  
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**I.  
DEADLINES FOR SUBMITTING EVIDENCE AND ARGUMENT CANNOT BE  
REASONABLY DETERMINED UNTIL AFTER THE TECHNICAL REPORT IS  
RELEASED**

As correctly noted in NASSCO's statement of objections, due process in administrative proceedings is a balance – the agency has the flexibility to proscribe procedures but those procedures must ensure that the subjects of the proceeding can meaningfully participate. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319 (1972).

As applied to this tentative Cleanup and Abatement Order, the parties named in the order cannot provide an accurate assessment of what procedures will be necessary to meaningfully participate in the Board's proceedings until they have reviewed the complete Technical Report. In the absence of the report, the Regional Board will be forced to sacrifice its flexibility to ensure that constitutional rights are not impinged, which may result in unnecessary delays. The approach that maintains the Board's flexibility in proscribing procedures while not impinging on due process is to set the appropriate procedures in a pre-hearing conference that occurs a short but reasonable time after the Technical Report has been released, such that the parties can develop a focused response strategy and request only those procedures necessary to meaningfully participate in this process.

**II.  
THE PROPOSED LIST OF SUBJECTS IMPERMISSIBLY LIMITS EVIDENCE AND  
ARGUMENT**

The broadest standard for the admission of evidence is relevance. Relevance is a fluid, but not boundless concept. In complex proceedings, where there are multiple parties and multiple theories of liability, what will be relevant cannot be determined by the mechanical application of a list issues. The parties must be able to submit evidence and argument regarding relevant, collateral matters that may not fit neatly into the concepts formulated at the outset of the proceedings. Thus, to the extent that the list proposed by the cleanup team may be used to exclude otherwise relevant evidence, such a proposal is objectionable.

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1 **III.**  
2 **THE ADMISSION OF ANY NEW PARTY SHOULD BE CAREFULLY LIMITED TO**  
3 **PREVENT UNNECESARILY ADDING COMPLEXITY TO THE PROCEEDINGS**

4 In its form as of the last public hearing, the parties divide into two discrete categories: the  
5 Cleanup Team in its prosecutorial capacity, and the dischargers. The so-called "proposed"  
6 procedures state unequivocally that the San Diego Bay Council is now a party. The City is not  
7 aware of any request or hearing on the admission of the Bay Council as a party.

8 Once the Regional Board itself addresses this topic, the City cautions that the addition of  
9 some entity as a party based merely on "interest" will unduly complicate the proceedings because  
10 this entity will be *both* afforded *and* subject to the full panoply of due process rights. The Board  
11 should carefully consider whether such entity in fact has relevant, admissible evidence that will  
12 assist the Board is coming to a final decision. In the absence of relevant, admissible evidence  
13 such entities will, colloquially speaking, add heat but no light, and should be limited to some type  
14 of procedure that addresses the desire of the general public to be heard on the Board's ultimate  
15 decision.

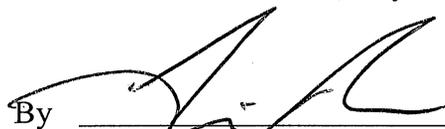
16 **CONCLUSION**

17 The City appreciates the effort expended by the Cleanup Team to draft proposed  
18 procedures for the Cleanup and Abatement Order. While this proposal provides a useful  
19 framework, the City objects to the wholesale adoption of the proposal because it does not ensure  
20 that the parties will be provided a meaningful opportunity to participate in the hearing.

21 Dated: August 3, 2005

22 Respectfully Submitted

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26 Timothy J. Miller  
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28 Attorneys for Respondent

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9 REGION 9

10 DECLARATION OF  
11 SERVICE BY MAIL

ORDER R9-2005-0126  
IN THE MATTER OF CLEANUP AND  
ABATEMENT ORDER NO R9-2005-0126; CITY  
12 OF SAN DIEGO, ET AL ,(SAN DIEGO BAY),

13 I, Marie Moseka, declare that I am, and was at the time of service of the papers herein  
14 referred to, over the age of eighteen years and not a party to the action; and I am employed in the  
County of San Diego, California, in which county the within-mentioned mailing occurred. My  
15 business address is 1200 Third Avenue, Suite 1620, San Diego, California, 92101. I served the  
following document(s): **OBJECTIONS TO PROPOSED PROCEDURES**, by placing a copy  
16 thereof in a separate envelope for each addressee named hereafter, addressed to each such  
addressee respectively as follows:

17 Mr. Christopher J. McNevin  
18 Attorney for Chevron  
Pillsbury Winthrop Shaw Pittman LLC  
19 10250 Constellation Blvd  
Los Angeles CA 90067-6221

Mr. Roy Thun  
BP/Atlantic Richfield Company  
6 Centerpointe Drive  
La Palma, CA 90623-1066

20 Mr. Vincent M. Gonzales  
21 SDG&E Sempra Energy  
555 West Fifth Street, Suite 1400  
22 Los Angeles, CA 90013-1001

Mr. Brian Gordon  
Department of the Navy  
Environmental Department N45  
Commander Navy Region Southwest  
33000 Nixie Way, Building 50, Suite 326  
San Diego, CA 92147-5100

23  
24 Mr. H. Allen Fernstrom  
25 Marine Construction & Design Company  
26 2300 West Commodore Way  
Seattle, WA 98199

Laura Hunter  
San Diego Bay Council  
Environmental Health Coalition  
1717 Kettner Blvd #100  
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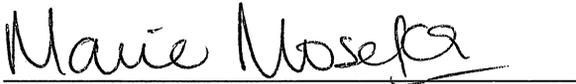
Mr. Michael Chee  
National Steel and Shipbuilding Company  
P O Box 85278  
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Mr. Sandor Halvax  
Southwest Marine Inc.  
P O Box 13308  
San Diego, CA 92170-3308

Mr. Scott Tulloch  
City of San Diego  
Metropolitan Wastewater Department  
9192 Topaz Way  
San Diego, CA 92123

I then sealed each envelope and placed it for collection and mailing with the United States Postal Service this same day, at my address shown above, following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 4, 2005, at San Diego, California.

  
Marie Moseka

**PROOF OF SERVICE BY MAIL**  
C.C.P. §§ 1013(a); 2015.5