



California Regional Water Quality Control Board

San Diego Region



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Item 9a
Doc. 1

TO: Designated Parties and Interested Persons

FROM: David King, Presiding Officer for Prehearing Proceedings
Tentative Cleanup and Abatement Order No. R9-2010-0002
SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD

DATE: June 17, 2010

SUBJECT: ORDER REQUESTING RESPONSES TO MOTION OF THE SAN DIEGO WATER BOARD CLEANUP TEAM TO EXTEND BY 120 DAYS THE REMAINING DEADLINES IN THE FINAL DISCOVERY PLAN FOR TENTATIVE CLEANUP AND ABATEMENT ORDER NO. R9-2010-0002 AND ASSOCIATED DRAFT TECHNICAL REPORT

By Order dated February 18, 2010, I approved the Final Discovery Plan (Plan) for the above proceedings. In accordance with the Plan, the discovery period for Tentative Cleanup and Abatement Order (CAO) No. R9-2010-0002 and the associated Draft Technical Report (DTR) ends August 23, 2010.

On June 16, 2010, the Regional Water Quality Control Board, San Diego Region, (San Diego Water Board) Cleanup Team submitted a Notice of Motion and Motion requesting an extension of time of 120 days for each of the remaining discovery deadlines in the Plan. The Notice of Motion and Motion, together with a supporting declaration by David Barker, was distributed simultaneously to the designated parties to the proceeding via e-mail and are attached to this Order. A 120-day extension of time would, if approved, extend the discovery cut-off through December 21, 2010.

The Designated Parties are hereby directed to submit written responses to the Motion filed by the Cleanup Team on or before 5 p.m. on June 24, 2010. The Mediation Parties, specifically, are directed to comment upon the Cleanup Team's stated expectations that the Mediation Parties will agree to fund the proposed cleanup while they resolve liability and allocation issues among them and that the Mediation Parties will have considerably narrowed the issues in dispute among them by the August 27, 2010, anticipated release of a revised tentative CAO and revised DTR.

The Cleanup Team states that it has reviewed proposals from consultants desiring to perform the necessary environmental review for the cleanup project under the California Environmental Quality Act (CEQA) and that the proposals indicate that it will take

approximately 40 weeks to complete the environmental review. As the Cleanup Team has known for at least six months that an Environmental Impact Report would need to be prepared, the Cleanup Team is directed to submit a response describing what CEQA-related activities it has been engaged in and why a CEQA consultant has not yet been selected. The Cleanup Team's response is also due by 5 p.m. on June 24, 2010.

Finally, because the Plan includes a June 22, 2010, deadline for disclosure of expert and non-expert designated party witnesses and a ruling on the Motion will not occur before that date, the witness disclosure deadline is stayed pending ruling on the Motion. If the Motion is denied, the designated parties will be given five days from the date of denial within which to disclose expert and non-expert witnesses.

Attachment

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 To Extend Certain Discovery
Deadlines From The Presiding
Officer's February 18, 2010, Order
Issuing Final Discovery Plan For
Tentative Cleanup And Abatement
Order No. R9-2005-0002 And
Associated Draft Technical Report;
Or (2) In The Alternative, Regional
Board Cleanup Team's Notice Of
Appeal Of The Presiding Officer's
February 18, 2010 Order To The
Regional Board; And (3) Regional
Board Cleanup Team's
Memorandum Of Points And
Authorities In Support Thereof

**NOTICE OF MOTION AND MOTION TO EXTEND DISCOVERY
DEADLINES**

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN;

PLEASE TAKE NOTICE that on June 16, 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 a
120-day extension of: (1) the June 22, 2010 deadline for expert and non-
expert witness designations on cleanup levels and liability issues; (2) the

July 7, 2010 deadline for expert counter-designations for experts' opinions on cleanup levels and liability issues; and (3) the August 23, 2010 discovery cut off on cleanup and liability issues set 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"). 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. Because good cause exists, because no designated party will be prejudiced and because the public interest will be served, the Motion should be granted. The Motion is supported by this Notice, the attached Memorandum of Points and Authorities, the Declaration of David T. Barker, submitted concurrently herewith, and any other matter the Presiding Officer may deem just and proper.

IN THE ALTERNATIVE – NOTICE OF APPEAL

PLEASE TAKE FURTHER NOTICE that in the event the Presiding Officer determines not to grant the Cleanup Team's Motion, the Cleanup Team will, and hereby does, appeal the Order to the San Diego Water Board. The Cleanup Team's appeal seeks a 120-day extension of: (1) the June 22, 2010 deadline for expert and non-expert witness designations on cleanup levels and liability issues; (2) the July 7, 2010 deadline for expert counter-designations for experts' opinions on cleanup levels and liability issues; and (3) the August 23, 2010 discovery cut off on cleanup and liability issues. It is beyond dispute that the Presiding Officer acts in this matter on behalf of the San Diego Water Board, and that his decisions are subject to its

discretionary review. (See egs. 9/26/05 Notice of Pre-Hearing Conference, p. 1 [the presiding officer will “conduct the prehearing conference on behalf of the Board.”]; 5/2/08 Second Amended Order of Proceedings, p. 1 [“Rulings by the Presiding Officer contained in Paragraphs 1 and 2 and 4 through 13 of this Order are final, subject to clarifications as necessary by the Presiding Officer and otherwise subject only to discretionary review by the Regional Board.”].)

In the event the Presiding Officer determines not to grant the Cleanup Team’s Motion for Reconsideration, the Cleanup Team hereby respectfully requests the San Diego Water Board to grant its request for an appeal, and hear the matter of whether the above-recited discovery deadlines should be extended for 120 days.

Dated: June 16, 2010

Respectfully submitted,

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

By: /s/

Christian Carrigan

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
MOTION FOR 120-DAY EXTENSION OF CERTAIN DISCOVERY
DEADLINES**

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 deadlines that are the subject of the instant Motion. Because there is good cause to extend the discovery deadlines, because no designated party will be prejudiced by extending the discovery deadlines and because the public interest will be served by extending the discovery deadlines, the Presiding Officer should exercise his authority to regulate the course of this proceeding by granting the Cleanup Team’s Motion.

GOOD CAUSE EXISTS TO GRANT THE MOTION

Although a showing of good cause is not required for the Presiding Officer to grant the Cleanup Team’s Motion, good cause exists because granting the Motion will result in a more scientifically-robust Draft Technical Report (“DTR”) and is likely to streamline the hearing on the merits of this matter. Since the DTR was first released for public comment on December 22, 2009, the Cleanup Team and the Designated Parties who continue to participate in the mediation (the “Remaining Mediation Parties”)¹ have diligently worked to refine the technical analysis that supports the directives

¹ The Unified Port of San Diego, San Diego Coastkeeper and Environmental Health Coalition are Designated Parties that have withdrawn from the mediation. The Remaining Mediation Parties include the Cleanup Team, the City of San Diego, NASSCO, BAE, SDG&E, the United States Navy and Marine Construction & Design.

in Tentative Cleanup and Abatement Order No. R9-2010-0002 (the “CAO”). (6/15/10 Declaration of David T. Barker in Support of Cleanup Team’s Motion to Extend Certain Discovery Deadlines; “Barker Decl.”, ¶ 2.) The additional technical analyses developed by the Remaining Mediation Parties also bolsters the evidentiary support for important proposed findings in the CAO concerning the protection of relevant beneficial uses. (*Id.*) As a result of the Remaining Mediation Parties’ development of additional and more robust technical analyses, the Cleanup Team intends to release for public comment a substantially augmented DTR and CAO by August 27, 2010. (*Id.*) The augmented documents will also contain additional data to support the technical analyses. (*Id.*)

Moreover, upon the August 27, 2010, release of the augmented DTR and Tentative CAO, the Cleanup Team expects that the Remaining Mediation Parties will have considerably narrowed the issues in dispute among them. (Barker Decl., ¶ 3.) The Cleanup Team expects the Remaining Mediation Parties to agree to fund the proposed cleanup while they resolve the issues of liability and allocation between them in their pending federal litigation. (*Id.*) This agreement will obviate the need for the Remaining Mediation Parties other than the Cleanup Team to designate experts or non-expert witnesses to testify at the hearing on the merits of the CAO, or, at a minimum, considerably narrow the number of experts or non-expert witnesses who need to be designated. Narrowing the issues in dispute and reducing the number of witnesses who will be designated to testify at the hearing on the merits will result in a streamlined and more orderly hearing before the San Diego Water Board. Because extending the discovery deadlines will produce a more scientifically-sound DTR and narrow the

disputed issues to be adjudicated at the hearing on the merits of the CAO, good cause exists to grant the Cleanup Team's Motion.

**NO DESIGNATED PARTIES WILL BE MATERIALLY PREJUDICED BY
THE 120-DAY EXTENSIONS**

First, as of June 16, 2010, no Designated Parties, including the Remaining Mediation Parties, the Unified Port of San Diego, Coastkeeper and Environmental Health Coalition, have propounded written discovery or noticed any depositions in this proceeding. (Barker Decl., ¶ 4.) In the event any of the Designated Parties intend to take discovery, granting the Motion and extending discovery deadlines would appear to benefit them, but certainly does not prejudice them with respect to preparing for and/or participating in the hearing on the merits of the CAO. In any event, extending the discovery deadlines preserves all the Designated Parties' discovery rights under the Order.

Second, California Environmental Quality Act ("CEQA") compliance must control the time when a public hearing on the merits of the CAO can take place (See *Fort Mojave Indian Tribe v. California Department of Health Services*, (1995) 38 Cal.App.4th 1574, 1601), and the best information the Cleanup Team has regarding when a Final EIR can be completed and ready for the San Diego Water Board's certification is that this will take approximately 40 weeks. (Barker Decl., ¶ 5.) Indeed, the Presiding Officer has not set a hearing date or a deadline for public comments on the CAO and DTR (Order, p. 2), and extending the discovery deadlines is unlikely, in any event, to delay the public hearing on the merits in light of the need to

prepare an EIR for this project. Accordingly, no Designated Party will be materially prejudiced if the Motion is granted.

**THE PUBLIC INTEREST WILL BE SERVED BY GRANTING THE
CLEANUP TEAM'S MOTION**

The Cleanup Team expects the revised DTR and CAO to be released for public comment on August 27, 2010, will be a more scientifically-robust document, contain additional analyses to support the CAO's directives and contain additional analyses to support findings that the proposed cleanup will not unreasonably affect present or anticipated future beneficial uses in San Diego Bay. The Cleanup Team believes the augmented CAO and DTR will provide a more transparent "roadmap" for the public and the San Diego Water Board to follow when navigating from evidence to findings to ultimate conclusions about the effectiveness of the cleanup proposal. (Barker Decl., ¶ 2.) Extending the discovery deadlines until a reasonable time after the augmented DTR and CAO are released will be in the public interest because it will allow the Designated Parties who have withdrawn from the mediation time to assess the new analyses and additional data and determine whether they want to engage in discovery under the Order now that the documents have been augmented.

For these reasons, the Cleanup Team respectfully requests the Presiding

Officer grant its Motion to extend certain discovery deadlines.

Dated: June 16, 2010

Respectfully Submitted

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

By: /s/

Christian Carrigan

**DECLARATION OF DAVID T. BARKER IN SUPPORT OF CLEANUP TEAM'S
MOTION TO EXTEND CERTAIN DISCOVERY DEADLINES**

I, David T. Barker, do hereby declare as follows:

1. I am the Branch Chief of the Surface Waters Basins Branch and a Supervising Water Resource Control Engineer at the California Regional Water Quality Control Board, San Diego Region. I am the designated manager of the Cleanup Team for the San Diego Water Board's proceedings to consider the development and issuance of a cleanup and abatement order for discharges of metals and other pollutant wastes to San Diego Bay marine sediments and waters at a Site referred to as the Shipyard Sediment Site. I supervised the preparation of a tentative version of Cleanup and Abatement Order No. R9-2005-0126, as well as No. R9-2010-0002 (the CAO) and the Draft Technical Reports (DTR), and the indexed electronic record of documents and other information from the San Diego Water Board's file records pertaining to the tentative CAO and the supporting DTR. The following facts are true of my own personal knowledge and, if called as a witness, I could and would competently testify thereto.
2. I have participated regularly on behalf of the Cleanup Team in mediation with NASSCO, BAE, the City of San Diego, the United States Navy and Marine Construction & Design since the December 22, 2009 issuance of the CAO and DTR. Since December 2009, these parties have diligently worked to refine the technical analyses that support the directives and findings in the CAO, including those findings that concern the protection of beneficial uses in San Diego Bay. To that end, we are preparing an augmented DTR and CAO that contain additional analyses and data, which we expect to release for public review on August 27, 2010. The Cleanup Team believes these augmented documents will provide a more transparent "roadmap" for the public and the San Diego Water Board to follow when navigating from evidence to findings to ultimate conclusions about the effectiveness of the cleanup plan.
3. As a result of the efforts described in paragraph 2, the Cleanup Team expects the issues in dispute between the parties to be considerably narrowed upon the August 27, 2010 release of the augmented DTR and CAO. The Cleanup Team understands that the parties referenced in paragraph 2 (excepting the Cleanup Team) will agree to fund the cleanup while they resolve disputes between and among them over liability and allocation in their pending federal litigation.
4. The Cleanup Team has been served with no written discovery nor deposition notices from any Designated Party to this proceeding.
5. The Cleanup Team has reviewed proposals from consultants desiring to perform environmental review for the cleanup project under the California

Environmental Quality Act. All of the proposals we have reviewed indicate it will take approximately 40 (or more) weeks to complete the process and have an environmental impact report prepared for the San Diego Water Board's consideration.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 16th day June, 2010, at San Diego California.

/s/

David T. Barker