

California Regional Water Quality Control Board  
San Diego Region

FIRST AMENDED  
ORDER OF PROCEEDINGS  
PRE-HEARING CONFERENCE FOR TENTATIVE CLEANUP AND ABATEMENT  
ORDER NO. R9-2005-0126.

Date: January 30, 2006

To: Distribution List (designated parties and interested persons)

The 1st Pre-Hearing Conference was held on Monday, September 26, 2005 at the office of the Regional Water Quality Control Board, San Diego Region (Regional Board). The 2<sup>nd</sup> Pre-Hearing Conference was held on December 6, 2005 at the Regional Board. Regional Board Chairman John Minan, serving as the Presiding Officer, conducted both hearings on behalf of the Regional Board. The Pre-Hearing Conferences were properly noticed and open to and attended by the public. An audio tape recording of both conference proceedings was made.

Additional pre-hearing conferences may be convened.

The primary goal of the Pre-Hearing Conferences is to ensure that the future hearing(s) for the Tentative Cleanup and Abatement Order No. R9-2005-0126 (CAO) proceed in an orderly manner. At the two Pre-Hearing Conferences, there has been no discussion of the merits of any provisions of the Tentative CAO.

This Amended Order of Proceedings reflects the nature of the discussions and agreements that have occurred at the Pre-Hearing Conferences and contains certain procedural decisions by the Presiding Officer. Rulings by the Presiding Officer contained in Paragraphs 1 and 2 and 4 through 14 of this Order are final, subject only to discretionary review by the Regional Board.

Attendees at the 1<sup>st</sup> Pre-Hearing Conference for the recommended and prospective designated parties included the following representatives:

Jim Dragna – Bingham McCutchen LLP (BP West Coast Products)  
David Mulliken – Latham and Watkins LLP (NASSCO)  
Kelly Richardson – Latham and Watkins LLP (NASSCO)  
Vincent Gonzales – Sempra Energy (SDG&E)  
Chris McNevin – Pillsbury, Winthrop, Shaw & Pittman LLP (Chevron USA)  
Tim Miller – City of San Diego  
Chris Zirkle – City of San Diego  
Marco Gonzales – Environmental Health Coalition & San Diego Bay-Keeper

David Merk – Port of San Diego  
Jim Mathison – Daley & Heft LLP (San Diego)  
Shaun Halvax – BAE Systems  
Lloyd Schwartz – BAE Systems  
David Silverstein – U.S. Navy  
Tom Fetter – San Diego Port Tenants Association  
Craig Anderson – Industrial Environmental Association  
John Richards – Regional Board Cleanup Team

Attendees at the 2<sup>nd</sup> Pre-Hearing Conference for the Designated Parties included the following representatives:

David Silverstein – U.S. Navy  
Lloyd Schwartz – BAE Systems  
Shaun Halvax – BAE Systems  
David Mulliken – Latham and Watkins LLP (NASSCO)  
Kelly Richardson – Latham and Watkins LLP (NASSCO)  
Lance McVey—NASSCO  
Mike Chee—NASSCO  
Tom Mulder—TN Assoc. (SDG&E)  
Barbara Montgomery—SDG&E  
Chris Zircle—City of San Diego  
Tim Miller—City of San Diego  
Mark Elliot-- Pillsbury, Winthrop, Shaw & Pittman LLP (Chevron USA)  
Marco Gonzalez—EHC  
Laura Hunter—EHC  
Paul Brown—Port of San Diego  
Jim Mathison—Daley and Heft LLP (Port of San Diego)  
John Richards—Regional Board Cleanup Team

The topics addressed in the Pre-Hearing Conferences and the respective discussions, agreements, and decisions are as follows:

**1. Executive Officer's Participation on the Advisory Team.**

The Presiding Officer considered motions objecting to participation by John Robertus, the Regional Board Executive Officer, as a member of the Advisory Team for the Regional Board. (See memorandum from John Robertus dated June 30, 2005 that describes the separation of staff into an Advisory Team and a Cleanup Team for this proceeding.)

The Presiding Officer placed Mr. Robertus under oath, permitted the parties to examine Mr. Robertus about his involvement in the development of the tentative CAO, his views regarding the need for cleanup of contaminated sediments, and related matters. Mr. Robertus testified that he would be able to provide advice to the Board in an open, unbiased manner based solely on the record and testimony

to be presented. No substantial evidence was presented to warrant disqualifying action.

As a result of Mr. Robertus' testimony and his response to questions, the Presiding Officer has determined that Mr. Robertus has not been personally involved in the investigation, prosecution, or advocacy roles of the staff to any extent that would preclude his involvement as a neutral advisor to the Regional Board. The Presiding Officer has further determined that Mr. Robertus has not developed any biases that would prevent him from providing neutral advice to the Regional Board in this matter.

The Presiding Officer, therefore, has determined that Mr. Robertus may continue to participate on the Advisory Team. The Presiding Officer has determined that Mr. Robertus shall provide all technical, scientific, and policy advice to the Regional Board in public meetings or in correspondence copied to all of the parties.

**2. Designation of Parties.**

The Pre-Hearing Conference provided an opportunity for persons seeking designated party status to address the Presiding Officer. The Presiding Officer hereby waives the strict applicability of Government Code Section 11440.50. (See Government Code Section 11440.50(a) and Title 23, California Code of Regulations, Section 648(d).) The Presiding Officer is applying Title 23, California Code of Regulations, Section 648.1.

The Presiding Officer determined that the Regional Board Cleanup Team is a Designated Party.

The Presiding Officer also considered requests from five persons requesting Designated Party status. Persons requesting Designated Party status submitted written requests and were provided the opportunity to address the Presiding Officer. All Designated Parties were provided the opportunity to comment on each request by persons seeking Designated Party status.

The Presiding Officer has determined that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the Bay-Keeper, the Environmental Health Coalition, and the San Diego Port Tenants Association to be Designated Parties. These entities are representative advocacy groups with a history of involvement in similar types of issues. The interests of their members that may be affected by this proceeding are, to some extent, different from the interests of the other Designated Parties. Therefore, the benefits to be derived from their participation outweighs the burdens. The San Diego Bay-Keeper, the Environmental Health Coalition, and the San Diego Port Tenants Association are hereby granted Designated Party status.

The Industrial Environmental Association and the Port of San Diego Ship Repair Association are denied Designated Party status. These entities' interests are adequately represented by having some of their members participate as Designated Parties. Moreover, their participation as Designated Parties may impede the orderly and prompt conduct of the hearing. To the extent that the San Diego Port Tenants Association desires to continue to collaborate with these entities, they may, of course, continue to do so. Otherwise, the participation of the Industrial Environmental Association and the Port of San Diego Ship Repair Association is limited to that of interested persons. They may present non-evidentiary policy statements, but may not present evidentiary testimony.

The Advisory Team's proposal to designate the San Diego Bay Council as a Designated Party is hereby rejected. The request for this designation was withdrawn by the Coast Law Group on behalf of the San Diego Bay Council in their correspondence of September 20, 2005.

### **3. The Proposed Order of Proceeding**

The Presiding Officer proposes the following schedule and process. The schedule and process may be revisited by the Presiding Officer in a subsequent Pre-hearing Conference after the Technical Report information in Phase II is distributed by the Cleanup Team or whenever the Presiding Officer deems appropriate. Any Designated Party may request an extension of the schedule or a revision to the process. All such requests shall include specific reasons why the existing schedule and process are insufficient and a specific explanation about how the Designated Party intends to take advantage of the requested additional time or revised process. Any extensions or revisions shall be in the sole discretion of the Presiding Officer.

The following narrative describes the various phases of the schedule and process to be followed. For the convenience of the reader, Appendix A to this Order provides a chronological outline of the phases.

Phase I: The 1<sup>st</sup> Pre-Hearing Conference was conducted on Sept. 26, 2005. The 2<sup>nd</sup> Pre-Hearing Conference was conducted on December 6, 2005.

Phase II: The Cleanup Team shall distribute to all Designated Parties a Technical Report that supports the proposed issuance of the Tentative CAO. In addition, the Cleanup Team shall identify, index, and make available to all Designated Parties all directly relevant technical information related to the Tentative CAO and Technical Report. The Cleanup Team is directed to investigate the feasibility of converting the technical information into a digitized, electronic format to facilitate the Designated Parties' review, and report back to the Advisory Team on its proposed course of action.

Phase III: The Designated Parties, excluding the Cleanup Team, shall have **90** days after the release and distribution of the Technical Report to conduct any necessary discovery and submit evidence and comments on the Technical Report. All such evidence and comments shall be appropriately distributed to all Designated Parties. Interested Persons are required to submit comments within 90 days. Also upon the start of the same **90** days of Phase III, the Designated Parties shall have 30 days to submit to the Advisory Team a nonbinding summary of the areas of disagreement regarding the Tentative CAO.

Phase IV: The Designated Parties shall then have **30** days following the close of the initial 90-day comment period to conduct any discovery, including cross-examination of witnesses, and submission of evidence and comments for the purposes of rebutting evidence and comments submitted under Phase III above. Only rebuttal evidence and related comments will be accepted.

Phase V: The Cleanup Team shall have **60** days to consider all of the evidence and comments submitted under Phases III and IV above, and submit a Response to Comments and any proposed revisions to the Technical Report and/or Tentative CAO. The Cleanup Team should not submit any new evidence in Phase V. In addition, the Cleanup Team shall also provide a summary of all continuing areas of disagreement.

Phase VI: There will be a minimum 45-day public notice and comment period prior to the hearing before the Regional Board. The Designated Parties may submit hearing briefs and Interested Persons may submit written non-evidentiary comments at the conclusion of this period. No further written materials will be accepted from Designated Parties, excluding the Cleanup Team, or from Interested Persons, except as described in Phases VII and VIII, below. The Cleanup Team may submit a response, which may not contain any new evidence, to these hearing briefs and comments.

Phase VII: The Regional Board will then conduct a hearing with the primary purpose to receive comments from the public and summaries of the previously-submitted evidence and comments by the Designated Parties. Cross-examination may be available to the Designated Parties at the discretion of the Presiding Officer. No new evidence will be admitted at the hearing, subject to the Presiding Officer's discretion. Also, the Presiding Officer will not allow the introduction of new or additional evidence following the close of the hearing.

Phase VIII: The Regional Board will subsequently conduct a non-evidentiary meeting to consider whether to adopt, modify, or reject the Cleanup Team's final Tentative CAO. Brief public comments will be allowed on the proposed changes, if any, to the revised Tentative CAO. No new or additional evidence will be

admitted at this meeting. However, the Regional Board may direct questions to any of the Designated Parties.

#### **4. General Requirements for the Submittal of Documents**

The Advisory Team shall be responsible for receiving and maintaining all documents and electronic submissions submitted by Designated Parties and Interested Persons that comprise the administrative record for this proceeding, and shall, to the extent feasible, post them on the San Diego Regional Board website (<http://www.waterboards.ca.gov/sandiego/>).

In order to facilitate the development of the administrative record, all documents submitted by the Designated Parties shall be provided to the Advisory Team in an electronically digitized, text searchable Adobe PDF file format and shall be accompanied by an electronic index entry that follows the format established in Appendix B to this Order. In addition, an authorized representative for the Designated Parties shall submit a signed paper copy certification that the electronic submittal is a true and accurate copy of the submitted signed original.

The Designated Parties shall also provide 12 hard copies of all submissions to the Advisory Team and shall simultaneously distribute electronic versions of all submissions to the complete list of Designated Parties.

The Cleanup Team shall, within two weeks after release of the Technical Report, provide a specific format for written comments to be used by all Designated Parties throughout the proceeding. The format shall consist of a sequential structure that is organized by subject matter to facilitate the review of submitted comments and the development of responses to comments. The Advisory Team shall approve the comments format to be used by all Designated Parties and will enter the format as Appendix C to this Order.

#### **5. Identity of Additional Responsible Parties**

The deadline for the Designated Parties to identify any additional potential responsible parties will be **30** days from the distribution of the Cleanup Team's Technical Report, in order to provide an adequate opportunity for any additional potential responsible parties to participate in this proceeding.

#### **6. Removal of Additional Responsible Parties**

In order to conserve the resources of the Regional Board and the remaining Designated Parties, there will not be a separate summary process for Designated Parties to request to be removed from further consideration as a potential responsible party under the Tentative CAO proposed by the Cleanup Team.

#### **7. Consideration of creating a comprehensive list of contested issues of fact and law.**

The Presiding Officer directed the Designated Parties to establish a list of contested material issues of fact and law. This shall occur in accordance with the provisions of Paragraph 3, Phase III above. If the parties are unable to reach agreement, no party will be precluded from raising additional issues.

**8. The length and date of the hearing(s).**

The Presiding Officer determined that the Designated Parties, the Regional Board, and the public will have a reasonable amount of time to review and comment on the Tentative CAO, the Technical Report and the comments submitted by all parties. Because of the limited time to speak and present information at the hearing and the above limitation on the submission of new evidence at the hearing, the parties should be prepared to focus primarily on advanced written submissions of testimony and evidence. The parties should similarly expect that the opportunity for live cross-examination during the hearing will be limited, and should therefore take advantage of the discovery process to conduct reasonable cross-examination of witnesses.

**9. Location of the hearing.**

The hearing may be conducted at the Regional Board, or at a facility in the vicinity of the cleanup site if reasonable arrangements can be made for a suitable site.

**10. Participation by non-English speaking persons.**

All parties should be aware that non-English speaking persons may be in attendance at the hearing and allowance for translation should be considered.

**11. Logistics for the workshops, tours, and other methods for providing background information to the Board Members and the public.**

The Presiding Officer does not anticipate any Board Member tours of the proposed cleanup site because of the difficulties inherent in creating a clear record, preventing ex parte communications, and providing for complete public access.

**12. Designated Parties Contacts, Organizations, E-mail Address, and Regular Mail Address.**

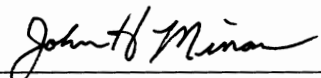
All designated parties shall submit in writing to the Advisory Team any revision to the contact information consisting of the organization representative, email address, and regular mail address.

**13. Service to Regional Board Advisory Team:**

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San Diego Regional Water Quality Control Board  
9174 Sky Park Court, Suite 100  
San Diego, California 93123  
[Mmccann@waterboards.ca.gov](mailto:Mmccann@waterboards.ca.gov)

**14. Pre-Hearing Conferences.**

The Presiding Officer may schedule additional pre-hearing conferences as needed.



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JOHN H. MINAN

Presiding Officer of the Pre-Hearing Conference and  
Chairman, SDRWQCB

Attachments:

- Appendix A
- Appendix B
- Appendix C





**APPENDIX B**  
**January 30, 2006**

Date of Document	Type of Document	Title/Description of Document	Submitted By	Submitted To	Total Number of Pages	Titles of Attachments

## APPENDIX C

### COMMENTS FORMAT

January 30, 2006

(To be provided by the Advisory Team following the release of the Technical Report)