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SAN DIEGO REGIONAL  
WATER QUALITY  
CONTROL BOARD

2005 SEP 21 A 10:42

9 Attorneys for Respondents

8 CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
9 REGION 9

10 IN THE MATTER OF: ) Order No. R9-2005-0126  
11 CLEANUP AND ABATEMENT ORDER NO. ) PREHEARING CONFERENCE  
12 R9-2005-0126; CITY OF SAN DIEGO, ET AL, ) STATEMENT  
13 ) Public Hearing Date: September 26, 2005  
14 )

15 INTRODUCTION

16 The City of San Diego [City] submits the following Pre-Hearing Conference Statement  
17 addressing matters raised in the Pre-Hearing Conference Notice, including comments and  
18 objections to the Cleanup Team's Proposed Procedures dated July 14, 2005.

20 GENERAL OBJECTIONS

21 A. Effect of Prior Orders

22 The pre-hearing conference notice states:

23 Due to incomplete service and the nature and timing of the previous  
24 Regional Water Board agenda items related to this matter, all  
25 previously-submitted comments and objections must be  
resubmitted, or they will be deemed to have been waived.

26 The City objects to this aspect of the Pre-Hearing Conference Notice to the extent that this  
27 statement could be construed as vacating the rulings of June 29, 2005 on NASSCO's motions  
28 regarding the Regional Board's participation in pre-hearing proceedings, including workshops,

1 when said motions and rulings were properly set on the Board agenda in accordance with the  
2 Bagley-Keene Open Meeting Law, and heard and decided in an open, public meeting.

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4 **B. Bias Towards Cleanup Team**

5 At numerous places throughout the Proposed Procedures, the procedures call for the  
6 Cleanup Team to prepare and submit documentation of some nature to the Regional Board for use  
7 in the Board hearing.

8 First, this is objectionable as the Cleanup Team is a party to these proceedings, but is  
9 preparing the materials to be used by the Board during hearings. The Board has assembled an  
10 Advisory Team. If materials need to be prepared in advance of hearings for Board use, those  
11 materials should be prepared by the Advisory Team, or drafts submitted by all parties.

12 Second, in all places where action is required by the Cleanup Team, the Proposed  
13 Procedures contain no timeline for completing these tasks, yet a timeline is imposed on every  
14 other party. Clearly, this creates an unfair advantage to the Cleanup Team. The Cleanup Team is  
15 a party and must have the same deadlines as the other parties for completing submissions to the  
16 Board.

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18 **PRE-HEARING CONFERENCE ISSUES**

19 The Pre-Hearing Conference Notice requested the following issues to be addressed: (1)  
20 Designation of Parties; (2) Executive Officer's Participation on the Advisory Team; (3) Specific  
21 Procedures to be Used for the Hearing; (4) A Comprehensive List of Contested Issues of Facts  
22 and Law; (5) Timing of Submission of Evidence and Briefs; (6) Length and Date of Hearing; (7)  
23 Location of the Hearing; (8) Participation by non-English Speakers; (9) Logistics for Workshops,  
24 Tours, and other methods for providing background information to Board members and the  
25 public.

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1 I.

2 **DESIGNATION OF PARTIES**

3 The Pre-Hearing Conference Notice sets forth the Advisory Team's recommendation for  
4 designated parties, including the San Diego Bay Council and the "Shipyard Sediment Site  
5 Cleanup Team." The Notice then goes on to state that any other party who desires designated  
6 party status must submit the request in writing, specifying "the basis for party status, a general  
7 description of the evidence that will be presented, and the reason why the proposed designated  
8 parties to the hearing do not adequately represent the person's interest." This written request is to  
9 then be served on the listed parties.

10  
11 **A. The "Cleanup Team"**

12 The City does not contest the admission of the Shipyard Sediment Site Cleanup Team  
13 [Cleanup Team] as a designated party to these proceedings. Although deficient in addressing  
14 each and every required element of a written request to be made a designated party, the tentative  
15 Cleanup and Abatement Order is more akin to a accusatory pleading in a civil action, and as such,  
16 the Cleanup Team should be deemed to have "plaintiff" party status as a matter of law.<sup>1</sup>

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18 **B. The San Diego Bay Council**

19 The San Diego Bay Council, unlike the Cleanup Team or a named party, does not have a  
20 sufficient stake to have party status as a matter of law, but instead are analogous to intervenors in  
21 a civil proceeding. Accordingly, by analogy and as contemplated by the Pre-Hearing Conference  
22 Notice, the San Diego Bay Council should submit a written request addressing the appropriate  
23 facts and law for gaining designated party status.

24 Accordingly, the City objects to any ruling by the Regional Board Chair at the September  
25 26, 2005 Pre-Hearing Conference regarding the San Diego Bay Council's admission to the  
26 proceedings as a designated party. The San Diego Bay Council has not served the City of San

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28 <sup>1</sup> Similarly, the named parties in the tentative order are in the position of defendants in the  
civil proceeding, and accordingly should be deemed to have party status as a matter of law.

1 Diego with a written request meeting the criteria specified in the Pre-Hearing Conference Notice.  
2 Thus, any action by the Regional Board Chair in designating the San Diego Bay Council a party  
3 absent ensuring that the named parties have been served with a copy of the required written  
4 request is arbitrary and capricious *ab initio* because the admission of the Bay Council as a party  
5 without such service creates a different standard for the San Diego Bay Council than any other  
6 entity seeking designated party status. Moreover, without a written request specifying the  
7 appropriate facts, it is impossible to properly apply the appropriate legal standard, whatever the  
8 standard. *See, e.g.*, CALIFORNIA RULE OF COURT 313(b) (specifying that any motion is to be  
9 supported by evidence.)

10 Further, the bestowing the status of a designated party on the San Diego Bay Council in  
11 the absence of the written request specifying the evidence that will be presented is prejudicial to  
12 the named parties in that they will not know if there is a need to gather additional rebuttal  
13 evidence or retain additional experts to evaluate the evidence proffered by the Bay Council so that  
14 the named parties can participate in a meaningful manner – an essential element of procedural due  
15 process.

16 Accordingly, the City objects to any ruling on designating parties to this proceeding –  
17 other than those entities named in the tentative order, the Cleanup team, and any other entity that  
18 has filed and served a written request in accordance with the procedures specified in the Pre-  
19 Hearing Conference Notice.

## 21 II.

### 22 THE EXECUTIVE OFFICER'S PARTICIPATION ON THE ADVISORY TEAM

23 The Proposed Procedures contemplate the Executive Officer assisting with two categories  
24 of tasks: (1) assist[ing] the Regional Board Chair in matters such as evaluating requests for  
25 designated party status, enforcing deadlines, and other limitations on written and electronic  
26 submissions and exhibits, and preparing for and conducting the proceedings;" and (2)  
27 "provid[ing] advice to the Regional Board . . . in their deliberations on the evidence presented in  
28 the proceedings. Proposed Procedures, pp. 3-4.

1 The City objects to any ruling by the Board Chair at the September 26, 2005 Pre-Hearing  
2 Conference regarding the Executive Officer's participation on the Advisory Team based on the  
3 incomplete record of the Executive Officer's participation in all Regional Board proceedings  
4 relevant to the Cleanup and Abatement Order.

5 First, to the extent that the Proposed Procedures attempt to divide the Executive Officer's  
6 duties into two categories, those categories are ambiguous regarding the extent to which the  
7 Executive Officer would be involved in the merits of any Board decision when the Executive  
8 Officer "assists. . . [in] preparing for and conducting the proceedings." As will be detailed  
9 below, any participation by the Executive Officer in any manner that addresses the merits of this  
10 Cleanup and Abatement Order is objectionable given the current record.

11 Second, the Executive Officer has supervised Regional Board staff's prosecutorial duties  
12 at all stages leading up the June 29, 2005 rulings on NASSCO's various motions. Based on the  
13 limited information available at this time, this means the Executive Officer has supervised  
14 Regional Board staff's participation in various Board orders relating to the Exponent study, the  
15 preparation and issuance of the tentative Cleanup and Abatement Order, and other proceedings  
16 conducted by the Regional Board in which the sediment conditions in the Shipyards were  
17 ancillary to such actions. Based on those limited facts, it is not possible to determine the  
18 Executive Officer's ability to impartially assist the Regional Board in any proceedings relating to  
19 the merits of the tentative order.

20 Accordingly, the City objects to the Regional Board Chair ruling on the appropriate role  
21 of the Executive Officer as a member of the Advisory Team until such a time as: (1) an  
22 unambiguous description of pre-hearing tasks that would be assigned to the Executive Officer is  
23 provided to the parties; (2) a full and complete declaration of the Executive Officer, under penalty  
24 of perjury, describing his participation in all previous proceedings relating in any way to the  
25 conditions in the Shipyard Sediment site is provided to the parties<sup>2</sup>, and (3) the parties are  
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27 <sup>2</sup> Such a declaration would include, but not be limited to, proceedings relating to other  
28 sediment cleanup orders in the San Diego Bay, the orders relating to the preparation of the  
Exponent study, and the development of the Chollas Creek metals TMDL.

1 provided an opportunity to address the facts and law relevant to the content of the Executive  
2 Officer's duties and declaration.

3  
4 **III.**

5 **THE SPECIFIC PROCEDURES TO BE USED FOR THE HEARING**

6 The City objects to the Pre-Hearing Conference Notice as ambiguous. The Clean Team  
7 issued a 21-page proposal organized into sections, where multiple sections could be construed as  
8 "the specific procedures to be used for the hearing." To the extent that this ambiguous statement  
9 may call for discussions of the Proposed Procedures outside of Section J, the City reserves the  
10 right to provide additional comments based on the ambiguity of the Pre-Hearing Conference  
11 Notice.<sup>3</sup>

12 Addressing the matters raised in the Cleanup Team's Proposed Procedures, the City takes  
13 exception to the following aspects of the proposed procedures: (1) the presentation of policy  
14 statements by interested persons after the presentation of the "case-in-chief;" (2) the lack of a  
15 rebuttal portion of the hearing; and (3) the proposal to permit the Cleanup Team to respond to  
16 Regional Board "issues of concern."

17 The City first notes that the title "case-in-chief" as applied to the Proposed Procedures is a  
18 misnomer because there is no other place in the procedures for parties to present additional  
19 evidence or argument. "Case-in-chief" usually designates that portion of a party's case where  
20 that party is presenting evidence and other parties cross-examine, as distinguished from "rebuttal"  
21 where a party can present new evidence to contradict evidence presented in another party's case-  
22 in-chief.

23 As to the merits of the Proposed Procedures, the Proposed Procedures do not have a place  
24 for the presentation of rebuttal evidence. The Proposed Procedures contemplate the need for  
25 rebuttal evidence (see Proposed Procedures, p.6 "prepare possible rebuttal evidence"), but do not  
26 provide a procedure for submitting that evidence. Given the technical nature of the issues in this

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28 <sup>3</sup> The City also finds the discussion of items 3 – 5 in Section H confusing as it relates to  
hearing procedures, and objects to the incorporation of those items into any Order as proposed.

1 case and the number of parties, it would be best if the presentation of the case-in-chief was  
2 limited to what is necessary to make the basic point, and additional evidence presented in rebuttal,  
3 if appropriate. In the absence of a rebuttal phase to the presentation of evidence, the parties will  
4 likely present rebuttal evidence out of context in the case-in-chief. This may make the hearing  
5 unnecessarily long, and possibly confusing. The inclusion of a rebuttal phase allows evidence to  
6 be presented in the most relevant context, simplifying the procedure for the Board and the parties

7 In addition, all parties – named or designated – should be provided an opportunity to  
8 respond to all policy issues raised in these proceedings to ensure that the parties’ participation is  
9 meaningful. Based on the current order of the Proposed Procedures, the presentation of policy  
10 statements after the parties’ case-in-chief, denies all parties the opportunity to respond – including  
11 the Cleanup Team and other designated parties. The City recommends that the presentation of  
12 policy statements be placed after witness cross-examination but before closing and legal  
13 arguments by the parties.

14 Finally, the Proposed Procedures contains the following statement in the description of the  
15 Public Hearing:

16 The Regional Board will communicate any issues of concern to the  
17 Cleanup Team and direct the Team to prepare a technical analysis  
18 and tentative Cleanup and Abatement Order that addresses these  
19 issues.”

19 Proposed Procedures, p.6

20 This is objectionable as this procedure reads as if the Cleanup Team – and only the  
21 Cleanup Team – will be provided an opportunity to supplement its case in response to Regional  
22 Board “concerns.” The playing field must be level. If supplemental briefing is required, it must  
23 be provided to all parties or no party.

#### 24 25 IV.

#### 26 A COMPREHENSIVE LIST OF CONTESTED ISSUES OF FACTS AND LAW

27 The broadest standard for the admission of evidence is relevance. Relevance is a fluid,  
28 but not boundless concept. In complex proceedings, where there are multiple parties and multiple

1 theories of liability, what will be relevant cannot be determined by the mechanical application of  
2 a list of issues. The parties must be able to submit evidence and argument regarding relevant,  
3 collateral matters that may not fit neatly into the concepts formulated at the outset of the  
4 proceedings. Thus, to the extent that any list promulgated at this time may be used to exclude  
5 otherwise relevant evidence, such a proposal is objectionable.

6 Without waiving the foregoing objection, the City of San Diego has identified the  
7 following issues of facts and law, in addition to those raised in the Proposed Procedures, which  
8 will be relevant to the Regional Board's decision on a final Cleanup and Abatement Order  
9 regarding the Shipyards Sediment Site:

- 10 1. Whether the Regional Board can render an unbiased decision regarding the City of San  
11 Diego's liability for any contamination in the Shipyards Sediment Site, including the legal  
12 issue of the standard for finding bias;
- 13 2. The legal standard for the quantum of evidence that must support the Regional Board's  
14 decision to impose liability on an alleged discharger;
- 15 3. Whether remedial action is warranted in the Shipyards Sediment Site;

## 17 V.

### 18 THE TIMING OF SUBMISSION OF EVIDENCE AND BRIEFS

19 The Proposed Procedures is a convoluted mess of comments and rebuttals that will  
20 unnecessarily delay resolution of this matter. First, there would be two 45-day comment periods –  
21 one for comments on the content of the technical report, and a second for rebuttal to those  
22 comments – upon release of the technical report. Next, there would be a public hearing before the  
23 Regional Board, followed by revised reports and orders issued by the Cleanup Team and  
24 unspecified time after that public hearing. There would then be a 30-day comment period  
25 followed by another public hearing. In the context of the public hearings – both public hearings -  
26 there will be at least 11 parties doing the following: (1) making opening statements; (2)  
27 presenting oral testimony; (3) cross-examining witnesses; (4) submitting rebuttal evidence; and  
28 (5) making closing statements and legal arguments. As noted previously, where the procedures



1 call for submissions by the Cleanup Team, there is no deadline proposed for completing that  
2 work.

3 This proposal is unnecessarily complex and, when viewed in light of the proposed  
4 November release date of the technical report, public noticing requirements, and other Board  
5 business, this will extend these proceedings well past the target date of April 2006. The biggest  
6 problem, however, is that these procedures ask the parties to speculate on what tasks will be  
7 necessary to meaningfully participate in the Board proceedings because the technical report has  
8 yet to be released. To the extent that the City is prejudiced by having to speculate on the amount  
9 of time that will be necessary to prepare and present a meaningful defense, the City objects to the  
10 Regional Board Chair deciding this issue at this time.

11 Instead, the City proposes a greatly simplified framework that would be finalized shortly  
12 after the release of the Cleanup Team's technical report. The parties other than the Cleanup Team  
13 should be allotted a substantial time - approximately 75 to 90 days - to the review of the technical  
14 report and then prepare and submit comments on the technical report. The preparation of these  
15 comments will require the coordination of technical experts, attorneys, and policy makers, who  
16 must review the technical report, determine the technical evidence that appropriately responds to  
17 the technical report, and assemble the responsive evidence, making 45 days far too short.

18 Next, all parties - Cleanup Team included - should be given approximately 30 to 45 days  
19 to prepare rebuttals. After this initial round of briefing, the parties should be given approximately  
20 30 to 45 days to prepare oral presentations to the Board. If any additional issues remain after the  
21 public hearing(s), then all parties should be provided an opportunity - approximately 30 days - to  
22 present supplemental briefing limited to a discussion of the evidence previously submitted.

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**VI.**

**THE LENGTH AND DATE OF THE HEARING**

The City recommends that this issue be left to a subsequent Pre-Hearing Conference, after the parties have reviewed the Cleanup Team's technical report so that the parties can prepare an accurate estimate of the amount of time necessary to fully and completely present it's evidence and argument to the Board.

**VII.**

**THE LOCATION OF THE HEARING.**

The City understands that the Regional Board may wish to hold hearings related to the Cleanup and Abatement Order at a location more accessible to the public that uses San Diego Bay.

Subject to any schedule conflicts and other procedures for the proper use of City facilities, the City of San Diego would be pleased to make its facilities available to the Regional Board, as they are significantly closer to the San Diego Bay than the Regional Board offices.

**VIII.**

**PARTICIPATION BY NON-ENGLISH SPEAKERS**

The City understands that there are diverse communities that are interested in the condition of San Diego Bay, and that many community members will wish to provide testimony to the Board.

As the Board proceedings may be subject to subsequent litigation, the only concern of the City is that any such testimony is translated by a court-certified translator, with the appropriate oaths, so that such testimony is admissible in any subsequent court proceedings.

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**IX.**

**THE LOGISTICS FOR WORKSHOPS, TOURS, AND OTHER METHODS FOR  
PROVIDING BACKGROUND INFORMATION TO THE BOARD MEMBERS AND THE  
PUBLIC**

The City objects to the Pre-Hearing Conference Notice as vague and ambiguous; there is inadequate information contained in the Pre-Hearing Conference Notice to develop a coherent response.

**X.**

**SERVICE LIST**

The City requests that the Service List be amended as follows, for the purposes of this Cleanup and Abatement Order only:

City of San Diego  
Tim Miller, Deputy City Attorney  
1200 3<sup>rd</sup> Ave., 11<sup>th</sup> Floor  
San Diego, CA 92101

**CONCLUSION**

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

Dated: September 20, 2005

Respectfully Submitted

MICHAEL J. AGUIRRE, City Attorney

By 

Timothy J. Miller  
Deputy City Attorney

Attorneys for Respondent

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8 CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

9 REGION 9

10 DECLARATION OF  
11 SERVICE BY MAIL

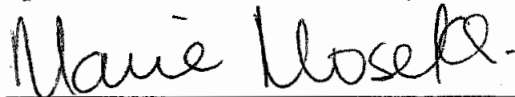
Case No. R9-2005-0126  
CLEANUP AND ABATEMENT ORDER NO.  
R9-2005-0126; CITY OF SAN DIEGO, ET AL

12 I, Marie Moseka, declare that I am, and was at the time of service of the papers herein  
13 referred to, over the age of eighteen years and not a party to the action; and I am employed in the  
14 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  
16 following document(s): Prehearing Conference Statement, by placing a copy thereof in a separate  
envelope for each addressee named hereafter, addressed to each such addressee respectively as  
follows:

17 See Attached List

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

20 I declare under penalty of perjury under the laws of the State of California that the  
21 foregoing is true and correct. Executed on September 20, 2005, at San Diego, California.

22 

23 Marie Moseka

24 **PROOF OF SERVICE BY MAIL**  
25 C.C.P. §§ 1013(a); 2015.5  
26  
27  
28

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