



Linda S. Adams  
Secretary for  
Environmental Protection

# California Regional Water Quality Control Board San Diego Region

Over 50 Years Serving San Diego, Orange, and Riverside Counties  
Recipient of the 2004 Environmental Award for Outstanding Achievement from USEPA



Arnold Schwarzenegger  
Governor

9174 Sky Park Court, Suite 100, San Diego, California 92123-4353  
(858) 467-2952 • Fax (858) 571-6972  
<http://www.waterboards.ca.gov/sandiego>

TO: Mike McCann  
✓ David Barker  
Catherine George  
Erik Spiess

FROM:

John H. Robertus  
Executive Officer

**SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD**

DATE: January 24, 2008

## SEPARATION OF FUNCTIONS FOR PROCEEDINGS ON CLEANUP AND ABATEMENT OF THE SHIPYARD SEDIMENT SITE IN SAN DIEGO BAY

This memorandum updates and supersedes my June 30, 2005 memorandum on the separation of functions for proceedings on cleanup and abatement of the Shipyard Sediment Site in San Diego Bay.

The Regional Board is preparing to consider development and issuance of a cleanup and abatement order for discharges of metals and other pollutant wastes to San Diego Bay marine sediment and waters at the Shipyard Sediment Site. The purpose of this memorandum is to confirm and update the membership of two teams working on the Cleanup and Abatement Order proceeding and to establish procedures to assure the Regional Board's proceedings in this matter are fair and impartial. The teams and procedures will remain in place until after the Regional Board issues a final Order in this matter.

The Regional Board proceedings in this matter are subject to regulations in Title 23, California Code of Regulations (CCR) Division 3, Chapter 1.5, sections 648, et seq., chapter 4.5 of the Administrative Procedure Act (commencing with section 11400 of the Government Code), sections 801-805 of the Evidence Code, and section 11513 of the Government Code. The following list identifies participants who are currently designated as Parties in the Regional Board proceedings on this matter:

1. Regional Board Shipyard Sediment Site Cleanup Team (as defined herein)
2. National Steel and Shipbuilding Company (NASSCO)
3. BAE Systems San Diego Ship Repair, Inc. (Formerly Southwest Marine, Inc.)

*California Environmental Protection Agency*

4. City of San Diego
5. Marine Construction and Design Company and Campbell Industries, Inc.
6. Chevron USA, A Subsidiary of ChevronTexaco
7. BP
8. San Diego Gas and Electric, a Subsidiary of Sempra Energy Company
9. United States Navy
10. San Diego Baykeeper (now known as San Diego Coastkeeper)
11. Environmental Health Coalition
12. San Diego Port Tenants Association

This current list of parties may be expanded during the course of the proceedings to include any other person whom the Regional Board determines should be designated as a party to the proceedings.

To comply with the separation of functions and *ex parte* communication requirements of the Administrative Procedures Act, and the due process provisions of the United States and California constitutions<sup>1</sup>, it is necessary to separate the functions of staff members presenting evidence for consideration by the Regional Board from those of staff members providing advice to the presiding hearing officer Board Member David King and other Regional Board members. Assigning responsibility for advising the Regional Board members to staff other than those who will present testimony to the Regional Board members will help assure the fairness and impartiality of the Regional Board's proceedings. Accordingly, the Regional Board staff participating in the proceedings are separated into two groups.

One group, the Cleanup Team, will serve in a "prosecutorial" function in these proceedings and assume responsibility for presenting evidence to the Regional Board on the issues that will be described in a public hearing notice. The other team, the Advisory Team, will assist the Regional Board members in matters such as evaluating requests for designated party status, enforcing deadlines and other limitations on written and electronic submissions and exhibits, and preparing for and conducting the proceedings. The Advisory Team will prepare any necessary hearing notice and establish all hearing and pre-hearing procedures. The Advisory Team will also provide advice to Regional Board members in their deliberations on the evidence presented in the proceedings.

Consistent with this separation of functions, members of the Cleanup Team will be treated like any other party before the Regional Board throughout the proceedings, and should not have any contact with Regional Board members or members of the Advisory Team on matters relating to the proceedings, except where those contacts are consistent with the limitations on *ex parte* contacts that apply to all other parties. For

---

<sup>1</sup> See Government Code §§ 11430.10-11430.80, 11425.30; *Howitt v. Superior Ct.* (1992) 3 Cal.App.4th 1575.

purposes of this memorandum, an "*ex parte* contact" is any written or verbal communication, pertaining to the Shipyard Sediment Site Cleanup project between a member of the Cleanup Team and a Regional Board member or a staff member of the Advisory Team, unless the communication is copied to all other parties to the proceedings (if written) or made at a proceeding open to all other parties and interested persons (if verbal). Communications regarding non-controversial procedural matters are not "*ex parte* contacts" and are not restricted. Cleanup Team members' communications with designated parties and other interested persons are not restricted.

Advisory team members shall not have *ex parte* communications with any designated party (including the Cleanup Team) or with any designated party representative regarding the Shipyard Sediment Site cleanup, until after the Regional Board issues a final order in this matter. Advisory team members shall not receive draft staff reports or orders related to the Shipyard Sediment Site cleanup unless the drafts are also provided to other designated parties in this matter.

I am designating the following staff members as the Cleanup Team:

David Barker, Supervising Water Resource Control Engineer  
Craig Carlisle, Senior Engineering Geologist  
Tom Alo, Water Resource Control Engineer  
Benjamin Tobler, Water Resource Control Engineer  
Alan Monji, Environmental Scientist  
Lisa Honma, Environmental Scientist  
Cynthia Gorham-Test, Environmental Scientist

David Barker will supervise the Cleanup Team. For this matter only, Mike McCann, Assistant Executive Officer and I will not be supervising David Barker, or the Cleanup Team. The State Water Resources Control Board, Office of Chief Counsel has assigned Erik Spiess, Senior Staff Counsel to provide legal support to the Cleanup Team. Erik Spiess will be supervised by Reed Sato, Director of the State Water Resources Control Board, Office of Enforcement.

Frank Melbourn, Water Resource Control Engineer, Mike McCann, Assistant Executive Officer and I, as Executive Officer, serve as members of the Advisory Team. The Office of Chief Counsel has assigned Catherine George, Senior Staff Counsel to provide legal support to the Advisory Team. Phil Wyels, Assistant Chief Counsel, is supervising Catherine George for this matter.

It is anticipated that as the Cleanup Team prepares its testimony, and as the Advisory Team reviews the written submittals from parties and interested persons, either or both teams may conclude that additional staff are needed. Should that occur, they should contact me, Reed Sato, Office of Enforcement or Phil Wyels, Office of Chief Counsel, as appropriate, to request assignment of additional staff as necessary. Staff assigned

to the Advisory Team should not include any individuals who have served as members of the Cleanup Team or who have actively participated in formulating the terms and conditions of a tentative cleanup and abatement order or a supporting Technical Report in this matter.

Any staff assigned to or who assists either team, during the proceedings or evaluating the hearing record, should be specifically assigned to that team. This includes any managers or supervisors who, by actively directing or assisting either team on matters such as deciding what theories to argue, go beyond routine procedural matters or assignment of staff. Once assigned to either team, an individual shall not participate in matters concerning the Shipyard Sediment Site cleanup that are assigned to the other team. For example, a staff member assigned to the Cleanup Team cannot participate in closed meetings with any Regional Board Member or Advisory Team Member to discuss issues associated with the Shipyard Sediment Site cleanup.

Please make sure any staff that may be assigned to either team or may be involved in discussions of the proceedings on the Shipyard Sediment Site cleanup issue are aware of and follow these procedures.

cc: Philip Wyels, Assistant Chief Counsel, State Water Resources Control Board  
Reed Sato, Director of the State Water Resources Control Board, Office of Enforcement  
Craig Carlisle, Senior Engineering Geologist  
Tom Alo, Water Resource Control Engineer  
Frank Melbourn, Water Resource Control Engineer  
Alan Monji, Environmental Scientist  
Lisa Honma, Environmental Scientist  
Cynthia Gorham-Test, Environmental Scientist