

ATTORNEYS AT LAW
101 W. BROADWAY, SUITE 2000
SAN DIEGO, CA 92101
PHONE: (619) 696-6700
FAX: (619) 696-7124
WWW.GORDONREES.COM

April 16, 2008

San Diego Regional Water Quality Control Board
Attn: Michael P. McCann, Supervising Engineer
9174 Sky Park Court, Suite 100
San Diego, CA 92123

Re: **Shipyard Sediment Site 2005 Tentative Cleanup & Abatement Order**
No. R9-2005-0126

Dear Mr. McCann:

On behalf of the City San Diego ("the City"), this letter is an initial response to the Regional Board Cleanup Team's release of the Indexed Electronic Record, the final Tentative Cleanup and Abatement Order, and supporting revised Technical Report on April 4, 2008 ("Notice of Commencement of Phase III"). The City also herein responds to the Cleanup Team's submission to the Advisory Team of its "Recommended Format for Written Comments" on March 25, 2008.

The Regional Board's distribution on April 4, 2008 consists of approximately 375,000 pages of documents, almost three times the volume of documents anticipated to be part of the administrative record at the end of last year. In addition, the documents have been provided in a format that is organized by the date in which the documents were scanned, not by chronological date or subject matter, which will make the process of reviewing this record more burdensome and lengthy than anticipated.

Due to the significant volume of these documents and the format in which they were provided, the City hereby requests a revision to the Proposed Order of Proceedings to extend the time frame for the completion of Phase III.

As to the "Recommended Format for Written Comments", as described below, the City believes that the formatting requirements are unduly onerous and unwieldy. The City understands that the intent behind this suggested strict compartmentalization of the evidence and comments is to simplify review by the Board and Designated Parties. However this forces the Designated Parties to label their evidence as belonging in identified categorical compartment(s) to the exclusion of possible others. Given the scope of the documents in the record and the complex interrelationship of scientific, historical, and causative factual spheres in this matter, it will prejudice Designated Parties to have to categorically restrict their comments without

reservation, or to be required to package evidentiary submissions in this rigid manner. The City requests that deviations should be allowed if necessary to fairly and conveniently present a party's case. In any event, the Regional Board must reject the Cleanup Team's proposed severe penalty of excluding any comments not found to conform to the formatting requirements.

The First Amended Order of Proceedings Contemplates Extending the Schedule Time Frames Once the Administrative Record is Distributed

The distribution of the administrative record, per the First Amended Order of Proceedings, signals the commencement of Phase III, a period in which the Designated Parties are afforded the opportunity to review the documentation and conduct any necessary discovery, and submit evidence and comments on the Technical Report. Specifically in recognition of the even then-anticipated significant volume of documents in the administrative record, former Presiding Officer, Chairman John Minan, did not make the time periods for discovery in the First Amended Order of Proceedings final, and explicitly noted in paragraph 3 that the schedule and process can be revisited, at a party's request, in pre-hearing conferences after the distribution of the Technical Report and supporting documentation:

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 of how the Designated Party intends to take advantage of the requested additional time or revised process.

The Existing Time Frame of the Completion of Phase III Is Insufficient Given the Volume of the Administrative Record and the Format of the Documents

The administrative record produced by the Board on April 4, 2008 consists of approximately 375,000 pages of documents, almost three times that contemplated last year. The time which the City—and ostensibly other Designated Parties—will need to review these documents alone may well consume or exceed the present time frame of 90 days for the completion of Phase III. Even at the Second Pre-hearing Conference in 2005, when it was anticipated there would be forty linear feet of documents, former Chairman Minan anticipated that review of that size record “obviously is going to require significant adjustment of time.”¹ Now, instead of forty linear feet, the record consists of 300 linear feet. No one, not even the Board, anticipated the current volume of documents. Because of the volume of this documentation alone, a significant adjustment to the schedule is needed and appropriate.

¹ Pre-hearing Conference Tr. at 63:7 (Dec. 6, 2005)

Furthermore, the documentation has been provided to the Designated Parties in a format which organizes the documents by the date that each document was scanned, which appear to be arbitrary dates with no relevance to this matter. Moreover, there is no indication as to the Board's view of the applicability of any particular document to any section of either the Tentative Cleanup and Abatement Order or the Technical Report. This format will require the Designated Parties' to open each document separately to determine the relevance, and then each Designated Party will need to analyze the applicability of each document to each section of the Order or Report. In short, the breadth of, and lack of any real format to, the administrative record will require a substantial amount of time by each Party to adequately digest the contents.

Due Process and Equity Require that the Phase III Time Frame Be Extended

The City is, in good faith, participating in these pre-hearing proceedings regarding Tentative Cleanup and Abatement Order No. R9-2005-0126. In order to have this process continue in the manner intended by the Board, procedural due process requires that the City be afforded an equitable amount of time to conduct its review of the administrative record given its volume and format, and conduct the discovery contemplated by Phase III. The 90 day period presently afforded to conduct these activities is insufficient. The City submits that the Board, as well as Designated Parties, will benefit from an extension of the schedule, as such an extension will also allow the Board additional time to receive and review public comments and evidence from Designated Parties, which, given the voluminous administrative record, figures to be similarly voluminous.

The Recommended Format For Written Comments Is Unduly Onerous, Inefficient, And Should Not Include The Proposed Penalty Of Exclusion For Non-Compliance.

In practical application, the rigid formatting requirements recommended by the Cleanup Team will be extremely onerous and create needless repetition. For example, it is anticipated that one or more of the Designated Parties will submit evidence generated by its environmental consultant. Such evidence would likely respond to several of the identified documents within the administrative record and potentially numerous paragraphs within each of those documents. To comply with the recommended formatting requirements could cause the Designated Party to be forced to repeat many times over the same basic evidentiary reference. Further, the complexity of the Site suggests that various factors are likely to interact with each other to affect potential toxicity, sources of wastes, potential remedies, and other important site issues. Requiring that all comments be distilled down to specific responses to specific paragraphs in the Order, Report, etc., will make it impossible to make effective comments regarding the interaction between different site factors on one or more conclusions drawn by the Regional Board or by any Designated Party. The City would urge the Regional Board to adopt a more flexible approach.

The City also urges the Regional Board to specifically not adopt the recommendation that "Comments which do not conform to this format may be stricken by the presiding Hearing Officer and excluded from the administrative record." In view of the potential massive liability that each Designated Party faces and the difficulty presented to comply with the formatting requirements as currently proposed by the Cleanup Team, the severe penalty of exclusion for lack of conformance to the formatting requirements is inappropriate.

Conclusion

To summarize, due to the volume of documents in the administrative record for this matter and the lack of formatting, the 90 days provided to the Designated Parties for Phase III is grossly insufficient, and the schedule contemplated in the First Amended Order of Proceedings should be extended. The City requests an extension of time for Phase III to review the administrative record and conduct the discovery and submission of evidence contemplated by the First Amended Order of Proceedings for Phase III. The City looks forward to the opportunity at the Third Pre-Hearing Conference to discussing an appropriate extension of the schedule in the First Amended Order of Proceedings and to discussing appropriate formatting requirements for comments.

Sincerely,

GORDON & REES LLP

A handwritten signature in black ink, appearing to read "Brian Ledger", written in a cursive style.

Brian Ledger

BML/KNR

cc: Advisory Team, c/o Michael P. McCann (12 copies)
David Barker, Regional Water Quality Control Board
Vice-Chair and Presiding Officer, David King, Regional Water Quality Control Board
See Attached E-Mail Service List