



# California Regional Water Quality Control Board San Diego Region



Over 50 Years Serving San Diego, Orange, and Riverside Counties

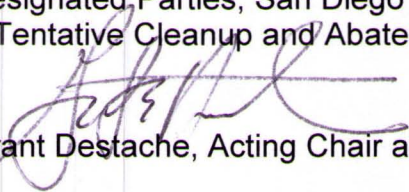
Recipient of the 2004 Environmental Award for Outstanding Achievement from USEPA

Linda S. Adams  
Secretary for  
Environmental Protection

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](http://www.waterboards.ca.gov/sandiego)

**TO:** Designated Parties, San Diego Bay Shipyard Sediment Site,  
Tentative Cleanup and Abatement Order No. R9-2011-0001

**FROM:**  Grant Destache, Acting Chair and Presiding Officer for Prehearing Proceedings

**DATE:** October 27, 2010

**SUBJECT:** Order Reopening Discovery Period, Establishing Discovery Schedule, and Identifying Star and Crescent Boat Company as a Designated Party for Purposes of Tentative Cleanup and Abatement Order No. R9-2011-0001

## I. Procedural Background

The California Regional Water Quality Control Board, San Diego Region's (San Diego Water Board), through its former Presiding Officer for Prehearing Proceedings, issued an order adopting a Final Discovery Schedule for the above matter on February 18, 2010. That Final Discovery Schedule provided for close of discovery on August 23, 2010. After considering a motion by the San Diego Water Board Cleanup Team, in July 2010, the San Diego Water Board declined to extend the discovery period beyond August 23, 2010. On August 9, 2010, the Designated Parties submitted a stipulation extending the discovery schedule through October 26, 2010, under Code of Civil Procedure section 2024.060. The San Diego Water Board's Presiding Officer for Prehearing Procedures thereafter indicated that any disputes arising during the stipulated, extended discovery period should be resolved by Tim Gallagher. On September 15, 2010, the San Diego Water Board Cleanup Team released a revised Tentative Cleanup and Abatement Order No. R9-2011-0001 (TCAO) and supporting draft technical report (DTR). The TCAO/DTR revises Tentative Cleanup and Abatement Order No. R9-2010-0001 and the earlier draft technical report in a number of respects, and as relevant here, for the first time identifies the San Diego Unified Port District (Port District) and the Star and Crescent Boat Company (Star and Crescent) as Dischargers.

On October 19, 2010, the Port District submitted a Motion to Reopen and Extend Discovery Deadlines (Motion) in the matter of the TCAO/DTR. By the noon deadline on October 22, 2010, many of the Designated Parties submitted responses to the Motion. On October 25, 2010, the Port District submitted a reply to the Designated Parties' responses. As explained

**California Environmental Protection Agency**



below, this Order reopens and extends the discovery schedule previously adopted by Order dated February 18, 2010, with all discovery to be completed on or before March 11, 2011.

## **II. Presiding Officer as Appropriate Decisionmaker**

The Port District directed its Motion to the San Diego Water Board's Presiding Officer. Several Designated Parties argue that the Motion should properly be resolved by Timothy Gallagher, who has acted as mediator and discovery referee during a substantial portion of these proceedings. As mentioned above, the previously adopted Final Discovery Schedule closed the discovery period on August 23, 2010. The Designated Parties stipulated among themselves to extend that schedule through October 26, 2010, and to designate Timothy Gallagher as the final arbiter of discovery disputes "absent an appeal and final ruling to the presiding officer." (August 9, 2010, Stipulation, p. 3, ¶ 6.) The Designated Parties also agreed that the stipulation does not "prohibit any party from seeking permission from the Presiding Officer to take additional discovery that is not authorized by this stipulation or the terms of the Final Discovery Plan." (Id., ¶ 5.) Even though then-presiding officer King declined to take an active role in resolving discovery disputes beyond August 23, 2010, the San Diego Water Board has not relinquished its authority to resolve prehearing matters, which include the reestablishment of a discovery schedule. (See Wat. Code § 13228.15.)

The decision as to whether to reopen and extend the previously adopted discovery schedule previously is appropriately before the Presiding Officer for San Diego Water Board.

## **III. Reopening the Discovery Schedule/Limitations on Scope**

On September 15, 2010, the San Diego Water Board Cleanup Team released the TCAO/DTR which, for the first time during this proceeding, identifies the Port District and Star and Crescent as Dischargers. The discovery period established in the August stipulation concluded October 26, 2010, leaving only approximately 5 weeks for completion of all discovery. The DTR, which sets forth the Cleanup Team's technical support for the TCAO, totals more than 1000 pages. A redline version comparing the TCAO with the earlier version was released several weeks ago. However, a redline comparison showing revisions appearing in the new DTR has not yet been released. The Cleanup Team anticipates making it available to the Designated Parties on or before November 1, 2010. (See October 22, 2010 E-mail from Cris Carrigan to the Designated Parties.) It is appropriate that more time be allowed for discovery by Designated Parties on revisions to the TCAO and DTR made by the Cleanup Team.

### Scope of Discovery

As proposed by the Port District and supported by the Cleanup Team and other Designated Parties, the scope of additional discovery allowed by this Order is limited to revisions to the TCAO/DTR released on September 15, 2010 as compared to the December 2009 versions of these documents. With the exception of discovery directed at financial resources/insurance assets against Port tenant/dischargers (see below), additional discovery may only be directed at the Cleanup Team. The Designated Parties are cautioned that any proposals to redepose witnesses must be strongly supported by connection to revisions to the TCAO/DTR as compared to the December version of the tentative order.



BAE Systems Ship Repair (BAE), National Steel and Shipbuilding Company (NASSCO), Campbell Industries and San Diego Gas & Electric (SDG&E) argue that the Port District should not be permitted to seek discovery about Port tenant/Dischargers' financial resources and insurance assets. The September 15, 2010, DTR provides: "Although the Port District is a public government entity, and there is no evidence in the record that the Port District initiated or contributed to the actual discharge of waste to the Shipyard Sediment Site, it is nevertheless appropriate to name the Port District as a discharger in the CAO to the extent the Port's tenants, past and present, have insufficient financial resources to clean up the Shipyard Sediment Site and/or fail to comply with the order. (Citations.) In the event the Port District's tenants, past and present, have sufficient financial resources to clean up the Shipyard Sediment Site and comply with the Order, then the San Diego Water Board may modify its status to secondarily responsible party in the future." (DTR, p. 11-5.)

The Port District is reasonably entitled to attempt to demonstrate that its former and/or current tenant/Dischargers have sufficient resources to clean up the Shipyard Sediment Site and to comply with the order to support an argument that the San Diego Water Board should find the Port to be secondarily responsible under a final order. The Port District is entitled to make such an argument *before*, not only after, adoption of a final Cleanup and Abatement Order in this proceeding. The Port District is therefore allowed to conduct discovery as against its former and current tenant/Dischargers on the issue of financial resources/insurance assets. The Port District is cautioned to make every effort to avoid duplicating discovery that has already been taken in this proceeding or may be submitted in this proceeding. If discovery on financial resources/insurance assets raises confidentiality concerns, the affected Designated Parties are encouraged to stipulate as to how the discovery may be used and/or maintained.

#### **IV. Discovery Schedule**

Various proposed schedules were submitted by the Port District, the San Diego Water Board Cleanup Team and San Diego Coastkeeper/Environmental Health Coalition (the Environmental Groups). The Port District requests that the discovery schedule continue until March 31, 2011. The Port notes that when it began discussions with other Designated Parties to arrive at a mutually acceptable schedule, it had proposed that discovery continue until the end of May, 2011. The San Diego Water Board Cleanup Team proposes that discovery close on March 4, 2011. The Environmental Groups prefer that discovery close sooner but no later than March 1, 2011, noting that the draft Environmental Impact Report (EIR) is expected to be released on March 3, 2011.

While it is premature to establish a hearing date and comment period for the TCAO (and DTR), there is benefit in concluding discovery on these documents before or as close as possible to the start of the comment period for the draft EIR. Moreover, as the Environmental Groups point out, the Port District's request for extension would result in a discovery schedule that exceeds the effective discovery period allowed in the February 2010 Final Discovery Schedule. The scope of discovery allowed through this Order also is narrower than the previous discovery scope because it is limited to revisions from the December 2009 tentative Cleanup and Abatement Order. As reflected below, the discovery



schedule, as limited in scope, above, allows more than four months for completion of discovery prior to release of the draft EIR. Given the nature of the TCAO revisions raised by the Port District, this period provides more than adequate opportunity to complete necessary discovery.

The discovery period therefore is reopened, subject to the limitations in scope discussed above, in accordance with the following schedule:

**November 5, 2010:** Cleanup Team makes available a complete update to Administrative Record and a redline version of the DTR showing revisions from the December 2009 DTR. Cleanup Team produces, upon request, for inspection and copying all non-privileged documents that relate to the allegations in paragraphs 5 and 11 of the TCAO/DTR.

**November 29, 2010** Last day for all Designated Parties to serve the Cleanup Team with written discovery on revisions in the TCAO/DTR; last day for Port District to serve written discovery on financial resources/insurance assets of tenant/Dischargers.

**January 5, 2011** Last day for Designated Parties to respond to discovery served on November 29, 2010.

**January 18, 2011** Last day for Designated Parties to designate expert and non-expert witnesses on revisions to the TCAO/DTR; last day for Port District and Star and Crescent Boat Company to designate expert and non-expert witnesses for all purposes.

**February 4, 2011** Last day for Designated Parties to make expert witness counter-designations on revisions to the TCAO/DTR; last date for Port District and Star and Crescent Boat Company to make expert witness counter-designations for all purposes.

**March 11, 2011** Discovery period closes; last day to submit expert reports.

This ruling on Discovery Schedule incorporates Sections I (Types of Permissible Discovery) and II A. and B. (Preservation of Procedural and Due Process Rights) in the Final Discovery Schedule adopted on February 18, 2010. **All objections/motions for protective orders must be made within 10 days of service of objectionable discovery.**

## **VI. Discovery Referee**

While during the mediation process, the Presiding Officer previously appointed Timothy Gallagher as designated discovery referee and provided that decisions by the Discovery Referee may be appealed to the Presiding Officer, the board-referred mediation was terminated in July 2010. The Designated Parties are encouraged to select a Discovery Referee, whether Timothy Gallagher or some other person, to resolve discovery disputes subject to final resolution by the Presiding Officer. The designated parties shall meet and confer about whether to continue to engage a discovery referee for this purpose and shall report back to the Presiding Officer about the results of the meet-and-confer process by **November 12, 2010.**

## **VII. Designation of Star and Crescent Boat Company as a Designated Party for Purposes of these Proceedings**

Because the TCAO alleges for the first time that Star and Crescent Boat Company is a Discharger under the terms of the TCAO, Star and Crescent is a Designated Party, with full rights to participate in this matter, both during prehearing proceedings and during a hearing when scheduled before the San Diego Water Board. (See Cal.Code.Reg., tit. 23, § 648.1(a).) All communications with or among Designated Parties must include the representative for Star and Crescent Boat Company, currently identified as Sarah Brite Evans, Esq.