



California Regional Water Quality Control Board

San Diego Region



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Via E-Mail Only

TO: David King, Presiding Officer for Prehearing Proceedings
Tentative Cleanup and Abatement Order No. R9-2010-0002
SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD

FROM: David T. Barker, Supervising WRC Engineer
Shipyard Sediment Site Cleanup Team
SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD

DATE: June 24, 2010

**SUBJECT: RESPONSE TO PRESIDING OFFICER KING'S JUNE 17 ORDER
REQUESTING RESPONSES TO MOTION**

This responds, on behalf of the Cleanup Team only, to Presiding Officer David King's June 17, 2010 Order Requesting Responses to Motion of the San Diego Water Board Cleanup Team to Extend by 120 Days the Remaining Deadlines in the Final Discovery Plan For Tentative Cleanup and Abatement Order No. R9-2010-0002 and Associated Draft Technical Report (the "Order").

- A. Cleanup Team's Response to Request Concerning the Cleanup Team's "expectations that the Mediation Parties will agree to fund the proposed cleanup while they resolve liability and allocation issues among them and that the Mediation Parties will have considerably narrowed the issues in dispute among them by the August 27, 2010 anticipated release of a revised tentative CAO and DTR."**

Since the December 22, 2009 release of the Tentative CAO and DTR for this matter, the Designated Parties, other than those that have withdrawn from the mediation, have continued to work with the Cleanup Team to develop detailed additional technical analyses to be included in the revised DTR, and to support the findings and directives in the CAO. The Cleanup Team views much of the detailed additional technical analyses as important bases for, in part, the findings required under State Water Board Resolution No. 92-49 *Policies and Procedures for Investigation and Cleanup and Abatement of Discharges Under Water Code Section 13304*. Resolution No. 92-49

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requires, in part, that the proposed cleanup be consistent with maximum benefit to the people of the state, that it not unreasonably affect present and anticipated beneficial use of waters of the state, and that it not result in water quality less than that prescribed in the Water Quality Control Plans and Policies adopted by the State and Regional Water Boards.

Since December 22, 2009, the Designated Parties, other than those that have withdrawn from the mediation, have consistently provided the Cleanup Team with ready access to respective technical consultants and specialists to assist the Cleanup Team with developing the detailed additional technical analyses to be included in the revised DTR. It is the cooperative approach of the Designated Parties that have not withdrawn from the mediation of assisting the Cleanup Team with preparing the often difficult and complex technical analyses we have requested that has narrowed the issues in dispute between us. It is this same cooperative approach that, in part, gives rise to our expectation that the Mediation Parties will agree to continue to fund the tasks necessary to advance the proposed cleanup. Moreover, some of the Designated Parties continue to pay staff oversight costs for all Cleanup Team work done on this matter, and have agreed to pay costs incurred by a CEQA consultant to be retained by the Cleanup Team for the important environmental review that is to be undertaken for the cleanup project. To sum, the Cleanup Team's expectation is grounded in the facts that the Designated Parties that have not withdrawn from the mediation continue to cooperate with the Cleanup Team to provide requested technical assistance to advance the proposed cleanup, and that all current tasks necessary to advance the cleanup are being funded in good faith by some of the Designated Parties.

B. Cleanup Team's Response Describing CEQA-Related Activities Since December 23, 2009.

- On November 24, 2009, the Cleanup Team released its Notice of CEQA Scoping Meeting. Between November 24 and December 22, 2009, while it was drafting the tentative CAO and supplemental DTR, the Cleanup Team also did its initial potential environmental impact screening analysis and drafted its Notice of Availability of and its Initial Study. During this time period, the Cleanup Team also prepared CEQA's mandatory Notice of Preparation to all responsible and trustee agencies.
- On December 22, 2009, the Cleanup Team published its Notice of Availability and Initial Study and began preparing materials for a slide show presentation to be presented at the CEQA Scoping Meeting.

- On January 21, 2010, the Cleanup Team held its CEQA Scoping Meeting at the San Diego Water Board Office. Shortly thereafter, the Cleanup Team began reviewing the public comments submitted and determined it would be appropriate to extend the public comment period.
- On February 3, 2010, the Cleanup Team posted its Notice of Extension of Public Review and Comment Period on the CEQA Initial Study. It also assisted with preparation of the Executive Officer's Report on the CEQA Scoping Meeting. After reviewing and analyzing the issues raised by the Initial Study and the public comments on the Initial Study, the Cleanup Team determined not to undertake environmental review "in house," but, rather, to retain a professional CEQA consultant. Accordingly, in mid-February, the Cleanup Team began its initial consultant screening efforts, and developed a list of eight potential consulting firms with appropriate qualifications from which it would seek proposals. From mid-to-late February, the Cleanup Team developed a proposed scope of services to distribute to the select list of consultants.
- On March 9, 2010, the Cleanup Team distributed its requests for proposals to the list of qualified consultants. On March 22, the public comment period on the Initial Study closed, and the Cleanup Team reviewed the comments submitted. By March 24, the deadline for submission of proposals from CEQA consultants, the Cleanup Team had received responses from four consultants that they would not submit proposals for the CEQA work and no responses from the remaining consultants. Accordingly, the Cleanup Team broadened its search for consultants and engaged in follow up with the non-responsive consultants to try to find out why no proposals were submitted.
- On March 24, 2010, the Cleanup Team distributed its second request for proposals to a broader group of potential CEQA consultants. One consulting firm submitted a proposal by the April 9 deadline. The Cleanup Team immediately coordinated a date for the bidding consultant to meet with the mediation parties to discuss the proposal and respond to questions. The first available mediation date was April 20, 2010.
- On April 20, 2010, the single bidding consultant met with the mediation parties and it was discovered during the interview that one of the key sub-consultants had a potential conflict of interest with one of the Designated Parties that had withdrawn from the mediation. The Cleanup Team immediately contacted the Designated Party, which refused to waive the conflict. While the bidding consultant began its search for a replacement

sub-consultant, an additional consulting firm that was willing to bid on the CEQA work was identified.

- On May 11 and May 13, respectively, the Cleanup Team received proposals from consultants to undertake the CEQA environmental review. On May 17, the Cleanup Team requested that one of the consultants revise its proposal to account for some sub-consultant costs. The following day, Cleanup Team leadership determined to add a new staff person to be the coordinator on CEQA issues and to facilitate the retention of a CEQA consultant.
- On May 24, 2010, the Cleanup Team received complete proposals from two consultants.
- On June 15, 2010, the second bidding consultant made a presentation on its proposal to the mediation parties. On June 22, a key sub-consultant made its presentation to the mediation parties and the Cleanup Team made its decision to retain a specific CEQA consultant.

C. Modified Request to Extend Discovery Deadlines Consistent with CEQA Process.

Since the Cleanup Team made its June 16, 2010 Motion to extend by 120 days the remaining discovery deadlines, it has been pointed out to us that, in light of the contemplated 40-week (at a minimum) CEQA process, it would be more desirable to integrate the remaining discovery deadlines with the CEQA process. The Cleanup Team believes that integrating the remaining discovery deadlines with the CEQA process will provide a longer discovery period, allowing the Designated Parties more time to develop expert reports specific to the soon-to-be released augmented DTR, and to probe the strengths and weaknesses of those reports. Because the CEQA process must determine the timing of the San Diego Water Board's consideration of the tentative CAO and DTR in any event, the Cleanup Team does not believe there is any good reason not to integrate the timing of the remaining discovery deadlines with the CEQA process and hereby requests an Order from the Presiding Officer adopting the following revised discovery deadlines.

Discovery Deadline	CEQA Process Benchmark
Expert and non-expert witness designations on cleanup levels and liability issues due at 5 p.m.	Close of public comment on the Draft EIR
Expert counter-designations due at 5 p.m.	15 days after close of public comment on the Draft EIR
Close of discovery at 5 p.m.	30 days prior to public hearing to certify the EIR, and adopt the CAO and DTR

In the alternative, should the Presiding Officer disagree with this approach, the Cleanup Team requests that the discovery deadlines be extended by at least 280 days, to allow more time to complete the CEQA process and discovery in the CAO proceeding. None of the CEQA consultants interviewed anticipated the CEQA process taking less than 280 days to conclude.