

California Regional Water Quality Control Board
San Diego Region

SECOND AMENDED
ORDER OF PROCEEDINGS
PRE-HEARING CONFERENCES FOR TENTATIVE CLEANUP AND ABATEMENT
ORDER NO. R9-2005-0126.

Date: May 2, 2008

To: Distribution List (designated parties and interested persons)

The 1st Pre-Hearing Conference was held on Monday, September 26, 2005 at the office of the California Regional Water Quality Control Board, San Diego Region (Regional Board). The 2nd Pre-Hearing Conference was held on December 6, 2005 at the Regional Board office. Regional Board Chairman John Minan, serving as the Presiding Officer, conducted the 1st and 2nd Pre-Hearing Conferences on behalf of the Regional Board. The 3rd Pre-Hearing was held on April 25, 2008 at the Regional Board office. Regional Board Vice Chair David King, serving as the Presiding Officer, conducted the 3rd Pre-Hearing Conference. The Pre-Hearing Conferences were properly noticed and open to and attended by the public. Audio tape recordings of the pre-hearing conference proceedings were made.

Additional pre-hearing conferences may be convened.

The primary goal of the Pre-Hearing Conferences is to ensure that the future hearing(s) for the Tentative Cleanup and Abatement Order No. R9-2005-0126 (CAO) proceed in an orderly manner. At the three Pre-Hearing Conferences, there has been no discussion of the merits of any provisions of the Tentative CAO.

This Second Amended Order of Proceedings reflects the nature of the discussions and agreements that have occurred at the Pre-Hearing Conferences and contains certain procedural decisions by the Presiding Officer. Rulings by the Presiding Officer contained in Paragraphs 1 and 2 and 4 through 13 of this Order are final, subject to clarification as necessary by the Presiding Officer and otherwise subject only to discretionary review by the Regional Board.¹

Attendees at the 1st Pre-Hearing Conference for the recommended and prospective designated parties included the following representatives:

Jim Dragna – Bingham McCutchen LLP (BP West Coast Products)
David Mulliken – Latham and Watkins LLP (NASSCO)

¹ Changes for clarification purposes have been made to Paragraphs 2, 4, 5 and 12 as a result of the 3rd pre-hearing conference.

Kelly Richardson – Latham and Watkins LLP (NASSCO)
Vincent Gonzales – Semptra Energy (SDG&E)
Chris McNevin – Pillsbury, Winthrop, Shaw & Pittman LLP (Chevron USA)
Tim Miller – City of San Diego
Chris Zirkle – City of San Diego
Marco Gonzales – Environmental Health Coalition & San Diego Bay-Keeper
David Merk – Port of San Diego
Jim Mathison – Daley & Heft LLP (San Diego)
Shaun Halvax – BAE Systems
Lloyd Schwartz – BAE Systems
David Silverstein – U.S. Navy
Tom Fetter – San Diego Port Tenants Association
Craig Anderson – Industrial Environmental Association
John Richards – Regional Board Cleanup Team

Attendees at the 2nd Pre-Hearing Conference for the Designated Parties included the following representatives:

David Silverstein – U.S. Navy
Lloyd Schwartz – BAE Systems
Shaun Halvax – BAE Systems
David Mulliken – Latham and Watkins LLP (NASSCO)
Kelly Richardson – Latham and Watkins LLP (NASSCO)
Lance McVey—NASSCO
Mike Chee—NASSCO
Tom Mulder—TN Assoc. (SDG&E)
Barbara Montgomery—SDG&E
Chris Zirkle—City of San Diego
Tim Miller—City of San Diego
Mark Elliot-- Pillsbury, Winthrop, Shaw & Pittman LLP (Chevron USA)
Marco Gonzalez—EHC
Laura Hunter—EHC
Paul Brown—Port of San Diego
Jim Mathison—Daley and Heft LLP (Port of San Diego)
John Richards—Regional Board Cleanup Team

Attendees at the 3rd Pre-Hearing Conference for the Designated Parties included the following representatives:

BAE Systems Ship Repair Inc.
Shaun Halvax
Lloyd Schwartz
Robert Longstreh, DLA Piper LP
Michael Tracy, DLA Piper LP

BP West Coast Products LLC

Michael McDonough, Bingham McCutchen LLP

Chevron USA, Inc.

Amy Gaylord, Pillsbury Winthrop Shaw Pittman LLP

City of San Diego

Ruth Kolb

Kris McFadden

Frederick Ortlieb

Richard Haimann, MWH

Environmental Health Coalition & San Diego Coastkeeper

Marco Gonzalez, Coast Law Group LLP

Gabe Solmer, San Diego Coastkeeper

Marine Construction and Design Company/Campbell Industries, Inc.

No representatives present.

National Steel and Shipbuilding Company

Christopher Barnes

Mike Chee

Scott Koreski

Ashley Coreen, Latham & Watkins LLP

David Mulliken, Latham & Watkins LLP

Kelly Richardson, Latham & Watkins LLP

Regional Board Cleanup Team

David Barker

Craig Carlisle

Lisa Honma

Alan Monji

Ben Tobler

Erik Spiess, State Water Resources Control Board, Office of Enforcement

San Diego Gas & Electric Company

Jill Tracy

Pete Nyquist, Weston, Benshoof, Rochefort, Rubalcava & MacCuish LLP

San Diego Port Tenants Association

Richard Cloward

San Diego Unified Port District

Leslie FitzGerald

Bill Brown, Brown & Winters LLP

Sandi Nichols, Allen, Matkins, Leck, Gamble, Mallory & Natsis LLP

U.S. Navy
Nate Cushman
David Silverstein
Len Sinfield

The topics addressed in the Pre-Hearing Conferences and the respective discussions, agreements, and decisions are as follows:

1. Executive Officer's Participation on the Advisory Team.

The Presiding Officer considered motions objecting to participation by John Robertus, the Regional Board Executive Officer, as a member of the Advisory Team for the Regional Board. (See memorandum from John Robertus dated June 30, 2005 that describes the separation of staff into an Advisory Team and a Cleanup Team for this proceeding.)

The Presiding Officer placed Mr. Robertus under oath, permitted the parties to examine Mr. Robertus about his involvement in the development of the tentative CAO, his views regarding the need for cleanup of contaminated sediments, and related matters. Mr. Robertus testified that he would be able to provide advice to the Board in an open, unbiased manner based solely on the record and testimony to be presented. No substantial evidence was presented to warrant disqualifying action.

As a result of Mr. Robertus' testimony and his response to questions, the Presiding Officer has determined that Mr. Robertus has not been personally involved in the investigation, prosecution, or advocacy roles of the staff to any extent that would preclude his involvement as a neutral advisor to the Regional Board. The Presiding Officer has further determined that Mr. Robertus has not developed any biases that would prevent him from providing neutral advice to the Regional Board in this matter.

The Presiding Officer, therefore, has determined that Mr. Robertus may continue to participate on the Advisory Team. The Presiding Officer has determined that Mr. Robertus shall provide all technical, scientific, and policy advice to the Regional Board in public meetings or in correspondence copied to all of the parties.

2. Designation of Parties.

The First Pre-Hearing Conference provided an opportunity for persons seeking designated party status to address the Presiding Officer. The Presiding Officer hereby waives the strict applicability of Government Code Section 11440.50. (See Government Code Section 11440.50(a) and Title 23, California Code of Regulations, Section 648(d).) The Presiding Officer is applying Title 23, California Code of Regulations, Section 648.1.

The Presiding Officer determined that the Regional Board Cleanup Team is a Designated Party.

The Presiding Officer also considered requests from five persons requesting Designated Party status. Persons requesting Designated Party status submitted written requests and were provided the opportunity to address the Presiding Officer. All Designated Parties were provided the opportunity to comment on each request by persons seeking Designated Party status.

The Presiding Officer has determined that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the Bay-Keeper (now named San Diego Coastkeeper), the Environmental Health Coalition, and the San Diego Port Tenants Association to be Designated Parties. These entities are representative advocacy groups with a history of involvement in similar types of issues. The interests of their members that may be affected by this proceeding are, to some extent, different from the interests of the other Designated Parties. Therefore, the benefits to be derived from their participation outweighs the burdens. The San Diego Bay-Keeper (now named San Diego Coastkeeper), the Environmental Health Coalition, and the San Diego Port Tenants Association are hereby granted Designated Party status.

The Industrial Environmental Association and the Port of San Diego Ship Repair Association are denied Designated Party status. These entities' interests are adequately represented by having some of their members participate as Designated Parties. Moreover, their participation as Designated Parties may impede the orderly and prompt conduct of the hearing. To the extent that the San Diego Port Tenants Association desires to continue to collaborate with these entities, they may, of course, continue to do so. Otherwise, the participation of the Industrial Environmental Association and the Port of San Diego Ship Repair Association is limited to that of interested persons. They may present non-evidentiary policy statements, but may not present evidentiary testimony.

The Advisory Team's proposal to designate the San Diego Bay Council as a Designated Party is hereby rejected. The request for this designation was withdrawn by the Coast Law Group on behalf of the San Diego Bay Council in their correspondence of September 20, 2005.

As of April 25, 2008, the Designated Parties for the proceeding are as follows:

1. BAE Systems San Diego Ship Repair, Inc. (formerly Southwest Marine, Inc.)
2. National Steel and Shipbuilding Company (NASSCO)
3. San Diego Gas & Electric Company, a subsidiary of Sempra Energy Company
4. Chevron USA, a subsidiary of Chevron Texaco
5. BP, the parent company of and successor to Atlantic Richfield Co. (ARCO)
6. U.S. Department of the Navy
7. City of San Diego
8. Marine Construction and Design Company / Campbell Industries, Inc.
9. San Diego Unified Port District

10. San Diego Coastkeeper (formerly San Diego Baykeeper)
11. Environmental Health Coalition
12. San Diego Port Tenants Association
13. Regional Board Cleanup Team

3. The Proposed Order of Proceeding

The Presiding Officer proposes the following schedule and process. The schedule and process may be revisited 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 about how the Designated Party intends to take advantage of the requested additional time or revised process. Any extensions or revisions shall be in the sole discretion of the Presiding Officer.

The following narrative describes the various phases of the schedule and process to be followed. For the convenience of the reader, Appendix A to this Order provides a chronological outline of the phases.

Phase I: The 1st Pre-Hearing Conference was conducted on Sept. 26, 2005. The 2nd Pre-Hearing Conference was conducted on December 6, 2005.

Phase II: The Cleanup Team was directed to distribute to all Designated Parties a Technical Report that supports the proposed issuance of the Tentative CAO. In addition, the Cleanup Team was directed to identify, index, and make available to all Designated Parties all directly relevant technical information related to the Tentative CAO and Technical Report. The Cleanup Team was also directed to investigate the feasibility of converting the technical information into a digitized, electronic format to facilitate the Designated Parties' review, and report back to the Advisory Team on its proposed course of action.

Note: Phase II was completed and Phase III commenced on April 4, 2008. The Cleanup Team distributed hard drives containing an indexed electronic record for the proceeding to each of the Designated Parties and posted a revised Technical Report and Tentative Cleanup and Abatement Order on the Regional Board website on that date. The Cleanup Team is further directed to post redline/strikeout versions of the Technical Report and Tentative Cleanup and Abatement Order showing the revisions from the previous versions. The Cleanup Team is also directed to provide additional details regarding other entities that were consulted, as described in the Cleanup Team's April 22, 2008 memorandum. The Cleanup Team is directed to work with the Advisory Team to produce and distribute to the Designated Parties an acceptable method for searching the electronic record.

Phase III: The 3rd Pre-Hearing Conference was conducted on April 25, 2008.

In the interest of promoting prompt resolution of this proceeding, Phase III shall be bifurcated into two stages: the Cleanup Levels Stage and the Liability Stage. The timing of the two stages will overlap, but the Cleanup Levels Stage will be conducted more expeditiously and will conclude first.

As described in the Notice of Settlement Conference dated April 28, 2008, a Settlement Conference has been scheduled for **May 16, 2008** on the cleanup levels issue. The Designated Parties are required to submit initial briefs and any technical reports addressing the cleanup levels proposed by the Cleanup Team, any other proposed cleanup levels, and directly-related issues by **June 30, 2008**. The Designated Parties are required to submit final briefs by **July 30, 2008**. Limited discovery by the Designated Parties regarding the cleanup levels may be authorized by the Presiding Officer in accordance with Government Code section 11450.05 (et seq.). Any requests for subpoenas or subpoenas duces tecum regarding the appropriate cleanup levels must be filed with the Presiding Officer no later than **July 7, 2008**. The Cleanup Levels Stage will conclude on **July 30, 2008**, at which time the Presiding Officer intends to notice a second settlement conference and/or an adjudicatory hearing before the Regional Board to determine the cleanup levels.

The Liability Stage of Phase III shall address the liability of the potential responsible parties for compliance with the Cleanup and Abatement Order and any other relevant issues not related to the appropriate cleanup levels. The Liability Stage will commence upon the determination by the Presiding Officer that the Cleanup Team has distributed an acceptable method for searching the electronic record. No later than **30 days** after the commencement of the Liability Stage, the Designated Parties shall submit a proposed comprehensive discovery plan. To the extent some or all of the Designated Parties agree on a proposed discovery plan, they shall so indicate. The Presiding Officer will approve the final comprehensive discovery plan. It is anticipated that the Liability Stage of Phase III shall conclude no later than **November 21, 2008**. The Designated Parties shall submit all evidence and comments and a summary list of the disputed material issues of fact and law, and Interested Persons shall submit all comments, by **November 21, 2008**.

Phase IV: The Designated Parties shall then have **30 days** following the close of Phase III to conduct any discovery, including cross-examination of witnesses, and submit any evidence and comments for the purposes of rebutting evidence and comments submitted under Phase III above. Only rebuttal evidence and related comments will be accepted.

Phase V: The Cleanup Team shall have **60 days** to consider all of the evidence and comments submitted under Phases III and IV above, and submit a Response to Comments and any proposed revisions to the Technical Report and/or Tentative CAO. The Cleanup Team should not submit any new evidence in Phase

V. In addition, the Cleanup Team shall also provide a summary of all continuing areas of disagreement.

Phase VI: There will be a minimum 45-day public notice and comment period prior to the hearing before the Regional Board. The Designated Parties may submit hearing briefs and Interested Persons may submit written non-evidentiary comments at the conclusion of this period. No further written materials will be accepted from Designated Parties, excluding the Cleanup Team, or from Interested Persons, except as described in Phases VII and VIII, below. The Cleanup Team may submit a response, which may not contain any new evidence, to these hearing briefs and comments.

Phase VII: The Regional Board will then conduct a hearing with the primary purpose to receive comments from the public and summaries of the previously-submitted evidence and comments by the Designated Parties. Cross-examination may be available to the Designated Parties at the discretion of the Presiding Officer. No new evidence will be admitted at the hearing, subject to the Presiding Officer's discretion. Also, the Presiding officer will not allow the introduction of new or additional evidence following the close of the hearing.

Phase VIII: The Regional Board will subsequently conduct a non-evidentiary meeting to consider whether to adopt, modify, or reject the Cleanup Team's final Tentative CAO. Brief public comments will be allowed on the proposed changes, if any, to the revised Tentative CAO. No new or additional evidence will be admitted at this meeting. However, the Regional Board may direct questions to any of the Designated Parties.

4. **General Requirements for the Submittal of Documents**

The Advisory Team shall be responsible for receiving and maintaining all documents and electronic submissions submitted by Designated Parties and Interested Persons that comprise the administrative record for this proceeding, and shall, to the extent feasible, post them on the San Diego Regional Board website (<http://www.waterboards.ca.gov/sandiego/>).

In order to facilitate the development of the administrative record, all documents submitted by the Designated Parties shall be provided to the Advisory Team in an electronically digitized, text searchable Adobe PDF file format and shall be accompanied by an electronic index entry that follows the format established in Appendix B to this Order. The documents shall also follow the specific format contained in Appendix C to this Order to facilitate the review of submitted comments and the development of responses to comments. In addition, an authorized representative for the Designated Parties shall submit a signed paper copy certification that the electronic submittal is a true and accurate copy of the submitted signed original.

The Designated Parties shall also provide 12 hard copies of all submissions to the Advisory Team and shall simultaneously distribute electronic versions of all submissions to the complete list of Designated Parties.

5. Identity of Additional Responsible Parties

The deadline for the Designated Parties to identify any additional potential responsible parties will be **August 29, 2008**, in order to provide an adequate opportunity for any additional potential responsible parties to participate in this proceeding. All of the Designated Parties (with the exception of the Environmental Health Coalition, the San Diego Coastkeeper, the San Diego Port Tenants Association, and the Cleanup Team) are on notice that they may ultimately be found by the Regional Board to be responsible for compliance with the Cleanup and Abatement Order. There will be no final determination regarding which parties are responsible for compliance prior to the Regional Board's adoption of a final Cleanup and Abatement Order.

6. Removal of Additional Responsible Parties

In order to conserve the resources of the Regional Board and the remaining Designated Parties, there will not be a separate summary process for Designated Parties to request to be removed from further consideration as a potential responsible party under the Tentative CAO proposed by the Cleanup Team.

7. Consideration of creating a comprehensive list of contested issues of fact and law.

The Presiding Officer directed the Designated Parties to establish a list of contested material issues of fact and law. This shall occur in accordance with the provisions of Paragraph 3, Phase III above. If the parties are unable to reach agreement, no party will be precluded from raising additional issues.

8. The length and date of the hearing(s).

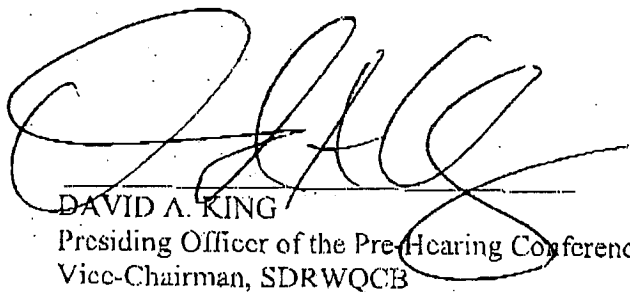
The Presiding Officer determined that the Designated Parties, the Regional Board, and the public will have a reasonable amount of time to review and comment on the Tentative CAO, the Technical Report and the comments submitted by all parties. Because of the limited time to speak and present information at the hearing and the above limitation on the submission of new evidence at the hearing, the parties should be prepared to focus primarily on advanced written submissions of testimony and evidence. The parties should similarly expect that the opportunity for live cross-examination during the hearing will be limited, and should therefore take advantage of the discovery process to conduct reasonable cross-examination of witnesses.

9. Location of the hearing.

The hearing may be conducted at the Regional Board, or at a facility in the vicinity of the cleanup site if reasonable arrangements can be made for a suitable site.

10. **Participation by non-English speaking persons.**
All parties should be aware that non-English speaking persons may be in attendance at the hearing and allowance for translation should be considered.
11. **Logistics for the workshops, tours, and other methods for providing background information to the Board Members and the public.**
The Presiding Officer does not anticipate any Board Member tours of the proposed cleanup site because of the difficulties inherent in creating a clear record, preventing ex parte communications, and providing for complete public access.
12. **Designated Parties Contacts, Organizations, E-mail Address, and Regular Mail Address.**
All designated parties shall submit in writing to the Advisory Team any revision to the contact information consisting of the organization representative, email address, and regular mail address. The Advisory Team shall maintain a current distribution list on the Regional Board website.
13. **Service to Regional Board Advisory Team:**

Michael P. McCann, Supervising Engineer
San Diego Regional Water Quality Control Board
9174 Sky Park Court, Suite 100
San Diego, California 93123
Mmccann@waterboards.ca.gov
14. **Pre-Hearing Conferences.**
The Presiding Officer may schedule additional pre-hearing conferences as needed.



DAVID A. KING
Presiding Officer of the Pre-Hearing Conference and
Vice-Chairman, SDRWQCB

APPENDIX A OUTLINE OF SCHEDULE AND PROCESS

Phase I Pre-Hearing Conference	Phase II Release of Tentative CAO & Technical Report	Phase III Public Comment (formatted sequential structure based upon the tentative CAO & Technical Report) Discovery Submission of Evidence List of Unresolved Issues	Phase IV 30-Day Public Comment on the Phase III Public Comments Additional Discovery Submission of Rebuttal Evidence	Phase V 60-Day Cleanup Team Response to "All Public Comments" No new evidence submitted. Revisions to CAO and/or Technical Report Final List of Unresolved Issues	Phase VI 45-Day Preparation & Noticing of CAO Hearing	Phase VII Hearing on CAO & Proposed Responsible Parties (Record closed at conclusion of hearing.)	Phase VIII Regional Board Meeting Deliberate & Vote on CAO
26 Sep 2005	04 Apr 2008						
Cumulative Days							0

**APPENDIX B
INDEX VALUES FOR COMMENTS ON
TENTATIVE CAO NO. R9-2005-0126**

Index Category	Entry
Assign To	FMELBOURN
Program	Site Cleanup Program (SCP)
Program Activity	Enforcement
Program Action	Cleanup and Abatement Order
Program Subaction	Public Comments and Responses
Document Date	MM/DD/YY
Date Received	Regional Board Staff will fill in
Subject	Comments on Tentative Cleanup and Abatement Order No. R9-2008-0126
Regulatory Measure	340860
From (Name Person)	Commenter to fill in
From Organization Type	Regional Board Staff will fill in
From – Organization Name	Commenter to fill in
To - Name (Person)	John Robertus, Executive Officer
To - Party Type	Regional Water Quality Control Board
To - Organization Name	RWQCB 9 - San Diego Region
File Code	N/A
File Volume	N/A
Related Document Handle	N/A
Place Number	712610
Place Name	Auto fill
Place Address	Auto fill
Place Number 2	Regional Board Staff will fill in
Confidential	No
Doc File Type	Regional Board Staff will fill in
Admin. Record Desc.	Shipyards Sediment Site CAO Proceedings

APPENDIX C
COMMENT FORM
SHIPYARD SEDIMENT SITE

INSTRUCTIONS: Persons representing Designated Parties to the Cleanup and Abatement Order (CAO) Proceeding, excluding the San Diego Water Board Cleanup Team, shall submit all written testimony, argument, and exhibits¹ to the San Diego Water Board in the formats presented below.

Each submittal by persons representing Designated Parties to the proceeding shall provide the following information on the cover page of their submittal:

Name: _____
Title: _____
Company/Agency: _____
Street Address: _____
City, State, Zip Code: _____
Phone Number: _____
Email Address: _____
Party Representing: _____

Each comment² shall be preceded by an information table as illustrated below. A separate information table shall be used for each individual comment. A single information table may refer to multiple document types (i.e., Tentative CAO, Draft Technical Report, Shipyard Administrative Record, or Written Testimony, Argument, and Exhibits Submitted by Participants), provided that the single information table is expanded to include all of the fields for those document types. A single information table may also refer to multiple documents, provided that pinpoint citations to each of those documents are contained in the information table. Citations to other materials should follow the California Style Manual and contain pinpoint citations to the extent feasible. Comments which do not conform to this format may be stricken by the Presiding Officer and excluded from the administrative record.

¹ Exhibits may include written testimony, technical documentation, factual information, expert opinions, statements of qualifications of expert witnesses, and other documents to be used as evidence.

² A "comment" is defined as any reasonably segregable issue, concern, or argument.

Tentative Cleanup & Abatement Order Comment Information

Document Name	Tentative CAO No. R9-2005-0126
Document Date	
Finding or Directive Number	
Page, Paragraph, Sentence Number	
Concise Summary of Issue	

Draft Technical Report for Tentative Cleanup & Abatement Order Comment Information

Document Name	Draft Technical Report for Tentative CAO No. R9-2005-0126
Document Date	
Section Number	
Page, Paragraph, and Sentence Number	
Concise Summary of Issue	

Shipyard Administrative Record³

Document Name	
Document Date	
Document Type	Shipyard Administrative Record
SAR Number ⁴	
Page, Paragraph, Sentence Number	
Concise Summary of Issue	

Written Testimony, Argument, and Exhibits Submitted by Participants⁵

Document Name	
Name of "Person" and Organization Document is From	
Document Date	
Document Type	Public Comment
Page, Paragraph, and Sentence Number	
Concise Summary of Issue	

³ The term "Shipyard Administrative Record" refers to the indexed administrative record in electronic format provided by the San Diego Water Board to the Parties to the Cleanup and Abatement Order Proceeding.

⁴ An individual Shipyard Administrative Record (SAR) Number is assigned to every page of every document in the electronic Shipyard Administrative Record.

⁵ Participants in the San Diego Water Board CAO proceedings are either "designated parties" or "interested persons."