

San Diego Water Board Response to Stakeholders Comments
Draft Investigative Order No. R9-2015-0058
October 26, 2015

Stakeholder Comment Period June 1st through July 31st 2015		
	Stakeholder Comments (Paraphrased)	San Diego Water Board Response
Number	Stakeholders¹	
1	<p>Limit this Investigative Order (IO) to Phase 1 only. Phase 1 findings may dictate that Stakeholder roles change for Phase 2, and asking all Stakeholders to participate in both Phases at this point increases the probability of delays due to internal disagreement.</p> <p>The uncertainty involved with the Phase 1 findings make it so that actions and deadlines for the work elements under Phase 2 cannot be effectively dictated at this time.</p>	<p>Any evidence should be included in the Phase 1 Report and stakeholders may request removal from the Order. The San Diego Water Board will consider the evidence and amend the Order to remove stakeholders if appropriate.</p> <p>The Phase 2 investigation is necessary to address the study questions that were developed and proposed by the stakeholder group and to investigate potential sources of impairment that may be identified in the Phase 1 Report (<i>Chollas Creek Investigative Order-Stakeholder Input, May 12, 2015</i>).</p>
2	Proposed timelines should be extended, Phase 1 Work Plan due March 30, 2016; Phase 1 Report due March 30, 2017.	The compliance dates were extended to: Phase 1 Work Plan due February 29, 2016; Phase 1 Report due February 28, 2017.
3	Identify a Work Plan approval process or the Stakeholders may assume SDRWQCB concurrence with the Phase 1 Work Plan if they do not receive comments to the contrary within 90-days of submitting the Plan.	The IO has been revised to include the San Diego Water Board's review process and time period to approve the Work Plan (See IO Directive 1. h. and 2. f.).
4	Provide clear delineation of the Tidal Prism.	The IO has been revised to include text and a figure outlining the Tidally-Influenced Area (See IO section 3).
San Diego Unified Port District (Port District)		
5	The District does not own or operate any MS4 that discharges into the investigation area.	The District has responsibility, authority and/or control for operation of the storm water system within the tideland area under the MS4 permit. As admitted in a previous matter, the Port's MS4 facilities have the potential to generate pollutants which can reach the MS4 system with each rainfall event and in turn be carried to receiving water bodies. Naming the District is consistent with the District's prior admissions and statements, State Water Resources Control Board orders pursuant to the Water Code related to the nature of control, responsibility, and ownership giving rise to liability under Water Code section 13304, and Cleanup and Abatement Order No. R9-2012-0024, which

¹ The Stakeholder Group includes the City of San Diego, U.S. Navy, NASSCO, the San Diego Unified Port District, City of La Mesa, City of Lemon Grove, BNSF, MTS, and Caltrans. The Stakeholder group worked collaboratively to provide group comments by July 31, 2015.

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		<p>included the District.</p> <p>Nevertheless, despite historical State Board Orders assigning primary liability to owners and permittees who have legal control over the property and to prevent the discharge leading to this and possible future enforcement actions, the San Diego Water Board is choosing to place the District in a secondarily responsible position. It appears, to the satisfaction of the San Diego Water Board, that physical and actual control rests with the City of San Diego, a co-permittee on the MS4 with the District. Although the District, despite its objections, could be liable as a co-permittee because it has the ability to oversee and prevent the discharges, in this instance, the San Diego Water Board is naming the District but considering it only a secondarily responsible party.</p>
6	The Water Board should look to NASSCO to address any contamination caused by its operations.	NASSCO is named in the IO. The Phase 1 investigation may identify areas of contamination that will have to be assessed by one or more responsible parties.
7	Findings 7 and 10 should be revised to reflect the fact that the District does not own or operate the MS4 discharging to Chollas Creek.	See Response No. 5 above.
8	<p>The District requests that Finding 3 be revised to correct the statements relating to the Tidal Prism:</p> <p>a) Replace the "San Diego Unified Port District" with the "City of San Diego" for jurisdictional ownership.</p> <p>b) Include a map of the Tidal Prism area within the body of the draft Order.</p>	<p>a) Both the City of San Diego and District are named to the IO. Clarification regarding control and ownership can be made at a later time.</p> <p>b) See Response No. 4 above.</p>
9	<p>The District requests the following corrections to the draft Order:</p> <p>a) Revise the draft Order to identify that NASSCO leases land from both the District and the U.S. Navy (Page 7).</p> <p>b) Include correlating language on page 9 to indicate that the U.S. Navy leases land to NASSCO.</p>	The IO sections 12 and 13 have been revised to include the requested corrections.
BNSF		
10	BNSF does not have a "Facility" in the Chollas Creek Watershed.	BNSF was removed from the IO (see San Diego Water Board letter, dated July 11, 2015). To the extent the parties named on the IO provide evidence to the
11	BNSF "Rail Lines" are not subject to the	

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	Board's jurisdiction.	Regional Board allowing it to name BNSF, the Board would make such revisions, subject to additional information related to BNSF liability or the Board's jurisdiction. Additionally, nothing precludes BNSF from voluntarily participating in the cleanup discussions to the extent that it would like to minimize its civil liability.
NASSCO		
12	The Draft IO disproportionately focuses on NASSCO even though NASSCO's alleged discharges to the TMDL area are <i>de minimis</i> , at most.	The Water Board does not determine allocation of liability.
13	To the extent the Water Board determines NASSCO is responsible for any discharges to the TMDL area, the District shares primary liability for such discharges.	The District as lessor can be named as either a primarily or secondarily responsible party (See Response No. 5). To the extent that the primarily responsible parties provide additional information or evidence that indicates the District did exert authority over facilities/outfalls or lessee's properties, or should have and failed to, this Order and future enforcement actions can be amended.
Caltrans		
14	Caltrans performed a Statewide Monitoring Characterization Study which demonstrated that, nearly always, the listed pesticides were not detected in storm water leaving Caltrans facilities. Caltrans has never used the targeted constituents such as Chlordane or PCBs within the right-of-way, nor are deicing salts used in this watershed.	This is good information to include in the Phase 1 Report.
15	To comply with its NPDES permit, Caltrans has, and continues to invest heavily in structural BMPs that address both the metals and Diazinon impairments in Chollas Creek.	This is good information to be used in developing the Phase 2 Work Plan.
16	Concentration levels for several pollutants of concern that are listed in the associated "TMDL for Toxic Pollutants in Sediment at San Diego Bay Shorelines". Many of the referenced constituents and sample limits appear to be far below current detection limits.	The IO does not specify detection limits for the constituents of concern. The Phase 1 Work Plan will propose the laboratory detection limits that will be used in the investigation.
MTS		
17	There is insufficient evidence to make MTS a party to the IO. There is no evidence that MTS's discharges are a source to Chollas Creek.	While we disagree that there is insufficient evidence to name MTS to the IO, MTS' second submission of comments indicates that MTS is similarly situated to BNSF and not subject to the San Diego Water Board's jurisdiction.

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		To the extent the parties named on the IO provide evidence to the Regional Board allowing it to name MTS, the Board would make such revisions, subject to additional information related to MTS liability or the Board's jurisdiction. Additionally, nothing precludes MTS from voluntarily participating in the cleanup discussions to the extent that it would like to minimize its civil liability.
18	If MTS remains subject to the IO, the Regional Board is not authorized to recover costs from MTS in this proceeding.	MTS has been removed from the IO. If litigation currently pending before the California Supreme Court produces an opinion that the ICCTA (Interstate Commerce Commission Termination Act of 1995) does not preempt state environmental laws, then the IO may be amended to name MTS.
Public Comment Period September 1st through 14th 2015		
San Diego Coastkeeper		
1	The IO for the Mouth of Chollas Creek and the CEQA Scoping for the water effects ratio should relate to one another.	There seems to be a low correlation between the draft IO for the Mouth of Chollas Creek and the Water Effects Ratio (WER) study. The WER study is evaluating site-specific water data collected in Chollas Creek to revise the modeling value for the Chollas Creek TMDL. The IO is investigating contaminated sediments in the Mouth of Chollas Creek and Tidally-Influenced Area.
2	Any change in WER to Chollas must consider the downstream impacts to the Bay and Bay sediments by allowing increased metals discharges as compared to the current TMDL requirements.	The process to develop and implement the WER into the Basin Plan will consider downstream impacts. Additional comments or concerns should be directed to the San Diego Water Board's Restoration and Protection Planning staff.
Late Comments Submitted After September 14, 2015		
City of San Diego		
3	Property records indicate that the only the portion of the channel upstream of Main Street is within the City's jurisdiction. Contrary to the Port District's assertion, the City does not have jurisdiction over any tidelands immediately adjacent to San Diego Bay.	Comment noted. However, the City of San Diego is a MS4 co-permittee and does exert jurisdiction and control over its outfalls that drain to Chollas Creek and therefore is properly named in this IO.
4	The Port District has jurisdiction in the area covered by the Draft IO and should not be excluded from the Draft IO.	The District is named as a secondarily liable party.
5	The County of San Diego should be included as a responsible party because it is named as a responsible party in the draft Chollas Creek Dissolved Metals Total Maximum Daily Load, and because of its ownership of property within the watershed.	As stated in the Technical Report for the Chollas Creek Metals TMDLs, San Diego County holds jurisdiction over less than one percent of the watershed. The property in question is a cemetery, and consists of mostly open space, with minimal hardscape compared to urban and commercial areas of the watershed.

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		<p>Concentrations of metals in storm water runoff from the property are likely very low as metals tend to adsorb to organic matter in the soil and become insoluble. Furthermore, the cemetery is not a likely source of sediment to Chollas Creek because the mature vegetation of the cemetery will prevent excessive erosion of soil from the landscape. The Technical Report compared metals loading to storm water from open space to a background condition. The report states “[a]ccording to the model, the relative contribution of metals from open space land use and thus from background appears to be insignificant in comparison to loadings from other land uses” (Section 5.4.1, p. 47). Additionally, The TMDL waste loads were expressed as concentrations and allocated to parties based on compliance with California Toxics Rule criteria. The IO, by contrast, is targeting discharges as defined under Water Code section 13304.</p>
	MTS	
6	The Interstate Commerce Commission Termination Act of 1995 (ICCTA) preempts the Regional Board’s authority to issue the Investigative Order to MTS.	See above comments related to MTS.
	The ICCTA preempts State actions affecting rail operations.	See above comments related to MTS.
	The ICCTA preempts the Regional Board’s action to include MTS a party to the IO because the IO affects MTS’s rail operations	See above comments related to MTS.