

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION**

**In re: Tentative Cleanup and
Abatement Order No. R9-2010-0002
(Shipyard Sediment Cleanup)**

Presiding Officer King

**SAN DIEGO COASTKEEPER'S AND ENVIRONMENTAL HEALTH COALITION'S
RESPONSE TO CLEANUP TEAM'S
MOTION TO EXTEND DISCOVERY DEADLINES**

On June 16, 2010, the Cleanup Team requested a 120-day extension of the discovery schedule in order to incorporate "additional technical analyses" into the Draft Technical Report.¹ San Diego Coastkeeper and Environmental Health Coalition ("EHC") agree that "a more scientifically robust Draft Technical Report"² is needed. But we have serious concerns about the process and lack of transparency involved in revising the Draft Technical Report ("DTR") and the integrity of the data that will be used to revise the report. We cannot support any revision of the DTR or Tentative Cleanup and Abatement Order ("CAO") based on unreliable or suspect data.

Extending the discovery schedule has a real threat of delaying the cleanup even further, and we could only agree to an extension if it would result in a stronger, more scientifically robust DTR and Tentative CAO. Therefore, we cannot agree to the Cleanup Team's motion to extend the discovery schedule until we have an opportunity to review the additional technical analyses and data to determine whether they could form the basis of a valid revised report and order. Additionally, uncertainties in the discovery process and post-discovery procedure justify a clarified discovery order and procedural schedule.

¹ See Cleanup Team's Memorandum of Points and Authorities in Support of Motion for 120-Day Extension of Certain Discovery Deadlines, June 16, 2010 ("Cleanup Team Memo") at 5.

² See *id.* at 4.

A. San Diego Coastkeeper and EHC Object to the Clandestine Sampling and Plans to Revise the Draft Technical Report Based on Data We Have Not Reviewed.

The Cleanup Team states that after San Diego Coastkeeper, EHC, and the Unified Port of San Diego withdrew from the mediation, the remaining parties “worked diligently to refine the technical analysis that supports the directives”³ in the Tentative CAO and “bolster[] the evidentiary support for important proposed findings”⁴ in the CAO. This means that some, but not all, of the Designated Parties have been privy to the data and documentation that will form the basis of the new DTR and Tentative CAO. The Cleanup Team, along with the City of San Diego, NASSCO, BAE, SDG&E, the United States Navy, and Marine Construction & Design engaged in clandestine sampling and data gathering—leaving three Designated Parties out of the loop—and now are asking to push the discovery schedule back even further to coincide with the release of a “substantially augmented” DTR and Tentative CAO in late August.⁵ The “augmented documents will also contain additional data to support the technical analyses”—San Diego Coastkeeper and EHC were not even aware of the data’s existence until the Cleanup Team’s June 16 filing.

San Diego Coastkeeper and EHC have serious concerns about the integrity of the data that some parties have been collecting without the knowledge or participation of all the Designated Parties. Section 13267 of Porter-Cologne Act authorizes the Regional Board to demand that dischargers or suspected dischargers provide, under penalty of perjury, technical or monitoring program reports to investigate water quality in the region. Why was this data that will supplement the DTR not collected at the direction of the Regional Water Quality Control Board with staff oversight? Why were San Diego Coastkeeper and EHC not given an opportunity to take split samples to run independent analyses?

³ Cleanup Team Memo at 4.

⁴ *Id.* at 5.

⁵ *Id.*

The DTR and Tentative CAO are the heart of these proceedings. For some of the Designated Parties to work together with the Regional Board's Cleanup Team to collect new data and perform new analyses to revise the DTR and Tentative CAO and exclude other Designated Parties undermines the integrity of these proceedings. Each Designated Party has been included in these proceedings because they have unique interests not adequately represented by other Designated Parties.⁶ Excluding some Designated Parties from evaluating and participating in a process to revise documents that are the essence of these proceedings renders the term "Designated Party" meaningless.

To remedy the situation and acknowledge the key role that all Designated Parties play in these proceedings, San Diego Coastkeeper and EHC request that before acting on the Motion, the Presiding Officer direct the Cleanup Team to provide immediately to **all** Designated Parties the following information regarding the "additional data" and "additional technical analyses" mentioned in the Motion:

- Work Plan;
- Field Sampling Plan (FSP);
- Quality Assurance Project Plan (QAPP; including the data quality objectives and Standard Operating Procedures);
- Field Sampling Summary Reports (including information on actual sampling locations, actual samples collected, all photos, all field data collection sheets);
- Data Validation Report;
- Data Report; and,
- Data Interpretation Report (if any).

San Diego Coastkeeper and EHC request at least two weeks to review the information to determine whether or not the data and analyses are scientifically robust enough to form the basis of a revised DTR and Tentative CAO. After reviewing the information, San Diego Coastkeeper and EHC will advise the Presiding Officer and the Designated Parties whether they

⁶ See Notice of Pre-Hearing Conference for Tentative Cleanup and Abatement Order No. R9-2005-0126 at 2, (specifying that any person requesting to be a designated party specify why "the proposed designated parties to this hearing do not adequately represent the person's interests"), *available at* http://www.swrcb.ca.gov/rwqcb9/water_issues/programs/shipyards_sediment/docs/sediment_cleanup/pre_hearingnoticefinal.pdf.

agree to extend the discovery schedule to provide time to revise the DTR and Tentative CAO. We may, however, request that the Presiding Officer issue a §13267 notice and require additional sampling with Regional Board oversight and participation of all Designated Parties.

B. Granting an Extension on the Discovery Process Has Consequences That Must Be Considered and Balanced.

The Cleanup Team argues in its Motion that extending the discovery schedule will not materially prejudice any Designated Party.⁷ The Cleanup Team bases its argument on the assertion that a protracted discovery schedule is “unlikely to delay the hearing on the merits” because the California Environmental Quality Act (“CEQA”) process “will take approximately 40 weeks.”⁸

But the hearing on the Tentative CAO must move forward before the environmental analysis CEQA requires can be completed. As BAE noted in its CEQA scoping comments, “there must be a clear and definite description of the project to be analyzed in the” environmental impact report.⁹ That “clear and definite description”—the Remedial Action Plan—will be developed *after* the Regional Board adopts the Tentative CAO. This means that the hearing on the merits of the Tentative CAO has to happen *before* the environmental impact report can be completed, and then the cleanup cannot occur until the environmental impact report is certified and the cleanup ultimately approved.

The lengthy CEQA process does not justify dragging out the hearing on the Tentative CAO. On the contrary, because the hearing on the merits must happen before CEQA can be completed, it is imperative that the hearing move forward in a timely manner. The requested 120-day extension on the discovery schedule would push the discovery cut off back to December 21, 2010. There is no current guidance about how long after discovery closes the

⁷ See Cleanup Team Memo at 6.

⁸ Cleanup Team Memo at 6.

⁹ Letter from Amy Nefouse of DLA Piper on behalf of BAE to San Diego Regional Water Quality Control Board, dated Jan. 21, 2010, *available at* http://www.swrcb.ca.gov/rwqcb9/water_issues/programs/shipyards_sediment/docs/sediment_cleanup/cut/updates_030410/DL_Piper.pdf.

hearing will take place, or how long after the hearing will a decision about the Tentative CAO be made. Further, there is always the possibility that one of the Designated Parties will appeal the results of the merits hearing, pushing back even farther the date when there will be a specific project to analyze in the environmental impact report.

The Cleanup Team's argument that a final environmental impact report will not be completed until late March 2011 does not justify a protracted discovery schedule. The longer the discovery process takes, the longer it will be before the heart of the CEQA process—assessing the environmental impacts of the proposed cleanup—can begin, and the longer before we can begin removing the contaminated sediments from our bay.

Despite our concerns about the need to move forward with cleanup expediently, we may agree that a short delay in the discovery schedule and hearing could potentially benefit everyone—but **only** if that delay produces a revised DTR and Tentative CAO based on reliable samples and robust scientific analysis. San Diego Coastkeeper and EHC cannot support a protracted discovery schedule until we review the data and analyses upon which the revised report and order will be based.

C. The Discovery Schedule Should Be Clarified and Limited.

The current discovery order has left San Diego Coastkeeper and EHC with several unanswered questions about the discovery process and the procedure following the close of discovery. Further, the Cleanup Team asserts that an extension of the discovery schedule will “considerably narrow[] the issues”¹⁰ in dispute between the City of San Diego, NASSCO, BAE, SDG&E, the United States Navy, and Marine Construction & Design.

For these reasons, we request that any discovery schedule revision to extend the timeline also narrow the scope of discovery, limit the amount of discovery permitted, and specify future procedural timelines, including dates for exchanging expert reports, deadlines for any briefing on the merits, and a hearing date.

¹⁰ See Cleanup Team Memo at 5.

First, we request that any modified discovery schedule set a specific date on which that Designated Parties must exchange expert reports. California Evidence Code § 2034.230(b) allows parties to demand a time be set to exchange expert writings. The discovery schedule currently specifies a time for designating experts, but not a time for exchanging expert reports. The discovery schedule should also provide at least two weeks to designate rebuttal experts and exchange rebuttal expert reports.

Second, given that the Cleanup Team anticipates that delaying the discovery schedule will “considerably narrow” the issues, the discovery process should be similarly limited. The standard limitations on the number of interrogatories and requests for admission should be reinstated. Each Designated Party should be limited to 35 interrogatories and 35 requests for admission. Because only one or two interrogatories on the form interrogatories could arguably be considered relevant to this discovery process, any questions on the form interrogatories should count towards a party’s total interrogatory limit.

Further, since the issues will be narrowed, the new discovery schedule should provide guidance on the scope of expert reports and mandate a page limit for those reports. Any new order should also prohibit harassing discovery, including depositions, and provide a process by which a party subject to what it views as harassing or irrelevant discovery can appeal to the Presiding Officer for review of the discovery.

Finally, we request that the Presiding Officer provide guidance and timelines for post-discovery briefing and hearing deadlines. This will allow the Designated Parties to arrange their schedules accordingly and to allocate sufficient time and resources to dedicate to this process.

Conclusion

Extending the discovery deadlines has the very real potential of delaying—yet again—the start of a long process of removing contaminated sediment from San Diego Bay and restoring the bay’s ecosystem. While San Diego Coastkeeper and EHC would like to see the bay cleanup start as soon as possible, we agree that the cleanup plan needs to be based on

robust, sound science in the DTR and Tentative CAO. If a short delay on discovery would actually result in a better report and order, San Diego Coastkeeper and EHC could support such an extension. However, because the Cleanup Team and the Designated Parties remaining involved in the mediation have collected samples and performed analysis without our input and oversight, we cannot sign off on an extension that could result in a weaker or scientifically unsound DTR and Tentative CAO. For these reasons, we cannot support an extension of the discovery deadlines unless and until we have an opportunity to review relevant samples, data, and information regarding the new data and analyses that would form the basis of the revised report and order.

Respectfully Submitted on June 24, 2010 by:



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