



California Regional Water Quality Control Board

San Diego Region



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FROM: Art Coe
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SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD

DATE: August 3, 2005

**SUBJECT: AGENDA ITEM 12 C - CONSIDERATION OF A BASIN PLAN
AMENDMENT TO DEVELOP MARINE SEDIMENT QUALITY
OBJECTIVES AS A BASIS FOR CLEANUP LEVELS**

The August 10, 2005 Regional Board Meeting Agenda Item 12c is to include a discussion of a process whereby the Regional Board would adopt a Basin Plan amendment to establish site specific sediment quality objectives for San Diego Bay. As we understand the proposal by the Regional Board Shipyard Sediment Site Advisory Team, this Basin Plan amendment process would be completed prior to initiating the public hearing process for the Regional Board to consider the tentative Cleanup and Abatement Order proposing cleanup requirements and responsible parties for contaminated marine sediments offshore of the NASSCO and Southwest Marine Inc. shipyards (Tentative Order No. R9-2005-0126).

Site-specific sediment quality objectives may eventually be determined to be valuable and necessary tools for protection of water quality in San Diego Bay. However, the Shipyard Sediment Site Cleanup Team recommends that the Regional Board not take the approach recommended by the Advisory Team for the following reasons: (1) this action would be premature in light of the pending State Water Resources Control Board (State Board) action to adopt statewide sediment quality objectives for marine waters; (2) it would significantly delay a process that has already been ongoing for many years; and (3) the benefits of having the site specific sediment quality objectives are nebulous and it is not at all clear that they would mitigate the additional time that would be added to the process of cleaning up the contaminated sediments offshore of the shipyards. Discussion of these points follows.

California Environmental Protection Agency

Adoption of a Basin Plan amendment to establish sediment quality objectives would be premature in light of the pending action by the State Board.

The purpose of site-specific objectives is to address situations where objectives of more general application are in place but are not appropriate or are deficient in some regard. The State Board is under a court mandate to adopt statewide sediment quality objectives by February 28, 2007. This process is well under way, and the Regional Board will have a presentation on the project during the August 10, 2005 meeting. The language for the proposal that the State Board will be considering has not been published and the hearing process has not begun. At this time we do not know what the State Board product will look like or how the Regional Board would be expected to use it. The Regional Board risks wasting a significant amount of time and resources in attempting to develop site specific sediment quality objectives for San Diego Bay without knowing if there will be any need for these site specific objectives after the State Board has acted.

If, in the future, the Regional Board does decide that site specific sediment quality objectives for San Diego Bay or a portion thereof are desirable, there would be a distinct advantage in initiating the project after the State Board has concluded the hearing process and acted on the statewide objectives. Many of the issues, arguments, etc. that would come before the Regional Board should they enter a hearing process to establish site specific sediment quality objectives will be brought before the State Board during their hearing process. In many cases the Regional Board will be able to rely on the State Board's disposition of issues in resolving them at the Regional level.

Undertaking the Basin Plan amendment would significantly delay the cleanup of the contaminated sediments offshore of the NASSCO and Southwest Marine Inc. shipyards.

Based on the information in the agenda package it is not clear if development of sediment quality objectives is being contemplated for San Diego Bay in its entirety or for the segment of San Diego Bay in the vicinity of the NASSCO and Southwest Marine Inc. sites. Development of sediment quality objectives for all of San Diego Bay would be a major undertaking and would require a significant data collection effort to insure that the derived objectives would be applicable to specific sites within the Bay. Such a project would also be highly controversial because of the far-reaching impacts that the objectives would have. The sediment quality objectives would be used to develop prohibitions, limitations, and monitoring requirements for subsequent discharge permits that the Regional Board would issue. The objectives would be a key determinant in future listings of impaired water bodies under the federal Clean Water Act Section 303(d). Finally, they would be used as a consideration in future sediment cleanup initiatives throughout the Bay – to help determine if a cleanup would be necessary and to help establish the cleanup levels. There would be an extensive body of stakeholders who we would expect to participate actively in any such effort. There would be high probability of legal challenges to the adopted Basin Plan amendment. The Regional Board could not expect to successfully undertake such a project without obtaining significant new resources, particularly for the data collection effort and the environmental analysis of the contemplated action.

A project to develop a Basin Plan amendment to include sediment quality objectives for the segment of San Diego Bay in the vicinity of the NASSCO and Southwest Marine Inc. sites would be more manageable. Resources to do the necessary work would still be a problem. We believe there is an adequate pool of data as a result of the work that has been done to date. A Basin Plan amendment establishing sediment quality objectives would have broader application (permitting, impaired water body listings, and other cleanup actions in the immediate vicinity) than cleanup levels for the shipyard site. However, because of the smaller area involved, the stakeholder population and associated controversy would be significantly less than if the entire Bay were to be involved. Notwithstanding the smaller scale of the project, a significant period of time would be required before Basin Plan amendment could be implemented by the Regional Board.

A Basin Plan amendment must be adopted by the Regional Board, approved by the State Board, and approved by the state's Office of Administrative Law. Basin Plan amendments affecting water quality standards for surface waters also require approval by U.S. EPA before they can be considered final, although we have received past guidance that the Regional Board can begin to implement them following approval by the Office of Administrative Law.

We estimate that it would require between 4 and 6 years before a Basin Plan amendment to establish sediment quality objectives for San Diego Bay in its entirety could be processed through the approval by the Office of Administrative Law. A project to develop site-specific sediment quality objectives for the segment of San Diego Bay in the vicinity of the shipyards would require between 2.5 years and slightly in excess of 3 years to reach the same stage. These time estimates assume there would be no remands from the State Board, Office of Administrative Law or U.S. EPA and that there would be no legal challenges. We disagree with the apparent assertion of the Advisory Team that inserting a process to develop a Basin Plan amendment to establish site-specific sediment quality objectives would somehow "fast-track" the cleanup of the contaminated sediments at the shipyard site.

The benefits of having the site-specific sediment quality objectives are nebulous and it is not at all clear that they would mitigate the additional time that would be added to the process of cleaning up the contaminated sediments offshore of the shipyards.

Each of the advantages put forward in support of front-ending the shipyard sediment cleanup process with a Basin Plan amendment process either do not exist or represent only a small theoretical increment of benefit, with no practical value, over the cleanup and abatement order issuance process currently underway. By any measure, the purported advantages of the Basin Plan amendment proposal do not justify delaying the shipyard sediment cleanup process that is already underway.

For example, the assertion that a Basin Plan amendment process would allow for a more objective consideration of the science of setting cleanup levels and enhance opportunities for public participation is misleading. Although Basin Plan amendment proceedings typically have

broader public participation and a wider scope than cleanup and abatement order proceedings, this has little practical significance in the matter of the Shipyard sediment site cleanup. The same public interests would generally participate to the same degree under either the proposed Basin Plan amendment approach or the current cleanup and abatement order approach. The cleanup and abatement order proceedings will be conducted in accordance with laws and regulations contained in Title 23 California Code of Regulations (CCR) Division 3, Chapter 1.5, sections 648, et seq., Chapter 4.5 of the California Administrative Procedure Act (commencing with section 11400 of the Government Code), sections 801-805 of the Evidence Code, and section 11513 of the Government Code. The proceedings will be structured to ensure an orderly, efficient, and impartial administrative process for the development of an appropriate Cleanup and Abatement Order based on scientific factual evidence in the record to the same degree as would occur for the development of sediment quality objectives under the Basin Plan amendment approach. The cleanup and abatement order proceedings will also provide ample opportunity for the public to share information and fully participate in the Regional Board proceedings to essentially the same degree as would occur under the Basin Plan amendment approach.

Another questionable advantage cited for supporting the Basin Plan amendment approach is that the adoption of sediment quality objectives would provide a strong basis for subsequent establishment of sediment cleanup levels in a cleanup and abatement order. The apparent assertion is that establishing cleanup levels in a cleanup and abatement order in the absence of sediment quality objectives would somehow be subject to greater legal challenges. Although a sediment quality objective may provide useful information on the least stringent level of cleanup needed to protect beneficial uses, the applicable state policies and regulations pertaining to establishment of cleanup levels under Water Code section 13304 do not support the notion that establishment of a water quality objective is a desirable prerequisite for establishing a defensible cleanup level. Furthermore the Regional Board has already had great success to date in obtaining complete cleanup or remediation of contaminated sediment sites in San Diego Bay by issuing cleanup and abatement orders with cleanup levels developed in the absence of Basin Plan sediment quality objectives. The Regional Board has to date issued sixty regulatory orders to direct cleanup activities at contaminated sediment sites in San Diego Bay. Most of these Orders were hotly contested at the time they were brought before the Regional Board. To date judicial relief has not been sought by any of the interested parties for any of the Orders.

The Basin Plan amendment approach is also cited as having the advantage of a more deferential judicial standard of review if the sediment quality objectives themselves are challenged. This assertion appears to be based on the premise that judicial deference to Regional Board findings supporting adoption of a Basin Plan sediment quality objective presents a distinct advantage in meeting legal challenges to a cleanup level that is derived from the sediment quality objective. This perceived advantage has little practical value for the cleanup of the contaminated sediments at the shipyard site. Eventually the Regional Board will need to issue a cleanup and abatement order to deal with the cleanup of the contaminated sediments whether or not the Board proceeds with a Basin Plan amendment to establish sediment quality objectives. The Regional Board

would not gain a more deferential standard of judicial review for the cleanup and abatement order if the cleanup level were derived from a sediment quality objective instead of other relevant criteria. Moreover the process for issuing a cleanup and abatement order containing cleanup levels derived from a sediment quality objective would be just as onerous and litigious as it is for the current draft cleanup and abatement order.

Summary.

The Shipyard Site Sediment Cleanup Team recommends that the Regional Board proceed with the hearing process for tentative Cleanup and Abatement Order No. R9-2005-0126 and not consider the matter of site specific sediment quality objectives for San Diego Bay until after the State Board adopts statewide sediment quality objectives for marine waters.

Based on our understanding of the current status of the State Board's effort to develop the statewide sediment quality objectives, it appears that a Regional Board decision on the tentative Cleanup and Abatement Order may trail the State Board's action by as little as six months. We recognize that there may be some concern about acting on the tentative Cleanup and Abatement Order prior to the State Board's mandated February 28, 2007 action because of potential for cleanup levels adopted by the Regional Board being inconsistent with the statewide sediment quality objectives. If this is a concern to the Regional Board we suggest the following alternative process and schedule that would keep the cleanup project moving while the State Board action is pending.

- Regional Board decision on need for cleanup at shipyard site – Fall/Winter 2005/06;
- Regional Board decision on responsible parties should cleanup be determined necessary – Winter/Spring 2006;
- After making decisions on responsible parties the Regional Board would review the status of the State Board's project and decide to either continue their process and consider the matter of cleanup levels or defer that consideration until after the mandated February 28, 2007 State Board action; and
- Any decision to initiate a project to develop site-specific sediment quality objectives could be made after February 28, 2007.

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