

**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 Destache**

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**SAN DIEGO COASTKEEPER'S AND ENVIRONMENTAL HEALTH COALITION'S  
RESPONSE TO NATIONAL STEEL AND SHIPBUILDING COMPANY'S MOTION TO  
EXCLUDE EXPERT TESTIMONY OF DONALD MACDONALD**

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Donald MacDonald is an internationally-renowned expert in the fields of environmental toxicology and chemistry, ecosystem-based resource management, water quality/water use interactions, and sediment quality assessment. He has been retained as an expert by governmental agencies in both the United States and Canada, including the U.S. Fish and Wildlife Service, the U.S. Environmental Protection Agency, National Oceanic & Atmospheric Administration, the U.S. Department of the Interior, the U.S. Department of Justice, Indian and Northern Affairs Canada, the Office of the Privy Council (Canada), Public Works and Government Services Canada, and the British Columbia Ministry of Environment. He has published more than 50 journal articles and book chapters and has prepared more than 250 technical reports. His accumulation of knowledge and experience related to contaminated sediment cleanups qualifies him to offer expert opinions on the proposed Tentative Cleanup and Abatement Order and Draft Technical Report. Mr. MacDonald's testimony in this matter will assist the Regional Board to make a well-informed decision regarding the Shipyard Sediment Site cleanup.

National Steel and Shipbuilding Company (“NASSCO”) wants to prevent the Regional Board from hearing Mr. MacDonald’s expert testimony—the only testimony offered by an expert not paid by a responsible party or a member of the Regional Board staff. NASSCO’s motion to exclude Mr. MacDonald’s testimony is meritless and based on misrepresentations of fact and law. San Diego Coastkeeper and Environmental Health Coalition (the “Environmental Parties”) urge the Presiding Officer to swiftly deny NASSCO’s unfounded and baseless motion to exclude Mr. MacDonald’s expert testimony and take any action he deems appropriate to respond to this meritless attack on Mr. MacDonald’s reputation.

**A. Because Donald MacDonald’s testimony is relevant to these proceedings, it must be admitted.**

Donald MacDonald’s testimony is relevant to this proceeding; therefore, it must be admitted. State law mandates that Regional Board “[a]djudicative proceedings will be conducted in accordance with the provisions and rules of evidence set forth in Government Code section 11513.” 23 CAL. CODE REGS. § 648.5.1.; *see also* 23 CAL. CODE REGS. § 648(b) (“all adjudicative proceedings before . . . the Regional Boards . . . shall be governed by . . . section 11513 of the Government Code.”). Section 11513 casts a wide evidentiary net, setting minimal requirements for evidence to be admitted to proceedings before the Regional Board. *See* CAL. GOV’T CODE §11513. Under § 11513(c), “any relevant evidence *shall be admitted* . . . regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.” *See* CAL. GOV’T CODE § 11513(c)(emphasis added). This means that if evidence is relevant to the proceedings before the Regional Board, the Board must hear that evidence.

Mr. MacDonald has provided testimony about the Tentative Cleanup and Abatement Order and Draft Technical Report; his testimony is undisputedly relevant to this proceeding.

NASSCO fails to make, nor could it maintain, any assertions that Mr. MacDonald's testimony is irrelevant. Because Mr. MacDonald is providing relevant testimony, it must be admitted. *See* CAL. GOV'T CODE § 11513(c). Any questions regarding Mr. MacDonald's credibility would go to the weight, not the admissibility, of his testimony.

**B. Donald MacDonald is qualified to offer an opinion on aspects of the Tentative Cleanup and Abatement Order and Draft Technical Report and Mr. MacDonald has limited his testimony to areas in which he has expertise.**

Donald MacDonald's experience and employment history qualify him to offer expert opinions on various aspects of the Tentative Cleanup and Abatement Order and Draft Technical Report. Mr. MacDonald has been actively working in the area of sediment quality assessment for the last 25 years. *See* Deposition of Donald MacDonald ("MacDonald Dep.") at 154:21-154:22. During this time, Mr. MacDonald has worked on 20 to 30 sediment contamination projects. *Id.* at 23:8-23:9. His duties for these projects have included: conducting a screening level risk assessment of the site, conducting a detailed ecological risk assessment of the site, identifying areas that needed to be remediated, identifying cleanup goals, and overseeing the remediation process. *Id.* at 19:21-20:1; *see also* MacDonald Declaration dated July 12, 2011 ("MacDonald Decl.") at 6-7. Further, Mr. MacDonald has written more than 75 technical reports pertaining to sediment, including multiple reports on the development and evaluation of remediation goals for sediment contaminants. *See* Curriculum Vitae of Donald D. MacDonald. In these reports, he developed preliminary remediation goals, evaluated post-remediation risks, established cleanup standards, and provided advice on post-remediation monitoring. *See* MacDonald Decl. at 6-7.

1. Mr. MacDonald has 25 years of experience as an expert working in the area of contaminated sediment, making him well-qualified to opine on the Shipyard Sediment Site cleanup.

NASSCO claims that Mr. MacDonald is not qualified because he holds a Bachelor of Science in Zoology. NASSCO Motion in Limine (“NASSCO Motion”) at 11. However, expertise in an area is not limited to a person’s education. A witness may qualify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. *See* CAL. EVID. CODE § 720(a); *see also* *People v. Bloyd*, 43 Cal. 3d 333, 357 (Cal. 1987) and *People v. Kelly*, 17 Cal. 3d 24, 39 (Cal. 1976) (showing that an expert need only demonstrate that he possesses “special knowledge, skill, experience, training, or education” sufficient to find him an expert).

NASSCO also asserts that Mr. MacDonald does not specifically hold himself to be an expert, or even a specialist, in sediment remedial design or planning. NASSCO Motion at 9. However, Mr. MacDonald specifically testified at his deposition that his accumulated knowledge and experience in sediment quality assessment qualifies him as an expert on the topic and on related topics, and he reasserts that experience in his declaration dated July 12, 2011. *See* MacDonald Dep. at 154:22–154:25; *see also* MacDonald Decl. EPA confirms that risk assessment an important initial part of the remedial design process. *See* Environmental Protection Agency, Office of Solid Waste and Emergency Response EPA/540/R-95/025, PB95-963308, March 1995 at 2-1 (“Before beginning a remedial design, review the nature of the project and select the appropriate technical assistance. Your technical review team may include Regional support staff (including ground-water, quality assurance/quality control (QA/QC), **risk assessment**, and engineering experts)” (emphasis added)).

Although NASSCO attempts to use Mr. MacDonald's deposition testimony to support its claims that Mr. MacDonald is not qualified to testify regarding sediment remediation, Mr. MacDonald testified repeatedly regarding his qualifications to opine on contaminated sediment and remediation plans like the Tentative Cleanup and Abatement Order and Draft Technical Report:

Q. Do you believe you're---do you believe you're an expert in contaminated sediment and remediation plans?

A. Yes. (MacDonald Dep. 153: 21-153:23.)

A. ... And so contaminated sediment, that is a topic area I have been working in for the past 25 years actively.... [t]hat puts me in a place where I have reviewed a variety of remedial action plans for site, commented on them, been able to provide advice and input related to those remedial action plans... (MacDonald Dep. 154: 4-154:6, 154:14-154:17.)

A. I've been working on contaminated sediments for the past 25 years. I've been—so I have been accumulating the experience, knowledge and experience, required to serve as an expert related to those topics of that 25-year period, yes. (MacDonald Dep. 154:21-154:25)

Q. What other cases have you been retained in where you offered opinions as to sediment remediation?

A. A variety of cases. For example, in the Calcasieu Estuary site. (MacDonald Dep. 15:21-15:24).

A. In the matter of Quathiaski Cove. (MacDonald Dep. 16:8)

A. Indiana harbor is another site that we've supported the remedial—development of a remedial action plan. That's Grand Calumet River in Gary, Indiana. (MacDonald Dep. 16:23-17:1.)

A. My specific duties were to conduct a screening level risk assessment of the site, to conduct a detailed or baseline ecological risk assessment of the site, to identify the areas that needed to be remediated, to identify cleanup goals, and to oversee the remediation that was done at that time. (MacDonald Dep. 19:21-20:1.)

Mr. MacDonald's declaration dated July 12, 2011 also sets forth his extensive qualifications to comment on various aspects of the Tentative Cleanup and Abatement Order and Draft Technical Report. *See* MacDonald Decl. at 6-7. Mr. MacDonald's own testimony is sufficient to show his special knowledge, skill, or experience with sediment related issues. *See*

CAL. EVID. CODE § 720(b) (stating that a witness may show his special knowledge, skill, experience, training, or education through “his own testimony”).

2. Mr. MacDonald’s expert testimony is limited to areas in which he has demonstrated expertise.

NASSCO’s argument boils down to the assertion that because Mr. MacDonald is not trained as an engineer, he has nothing useful to add regarding the Tentative Cleanup and Abatement Order or Draft Technical Report. But Mr. MacDonald relied on his ‘special knowledge, skill, experience, training, or education’ as a sediment risk assessment expert to develop a risk assessment framework for determining which polygons at the Site have high, medium, low risk to benthic invertebrates and/or fish and thus should be considered for remediation. *See* MacDonald, D.D. “Development of a Sediment Remediation Footprint to Address Risks to Benthic Invertebrates and Fish in the Vicinity of the Shipyards Site in San Diego Bay, California,” October 2009. The Environmental Parties shared this suggested approach with Cleanup Team members in October 2009 for their consideration when developing the Tentative Cleanup and Abatement Order and Draft Technical Report.

In his March 11, 2011 expert report, Mr. MacDonald uses his 25 years of experience to review the approach implemented by Staff to assess risk to benthic invertebrates and wildlife and provide constructive criticisms of that approach. In addition, Mr. MacDonald examines the approaches used by Board staff to reveal inconsistencies in their own approach and suggests that based on their approach, that there are polygons that should have been included in their footprint.

Mr. MacDonald also calls on his vast expertise in developing water quality objectives, criteria, and ecotoxicological thresholds to provide input on the fatal weaknesses in the Staff’s approach for establishing clean-up triggers. Finally, based on his expertise in ecological and

wildlife monitoring, he offers suggestions on how the post-remedial monitoring plan can and should be improved if staff, the Board, and the public are to have any confidence in this clean-up plan. This testimony was all well within Mr. MacDonald's demonstrated areas of expertise.

Mr. MacDonald demonstrates through his testimony, summary of qualifications, and his *curriculum vitae* that he possesses the special knowledge, skill, and experience sufficient to qualify as an expert on the Tentative Cleanup and Abatement Order and Draft Technical Report. Even if typical rules of evidence apply in this proceeding—which they do not—NASSCO failed to meet the heavy burden of proving that Mr. MacDonald “clearly lacks qualification” as an expert to testify regarding the Tentative Cleanup and Abatement Order and Draft Technical Report. *See People v. Hogan*, 31 Cal. 3d 815, 852 (Cal. 1982) (Error regarding a witness's qualifications as an expert will be found only if the evidence shows that the witness clearly lacks qualification as an expert.).

**C. There is no reason to exclude Donald MacDonald's relevant testimony on an area where he is clearly qualified as an expert.**

NASSCO resorts to disparaging remarks and personal attacks in a pathetic attempt to discredit Mr. MacDonald, a well-qualified expert who has provided testimony about the Tentative Cleanup and Abatement Order that NASSCO desperately wants to prevent the Regional Board from hearing because it could result in a more protective—and more expensive—cleanup.

1. NASSCO's claims that Mr. MacDonald has purposely and improperly destroyed evidence and that NASSCO has been prejudiced are untrue and unsupported.

Mr. MacDonald has been advising Environmental Health Coalition and San Diego Coastkeeper about the Shipyard Sediment Site for a number of years, providing expertise and helping the Environmental Parties understand the technical complexities of the contamination

level and proposed cleanup. *See* MacDonald Decl. at 2. In his advisory capacity to the Environmental Parties, Mr. MacDonald prepared a report in 2009 entitled “Development of a Sediment Remediation Footprint to Address Risks to Benthic Invertebrates and Fish in the Vicinity of the Shipyards Site in San Diego Bay, California” (the “Benthic Report”). *See* MacDonald Decl. at 2.

Mr. MacDonald prepared the Benthic Report for the Environmental Parties to use during mediation, and the purpose of the report was to show an alternative method for developing a remedial footprint that did not rely on the reference data that had been collected. *See* MacDonald Decl. at 2. As Mr. MacDonald prepared the Benthic Report for the Environmental Parties, he followed his ordinary business practice in preparing reports and recycled prior drafts of the report as he incorporated edits and information into the most recent draft. *See* MacDonald Decl. at 2; *see also* MacDonald Dep. at 47:13-47:14.

Four months after Mr. MacDonald finalized the Benthic Report, then Presiding Officer King issued the Discovery Plan for this proceeding. *See* Discovery Plan, dated February 18, 2010. As part of the Discovery Plan, Designated Parties were directed to designate expert witnesses by June 22, 2010 and were permitted to take discovery of expert witnesses according to California Code of Civil Procedure § 2034.10 *et seq.* On June 22, 2010, the Environmental Parties designated Mr. MacDonald as their expert witness. Mr. MacDonald submitted his expert report on the most recent version of the Tentative Cleanup and Abatement Order and Draft Technical Report on March 11, 2011, the date designated “last day to submit expert reports” in Presiding Officer Destache’s October 27, 2010 order.



NASSCO is now asking the Presiding Officer to prohibit the Regional Board from hearing any testimony by Mr. MacDonald because Mr. MacDonald recycled notes as he prepared a 2009 report for the Environmental Parties to use in mediation, four months before the Discovery Plan was issued and eight months before he was designated an expert witness in this matter. NASSCO attempts to paint Mr. MacDonald's benign recycling practice on a report prepared for clients a year before the current version of the Tentative Cleanup and Abatement Order and Draft Technical Report was released as so-called "intentional destr[uction] of key evidence." There is no evidence to support that claim.

NASSCO claims that the Code of Civil Procedure § 2034.260<sup>1</sup> provides that the "expert opinion of any witness who has unreasonably failed to produce reports and writings of expert witnesses 'shall' be excluded." *See* NASSCO Motion at 1. Section 2034.300, not Section 2034.260, discusses exclusion of expert witnesses. Section 2034.300 only allows an expert witness to be excluded if the witness unreasonably fails to "produce reports and writings of expert witnesses under Section 2034.270." CAL. CODE CIV. PROC. § 2034.300. Section 2034.270 provides that if any party makes a demand for a "mutual and simultaneous" exchange of expert information under § 2034.210(c), "***all parties shall produce and exchange***, at the place and on the date specified in the demand, all discoverable reports and writings, if any, made by any designated expert...." CAL. CODE CIV. PROC. § 2034.270 (emphasis added); *see also* CAL. CODE CIV. PROC. § 2034.210(c) (allowing any party to "include a demand for the mutual and simultaneous production for inspection and copying of all discoverable reports and writings, if any, made by any expert... in the course of preparing that expert's opinion.").

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<sup>1</sup> NASSCO mis-cites the law. Section 230.260 does not discuss exclusion of expert witnesses.

NASSCO never requested a mutual and simultaneous demand for production and copying of all discoverable reports made by any expert under § 2034.210(c). Indeed, no other Designated Party provided all discoverable reports and writings made by their designated experts to the Environmental Parties. If § 2034.210(c) was indeed invoked, all experts besides Mr. MacDonald must be excluded—an absurd result.

Instead of requesting that all parties exchange expert writings, NASSCO submitted voluminous Requests for Production and Requests for Admission and a deposition notice for Mr. MacDonald on July 22, 2010.<sup>2</sup> The Environmental Parties provided boxes of responsive documents, along with multiple electronic documents on CDs, responsive to NASSCO's requests. Mr. MacDonald was subjected to two full days of deposition, at which the Environmental Parties provided NASSCO additional responsive documents.

Following Mr. MacDonald's deposition, the Environmental Parties worked with discovery referee Timothy Gallagher for months to satisfy all NASSCO's qualms about the Environmental Parties' discovery response, which included delivery of a notebook full of Mr. MacDonald's hand-written notes. To respond to complaints by NASSCO's attorneys that they did not believe that attorneys for the Environmental Parties had properly produced all documents in Mr. MacDonald's possession, Mr. MacDonald and his staff prepared—at cost to the Environmental Parties—a full index of all relevant documents kept and provided NASSCO's attorneys an opportunity to visit Mr. MacDonald's offices in British Columbia to review all of Mr. MacDonald's files as they are kept in his offices. *See* MacDonald Decl. at 3. No one ever showed up at Mr. MacDonald's offices to review or copy the files. *See* MacDonald Decl. at 3.

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<sup>2</sup> Contrary to NASSCO's "reinterpretation" of its discovery request in its Motion in Limine, NASSCO did not request "Mr. MacDonald's 'expert report' including all drafts." *See* NASSCO Motion in Limine at 6. NASSCO requested documents related to the Benthic Report and documents related to the Tentative Cleanup and Abatement Order and Technical Report.

Although NASSCO complains that it has been “unfairly deprived” of the “ability to fully defend its interests in these proceedings” by the fact Mr. MacDonald recycled prior drafts of the Benthic Report, NASSCO has no proof that it was unfairly deprived of anything. *See* NASSCO Motion at 7. Through the discovery process, NASSCO received the e-mail comments provided by two of the peer-reviewers of the Benthic Report, Jay Field and Russell Fairy, and questioned Mr. MacDonald about those comments at length. *See* MacDonald Dep. at 57:4-67:15. The third peer reviewer of the Benthic Report was Steve Bay, who provided hard-copy comments on the Benthic report that Mr. MacDonald recycled after incorporating into the final draft of the report. NASSCO deposed on Mr. Bay on September 27, 2010 and had adequate opportunity to ask Mr. Bay about the comments he provided on the Benthic Report. *See* NASSCO’s Second Amended Notice of Videotaped Deposition of Steve Bay.

The Environmental Parties and Mr. MacDonald have reasonably provided NASSCO all the discoverable information they requested in their Requests for Production and Admission and under Mr. MacDonald’s deposition notice that was not protected by privilege and that had not been long-before recycled according to Mr. MacDonald’s ordinary business practice prior to his designation as an expert witness. *See* United States v. \$40,955.00 in United States Currency, 554 F.3d 752, 758 (9th Cir. Cal. 2009) (a party does not engage in spoliation of evidence when it “destroys the evidence according to its policy or *in the normal course of its business.*” (emphasis added)); *see also* MacDonald Dep. at 47:4-47:7 (Q. “When you were designated as an expert, were you instructed not to destroy work product that are a part of this case?” A. “Yeah.”).

As NASSCO has made no showing that the Environmental Parties or Mr. MacDonald unreasonably failed to produce Mr. MacDonald’s reports and writings under Code of Civil

Procedure§ 2034.270, there are no grounds upon which to exclude Mr. MacDonald's expert testimony. NASSCO can show no injury by not having the recycled comments on the Benthic Report because those notes were incorporated into the final version of the Benthic Report and NASSCO deposed the author of the recycled comments. *See* MacDonald Decl. at 2-3; *see also* MacDonald Dep. at 45:16-45:18.

To the extent NASSCO complains that it did not have an opportunity to conduct full discovery on Mr. MacDonald's "expert report," Mr. MacDonald's expert report was submitted on March 11, 2011, the day when all Designated Parties exchanged expert reports. No discovery was conducted by any party on any expert report submitted on March 11, 2011 because that day was the last day of discovery.

2. NASSCO's claim that Mr. MacDonald acted unethically in the past is unsupported, inflammatory, and provides no basis for excluding his testimony in this matter.

In its last attempt to besmirch Mr. MacDonald's image before the Presiding Officer and Regional Board, NASSCO makes an outrageous claim that Mr. MacDonald's testimony should be excluded from this proceeding because a man with a similar name was excluded from testifying as an expert in a case 12 years ago based upon an allegation that lawyers for the State of California and the federal government misused testimony of several experts. The August 1, 2000 order signed by federal district court judge Hon. Manuel Real provides that the state plaintiffs in *United States v. Montrose* "may not rely in any respect upon John Cubit, JoEllen Hose, Raymond Kopp, **Ronald McDonald**, and Michael Palermo, all of whom are excluded as witnesses." *See* NASSCO Motion Ex. 6, Order Re: Sanctions Against State of California (emphasis added). NASSCO asks the Presiding Officer to exclude Donald D. MacDonald's testimony regarding the Tentative Cleanup and Abatement Order and Draft Technical Report

based on the fact that in 2000, a federal district court judge excluded the State of California from relying on testimony provided by “Ronald McDonald.”

Donald D. MacDonald was retained by the National Oceanic and Atmospheric Administration in 1993 to prepare a report to derive sediment effect concentrations (SECs) of DDTs and PCBs for assessing sediment injury in the Southern California Bight. *See* MacDonald Decl. 4. To support development of the SECs, Mr. MacDonald compiled data and information on the toxicity of DDTs and PCBs from numerous documents available in the scientific literature. *See* MacDonald Decl. at 4. Mr. MacDonald’s report did not rely on a report prepared by EVS Consultants because his evaluation of the data in the literature was intended to be independent of the EVS study; another expert witness would provide testimony on the results of the EVS study. *See* MacDonald Decl. at 4.

NASSCO submitted into the record a 51-page motion prepared by attorneys for Montrose Chemical Corporation that included a one-page allegation that Mr. MacDonald’s report showed the “government [was] trying desperately to ignore the results of the EVS study.” *See* NASSCO Motion Ex. 5 at 23-24. These mere allegations made regarding the government’s alleged misuse of expert testimony more than a dozen years ago cannot form the basis for excluding Mr. MacDonald’s expert testimony in this proceeding.

**D. Mr. Richardson’s disregard for the truth and malicious attempt to ruin Mr. MacDonald’s reputation before the Regional Board violates Mr. Richardson’s duties as an attorney and should not be tolerated.**

Mr. Richardson, as a member of the bar of the state of California and as an attorney practicing before the Regional Board, must meet certain standards of conduct. Through his motion to exclude Mr. MacDonald, he has violated two duties that an attorney must meet—the

duty of candor and the duty to refrain from prejudicing a witness—actions which should not be tolerated in proceedings before the Regional Board.

Attorneys practicing in California have a duty of candor to the tribunal; they must, when representing clients, “employ means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.” CAL. CODE BUS. & PROF. § 6068(d). They also owe a duty to refrain from smear tactics and baseless allegations designed to besmirch a witness’ reputation before the tribunal. *Id.*, at § 6068(f) (attorneys have a duty “to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged.”).

Through his Motion in Limine, Mr. Richardson has launched a campaign to ruin the reputation of a man whose livelihood hinges on his reputation. *See MacDonald Decl.* at 8. He has accused Mr. MacDonald of not only “unethically disregarding a basic requirement to preserve, and produce all of the reports underlying his opinion” by “destroying key evidence” in this case, but engaging in a “standard practice to routinely destroy key evidence...” and multiple “ethical breach[es].” NASSCO Motion at 6, 7. These allegations are baseless and inflammatory, designed only to “ring the bell” and prejudice the Regional Board against a well-qualified expert.

Engaging in these tactics in an administrative proceeding—where the evidence rules clearly state that any relevant evidence is admissible and such a motion to exclude has no chance of success—shows reckless disregard for Mr. MacDonald’s reputation and fails to uphold his sworn duties. These damaging tactics would not be tolerated in a court of law and should not be tolerated in proceedings before the Regional Board.

## Conclusion

There is no basis to exclude well-qualified expert Donald MacDonald from providing expert testimony in this matter. The Environmental Parties respectfully request that the Presiding Officer deny NASSCO's Motion in Limine to exclude Mr. MacDonald's expert testimony and take any action he deems appropriate to respond to this meritless attack on Mr. MacDonald's reputation.

Respectfully Submitted on July 12, 2011 by:



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On behalf of San Diego Coastkeeper and  
Environmental Health Coalition

Q. Okay. And it's entitled "San Diego Peer Review." Do you see that? 10:10:28  
10:10:31  
A. Yes. 10:10:33  
Q. And are these Russell Fairey's comments back to you in connection with the May 2009 draft report? 10:10:35  
10:10:40  
A. Yes. 10:10:43  
Q. Mr. Fairey indicates in the first line that -- he compliments you. He says, "Nice job." Then there's a sentence that says, "I suspect a fair amount of cutting and pasting here." 10:10:48  
10:10:51  
10:10:55  
10:10:57  
Did you cut and paste portions of your October 2009 report from other work product? 10:11:00  
10:11:06  
A. By cutting and pasting, you mean what specifically, just so that we understand each other? 10:11:09  
10:11:13  
Q. Is the -- copying verbatim sections from other work product into this report, into the October 2009 report? 10:11:16  
10:11:23  
10:11:26  
A. I doubt that stuff was copied verbatim, no. 10:11:27  
Q. Do you know that to be the case? 10:11:31  
A. I don't know specifically that it was the case. 10:11:32  
10:11:35  
10:11:38  
10:11:42  
10:11:45  
10:11:50  
There is one section in here that I use frequently as sort of an educational section. One is "Role of Sediments in Aquatic Sediments," for example. That may or may not be close to verbatim. I often edit that just a little bit each time. But I use that -- that



particular documentation quite frequently in reports. It 10:11:53  
provides sort of a nice overview of why sediments are 10:11:55  
important in aquatic ecosystem. 10:11:59

"Ecosystem Goals and Objectives," some of this 10:12:02  
background information is information that I use in other 10:12:10  
types of projects to try to explain. It's educational 10:12:16  
again, provides -- it's background information on what 10:12:21  
ecosystem goals and objectives are. 10:12:24

"Remedial Project Objectives" was consistent, 10:12:27  
was unique to this particular -- 10:12:33

Q. Let me rephrase the question. 10:12:37

Was any -- other than the introductory section, 10:12:38  
was any part of the October 2009 report copied verbatim 10:12:41  
or cut and pasted from previous work product that you 10:12:48  
provided or performed? 10:12:52

A. I'm looking at page 10 right now. And I see 10:12:54  
"Relevant data for evaluating sediment quality 10:12:59  
conditions." This identifies -- there's a little table 10:13:02  
in here that identified receptors of interest and 10:13:04  
indicators of sediment quality conditions. That's a 10:13:09  
little table that I use frequently to explain what types 10:13:14  
of information is typically used in this kind of -- of a 10:13:18  
case. 10:13:22

As I go to page 14, I see "Criteria on the 10:13:38  
selection of methods and species as described in ASTM and 10:13:47

1 EPA." And there's a series of ten bullets there. That's 10:13:53  
2 the type of information that is common to many -- many 10:13:59  
3 types of assessments. And so that easily could have come 10:14:01  
4 from another document that I'd worked on. 10:14:05

5 As I look at page 16, I see "Description of 10:14:18  
6 various approaches to interpreting sediment toxicity 10:14:25  
7 data." This -- this is consistent with terminology that 10:14:29  
8 I would use in a variety of different cases to explain 10:14:37  
9 options. 10:14:40

10 So that's sort of the approach that I use. When 10:15:10  
11 there's a -- there are topics that are primarily 10:15:12  
12 educational or cut across project lines, rather than 10:15:15  
13 trying to redevelop that text, I frequently will use text 10:15:21  
14 that looks very much like what you might see in this 10:15:27  
15 text. Whether it's verbatim or not, I don't know. 10:15:30

16 It's very uncommon that I don't edit things as 10:15:33  
17 it goes into a report, as I go through it multiple times. 10:15:39  
18 But hopefully, that explanation helps you understand a 10:15:44  
19 little bit. 10:15:47

20 Q. It does. 10:15:48

21 Did you personally write the October 2009 10:15:48  
22 report? Did you actually sit there and word process the 10:15:50  
23 document? 10:15:53

24 A. Yes. 10:15:54

25 Q. And do you have any understanding of why 10:15:56

Mr. Fairey would say, "I suspect a fair amount of cutting and pasting here"? 10:15:58  
10:16:02

A. I think the reason he would say that is that 10:16:03  
either, A, he has seen, you know, some of this text 10:16:05  
before, like the role of sediments in aquatic ecosystems. 10:16:09  
Or B, he said -- looked at the size of the document and 10:16:14  
wondered how it was done quickly under a limited budget. 10:16:19  
He's a fairly perceptive lad. 10:16:24

Q. What was the budget for the report? 10:16:27

A. I don't recollect offhand exactly what it was. 10:16:30

Q. Was there a budget? 10:16:33

A. Yes. There would have been a budget for 10:16:34  
producing this. I just don't recall what it was offhand. 10:16:37

Q. Do you have a -- a reasonable estimate of what 10:16:40  
the budget was? 10:16:42

A. I could provide -- I think including the trip to 10:16:46  
participate in the mediation session, which was also 10:16:52  
early in 2009, I believe the budget was somewhere around 10:16:56  
\$15,000. But again, that's just a guess. 10:16:59

Q. Let me ask you a different question. How much 10:17:04  
did you -- how much did it cost to prepare the 10:17:08  
October 2009 report? 10:17:09

A. I haven't done that calculation. I -- I have 10:17:11  
not gone through the time sheets and added it up. 10:17:15  
It's -- I just haven't done that. 10:17:18

Q. Does that information exist back in your office? 10:17:21

A. Time-sheet information? 10:17:23

Q. The -- how much this would cost. 10:17:24

A. I don't believe that it has been calculated and 10:17:25  
exists in one place in my office. 10:17:30

Q. How many hours -- if you know, how many hours 10:17:33  
did you spend preparing the October 2009 report? And by 10:17:36  
"you," I mean you personally. 10:17:41

A. Yeah. I don't know offhand. 10:17:42

Q. Do you have an estimate? 10:17:43

A. I would say something in the order of 80 to 100 10:17:45  
hours. 10:17:54

Q. Mr. Fairey's comments back to you on the forward 10:18:02  
full paragraph, first sentence, states, "I haven't done a 10:18:07  
remediation footprint before, so I read this from more of 10:18:10  
a novice perspective than an expert." 10:18:14

Do you see that? 10:18:17

A. I do see that. 10:18:18

Q. Fair to say that Mr. Fairey is -- is calling 10:18:19  
himself no expert in this area? 10:18:22

A. In what area are you referring? 10:18:24

Q. He's reviewing this -- this draft report from 10:18:26  
May 2009, and he's advising you that he doesn't feel like 10:18:29  
he can offer some expert feedback to you. Would you 10:18:34  
agree with that? 10:18:37

Q. No one else chose them for you? 10:24:19

A. No one else chose them for me. 10:24:21

Q. You reached out to them and asked each of them  
to take a look at your draft report; correct? 10:24:24  
10:24:26

A. Correct. 10:24:29

Q. And did each of the three individuals provide  
comments to you? 10:24:29  
10:24:31

A. Yes, they did. 10:24:32

Q. Did each of the three provide comments to you in  
writing? 10:24:33  
10:24:35

A. Yes, they did. 10:24:37

Q. Did you revise your October -- excuse me.  
Did you revise your May 2009 draft report in  
response to the comments that you received from the three  
reviewers? 10:24:39  
10:24:43  
10:24:46  
10:24:49

A. I'm sorry. Can you say that again? 10:24:52

Q. Did you revise your May 2009 draft report in any  
way in response to the comments that you received from  
Mr. Bay, Dr. Fairey, or Jay Field? 10:24:55  
10:25:00  
10:25:04

A. Yes. I believe I did. 10:25:09

Q. And where would we find those comments? 10:25:10

A. I believe that you've got comments here from  
Russell "Rusty" Fairey provided by email. 10:25:14  
10:25:18

Q. Was that it? Was that the full extent of his  
comments? 10:25:23  
10:25:25

A. That was the full extent of his comments. I believe that you've got comments from Jay Field in the second page of the Exhibit No. 801-A.

Q. Where do you see the comments from -- is that the -- you're referring to the June 3, 2009, email from Jay Field to MESL?

A. No. On the second page of the Exhibit 801-A that you provided to me, there is an email dated Thursday, July 16th, 2009, 4:59 p.m. Topic, "Shipyard Comments." Let me provide that to you.

Q. I don't even see that. So let me see. Ah. Okay. Got it. Thank you.

Were those -- the July 16, 2009, email, were those the full extent of the comments you received from Jay Field?

A. Yes, they were.

Q. And how about the third comment from Mr. Bay? Did you receive an email from him?

A. I did not.

Q. What were the nature of Mr. Bay's comments?

A. He provided me with a marked-up version of the draft report which I reviewed and incorporated those comments.

Q. And where is his marked-up version of the draft report?

**DECLARATION OF DONALD DOUGLAS MACDONALD, PRINCIPAL  
MACDONALD ENVIRONMENTAL SCIENCES LTD.  
#24 - 4800 ISLAND HIGHWAY NORTH  
NANAIMO, BRITISH COLUMBIA V9T 1W6**

I, Donald Douglas MacDonald, declare as follows:

On May 26, 2011, Kelly E. Richardson of Latham and Watkins LLP filed, on behalf of National Steel and Shipbuilding Company (NASSCO), a motion in limine to exclude my expert testimony from these proceedings. The motion is based on untruthful information and misrepresentations of facts, so much so as to be libelous. This declaration is to provide a formal response to the untruthful and misleading allegations in the motion to allow the Regional Board to make an informed decision regarding the admissibility of my expert testimony.

**A. NASSCO's Allegation that I Purposely Destroyed Reports and Writings Required to be Produced for These CAO Proceedings is Untrue.**

NASSCO, through Mr. Richardson, alleged that I purposely and improperly destroyed substantial portions of my expert file. NASSCO also alleges that it is my standard practice to routinely destroy key evidence related to the development of my expert report, including notes, draft reports, and peer-review comments. All of the allegations made by NASSCO and Mr. Richardson in this respect are categorically false. Furthermore, the arguments presented to support these allegations misrepresent the facts and, I believe intentionally, mislead the Regional Board. The facts of the matter are as follows:

- In 2005, the California Regional Water Quality Board - San Diego Region (i.e., the Regional Board) issued a Tentative Cleanup and Abatement Order (No. R9-2005-0126; i.e., the Order) related to contaminated marine sediment in San Diego Bay within and adjacent to Southwest Marine, Inc. and National Steel and Shipbuilding Company leaseholds generally between Sampson Street Extension and the Mouth of Chollas Creek (hereafter referred to as the Shipyards Site). This Order identified persons responsible, provided factual background information, described beneficial use impairments (BUIs), and specified sediment cleanup goals for the site. The Order also provided a number of directives to the persons responsible, including to cleanup contaminated sediments, to prepare and

implement a remedial action plan, to verify completion of the cleanup, and to conduct post-cleanup monitoring.

- On or about July, 2008, the parties entered into a Mediation Process in an attempt to develop a negotiated settlement for remediating the Shipyard Sediment Site.
- In April, 2009, San Diego Coastkeeper asked me to assist them by developing a method for identifying a remedial footprint that did not rely on a reference pool, a topic about which there was substantial debate during the mediation process. The underlying logic was that development of such a method for identifying the remedial footprint could expedite negotiations on the scope of the remediation at the Shipyard Sediment Site.
- In May, 2009, I prepared the first draft of a report entitled, Development of a Sediment Remediation Footprint to Address Risks to Benthic Invertebrates and Fish in the Vicinity of the Shipyards Site in San Diego bay, California (hereafter referred to as the “Benthic Report”). This report was prepared for San Diego Coastkeeper to enable them to participate effectively in discussions regarding the remediation footprint during mediation process.
- In June, 2009, I asked three of my colleagues to review the Benthic Report and provide me with comments. These colleagues included Russell Fairey, Steven Bay, and Jay Field. Russell Fairey and Jay Field provided comments by email, while Mr. Bay provided comments directly on the Benthic Report.
- After considering all of the comments provided on the Benthic Report, I revised the document and submitted the final report to San Diego Coastkeeper on October 14, 2009.
- As the matter was not under any discovery order at the time and I had not been designated as an expert for the Environmental Parties, I recycled earlier drafts of the Benthic Report. This is part of my standard business practice for matters that are not covered under a discovery order. For other matters (i.e., those subject to legal proceedings), my standard business practice is to retain for a minimum of seven years any and all documents related to the matter under review (See Attachment 1. Document Control/Retention Standard Operating Procedure).



- On June 22, 2010, the Environmental Parties designated me as their expert witness and the Benthic Report was filed with the Regional Board. After that date, all documentation related to the Shipyard Sediment Site was retained in accordance with the California Code of Civil Procedure.
- On July 22, 2010, NASSCO filed Notice of Videotaped Deposition of Donald MacDonald for August 16, 2010. That document requested a number of documents related to the preparation of the Benthic Report.
- Between July 22, 2010 and September 30, 2010, I provided attorneys for the Environmental Parties with all of the documents that I relied on to prepare the Benthic Report related to the Shipyard Sediment Site. In addition, copies of all communications related to this matter were also provided to attorneys for the Environmental Parties. The only documents that were not included in these submissions were those that had already been recycled during the mediation process (i.e., in accordance with my usual practices during document preparation for matters not covered under rules of discovery);
- On October 20 and 21, 2010, I attended a videotaped deposition in San Diego, CA.
- Following my deposition, attorneys for NASSCO requested access to my office to enable them to review any documents related to the Shipyard Sediment Site. To facilitate this review, I asked my staff to re-compile all relevant documents that we had in either electronic or hard copy format. However, attorneys for NASSCO have not yet come to my office to review this material.

In summary, I produced two drafts of the Benthic Report for San Diego Coastkeeper, including a draft report and a final report. The final report incorporates any relevant comments provided by the reviewers. All documents relied upon to prepare the Benthic Report were provided to attorneys for the Environmental Parties, along with any communications related to this matter. I have never failed to produce reports or writings related to the Benthic Report, nor have I destroyed any evidence covered under the discovery process.

Any documents related to this matter that I recycled were earlier drafts of the document that were no longer of use and such recycling occurred *before* the Benthic Report was covered under the discovery process for the Shipyard Sediment Site (i.e., during the Mediation Process, when all parties were instructed to keep confidential any and all

information related to the Mediation Process). Therefore, all of the allegations made by NASSCO and Mr. Richardson regarding the failure to produce documents and/or destruction of evidence are false and the associated arguments are intentionally misleading.

**B. NASSCO's Allegation that I Unethically Used Data and Was Excluded from Testifying in another Case is Untrue.**

NASSCO alleged that, as an expert in *The United States v. Montrose Chemical Corporation of California* case, I “deliberately ignored a crucial study conducted at the exact location at issue showing that there were no toxic effects from contaminant concentrations many times higher than” the threshold I proposed and that my testimony was excluded for that reason. These allegations are without merit and are not supported by the facts. The facts of the matter are as follows:

- I was retained by NOAA in 1993 to conduct a review of the literature on the effects of PCBs and DDTs on sediment-dwelling organisms.
- In 1997, I prepared a report entitled, *Sediment Effect Concentrations (SECs) of DDTs and PCBs for Assessing Sediment Injury in the Southern California Bight*.
- During the preparation of this report, I compiled data and information on the toxicity of DDTs and PCBs from numerous documents available in the scientific literature. I did not rely on a report prepared by EVS Consultants because my evaluation of the data in the scientific literature was intended to be independent of the EVS study. More specifically, it was my understanding that another expert witness had been retained by NOAA to testify on the results of the EVS study.

I have no knowledge or information indicating that my testimony was excluded in the *Montrose* Case. I have reviewed the materials NASSCO submitted with the motion and noted that the court issued an order excluding testimony of “Ronald McDonald,” which is not my name. I have never been excluded from providing expert testimony because of the *Montrose* case or for any other reason.

**C. I am Well-Qualified to Offer an Opinion on Sediment Remedial Design and the Mechanics of Sediment Cleanup.**

NASSCO alleges that I am not qualified to offer an opinion on the mechanics, engineering or scientific principles relating to sediment cleanup or sediment remedial design. To support these allegations, NASSCO—through its attorney, Mr. Richardson—presents incorrect information, deliberately misleading information, and quotes from my deposition taken out of context. The facts related to my qualifications to serve as an Expert Witness in the matters related to the Shipyard Sediment Site are as follows:

- I am the principal of MacDonald Environmental Sciences Ltd. (MESL) and Canadian Director of the Sustainable Fisheries Foundation (SFF). The Canadian offices of both organizations are located in Nanaimo, British Columbia, Canada.
- I am a Registered Professional Biologist, a member of the British Columbia College of Applied Biology, and a Certified Fisheries Practitioner.
- I am an expert in the field of ecological risk assessment, natural resource damage assessment, and ecosystem-based management. I specialize in designing and conducting investigations to evaluate the effects of contaminated sediment on ecological receptors, including benthic invertebrates, fish, and aquatic-dependent wildlife. I also specialize in the design and implementation of environmental quality monitoring programs.
- I received my Bachelor of Science in Zoology in 1981 from the University of British Columbia, which is located in Vancouver, British Columbia.
- Between 1982 and 1989, I was employed by a federal government agency (Environment Canada) as a Technical Planning Coordinator and as a Physical Scientist.
- MacDonald Environmental Sciences Ltd. (MESL) was incorporated in 1989 and I have worked as an independent consultant over the past 21 years. Over that period, I have provided specialized consulting services to a wide range of clients in Canada, the United States, and elsewhere, including federal, state, provincial, and tribal government agencies, academic institutions, non-governmental organizations, and industry.
- Over my professional career, I have authored over 300 primary journal articles, book chapters, and technical reports on a wide range of topics related to environmental assessment and management. In addition, I have edited several books that were published by various scientific organizations.

- I have designed, conducted, and/or provided technical oversight on numerous ecological risk assessments and/or natural resources damage assessments at sediment-contaminated sites in North America. The tasks that were completed at several of these sites are briefly described to illustrate relevant experience in contaminated site assessment and remediation. My experience in the design and implementation of environmental monitoring programs is also briefly described.

The Calcasieu Estuary site is located in the vicinity of Lake Charles, LA. At this site, I have conducted a baseline ecological risk assessment (2000-2002), developed preliminary remediation goals (PRGs; i.e., clean-up goals) and evaluated post-remedial risks (2003), conducted a natural resources damage assessment (2005), evaluated the effects of the Citgo oil spill (2006), estimated ecological service losses in Bayou d'Inde (2009 - 2010), and provided advice on post-remediation monitoring (2010). To support these projects, I designed and implemented two sediment and biota sampling programs to provide the data and information needed to evaluate risks and/or injury to benthic invertebrates, fish, birds and mammals associated with exposure to metals, PAHs, PCBs, PCDDs/PCDFs, and other contaminants. Clients included USEPA, NOAA, USFWS, and LDEQ.

The Tri-State Mining District is located in the Spring and Neosho river basins of KS, MO, OK. At this site, I prepared the sampling and analysis plan to support evaluation of the effects on benthic invertebrates associated with exposure to contaminated sediments. The resultant data were used to develop concentration-response models and toxicity thresholds for selected COPCs and COPC mixtures. I used these data, including the toxicity thresholds, to evaluate risks to benthic invertebrates utilizing habitats throughout the study area. I have also developed sediment injury thresholds to support a natural resource damage assessment of the site. Clients included USEPA and USFWS.

The Upper Columbia River is located between the Canada-U.S. border and Grand Coulee Dam in Washington State. At this site, I developed numerical sediment quality standards to support sediment management initiatives in the study area. I have also provided USEPA with oversight support on the remedial investigation that was being conducted by the Dischargers. This work included development of a problem formulation document, establishing expectations for data collection, reviewing and evaluating sampling and analysis plans, providing oversight of laboratory toxicity testing programs,

and reviewing environmental data and information. I have also supported the Natural Resources Trustees by contributing to the Natural Resource Damage Assessment Plan, reviewing settlement offers, and interpreting matching sediment chemistry and toxicity data from the site. Clients included USEPA, USFWS, WDOE, and the Confederated Tribes of the Colville Reservation.

The Indiana Harbor site is located in the vicinity of Gary, Indiana. Activities at the Indiana Harbor site have included reviewing and evaluating historical data and information, conducting a natural resource damage assessment, developing remedial action objectives, deriving preliminary remedial goals (i.e., clean-up goals), reviewing remedial alternatives, and predicting post-remedial risks to ecological receptors. Clients included USDOJ and USFWS.

The Quathiaski Cove is located on Quadra Island, British Columbia. At this site, I have designed and implemented environmental sampling programs, evaluated the nature and extent of contamination, assessed risks to ecological receptors, developed numerical clean-up goals, reviewed and evaluated remedial alternatives, provided oversight during remediation, evaluated confirmation monitoring data, oversaw site restoration, and prepared applications for certificates of compliance. Client is Weston Foods Canada.

I have also conducted investigations to assess risks and/or natural resource injury at the Passaic River-Newark Bay Complex (NJ), Hudson River site (NY), Bloomington PCB site (IN), Piles Creek site (NJ), Cornell-Dubilier site (NJ), Vermont Asbestos site (VT), Anniston PCB site (AL), Sauget site (IL), Crofton site (BC), Portland Harbor site (OR), and others. Furthermore, I have designed and/or implemented environmental monitoring programs (i.e., for water, sediment, and/or biota) for the Fraser River and Estuary (BC), Columbia River (BC), Flathead River (BC), Similkameen River (BC), Thompson River (BC), Kootenay River (BC), Strait of Juan de Fuca (BC), Slave River (NWT), Liard River (NWT), Peel River (NWT), Presque Isle Bay (PA), Delaware River (PA, DE), and Tampa Bay (FL).

In summary, my education, knowledge, and experience in the area of sediment quality assessment and related topics qualify me to offer expert opinions on sediment remediation design and alternative footprints. An accurate copy of my Curriculum Vitae is included as Attachment 2 of this declaration.

**D. Mr. Richardson Has Demonstrated Reckless Disregard for the Truth and Made a Malicious and Meritless Attempt to Ruin My Reputation Before The Regional Board.**

I am personally distraught by Mr. Richardson's reckless disregard for the truth that he has demonstrated in the motion he submitted on behalf of NASSCO. As a professional and expert, my reputation is integral to my ability to make a living and to continue to provide expertise to a wide variety of clients. Mr. Richardson's reckless disregard for the truth and meritless accusations could seriously damage my reputation just by the virtue of the fact that he made such allegations in a public forum. The most damaging allegations are those that impugn my honesty—the allegations that I purposely destroyed key evidence and that I repeatedly engage in unethical behavior for personal gain. These allegations are patently untrue and are based on gross misrepresentations of fact. Even if the motion is unsuccessful, some damage to my reputation has already been done. I urge the Regional Board and Presiding Officer not to turn a blind eye to this malicious and reckless conduct and to hold Mr. Richardson accountable for his underhanded actions.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration is made this 12<sup>th</sup> day of July, 2011 in Nanaimo, British Columbia.

A handwritten signature in black ink, appearing to read "D. MacDonald", with a long horizontal flourish extending to the right.

---

Donald D. MacDonald,  
Declarant

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**Attachment 1**  
Document  
Control/Retention  
SOP

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## **Document Control/Retention Standard Operating Procedure**

MESL receives documents from various sources; documents it produces on its own; hard copy reports received via mail, electronic reports/materials received via email, electronic reports/materials received on CD. Below are instructions on how to deal with these documents.

### **Physical and Electronic Library:**

*Description* - MESL has an electronic and hard copy library. Documents received and produced by MESL are assigned a library number which is written on the hard copy and an entry in MS Access Library database is created to record the document. The document is then filed in the physical library, and in the case of electronic files, stored in the electronic library. Many documents reside in both the electronic and physical library. These documents are retained for an indefinite period of time.

### **Hard Copy Archiving:**

*Description* - The archiving system has been set up to archive aged project related files. It consists of boxes containing old files from various projects, yearly accounting, and presentations given over the years. These files are kept for a specific length of time and are accessed as needed (i.e., either to confirm or research a procedure or, in some cases, if it is a legal issue then we are required to keep all documents and work products used for that project). These boxes are stored in the storage room. Temporary files are generally removed after 10 years of storage, unless it's use deems it necessary to retain on a permanent basis. Permanent files are retained for an indefinite period of time and may be removed after 20 years of retention, unless it's use deems it necessary to retain longer. Descriptions of the contents of the boxes are kept in an Archiving System Database.

### **CD (Electronic) Copy Archiving:**

*Description* - Aged electronic files are removed from the central networking system, generally when space dictates, or when a project end date exceeds an age of 7-10 years. These files are either stored on CD or on an external hard drive. Two copies of each media are prepared, with one copy kept on-site and one copy stored off-site. An archiving excel file contains a log of the backup CDs created and also provides detailed instructions on how to create a backup CD. In the case of files that are stored on an external hard drive, a copy of these files are also stored on a local hard drive entitled "Inactive Projects". These CDs and external drives are maintained indefinitely.



**File Management of Email:**

*Description* - MESL receives various files via its centralized email system using Microsoft Outlook. The email system structure is similar to that of file management, where all correspondences with clients are contained in a project directory. Emails are kept until the system reaches capacity at which time an archiving file is created to remove emails older than 10 years from the daily system.

Attachments to emails are copied and pasted into the appropriate sub-directories and printed. Documents that are received via email are assigned a library number and are stored in the electronic library and, in the cases where the document was printed, are stored in the physical library as well. These files are maintained for an indefinite period of time.

**Backup of Daily Use Files:**

*Description* - MESL backs up its working (daily use) files daily. MESL maintains three external hard drives labeled, Monday/Wednesday; Tuesday/Thursday; Friday. Each drive contains two days of backup, except Friday which contains a Full System backup. In addition, a backup is simultaneously created on a separate partition on the server. External hard drives that are not being used for the current day's backup are removed from site daily, to protect against a system failure or a fire.

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**Attachment 2**  
Curriculum Vitae  
- Donald D.  
MacDonald

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**EDUCATION:**

Bachelor of Science, Zoology  
(Fisheries Biology; Environmental Physiology, Comparative Biochemistry)  
University of British Columbia, 1982

**SPECIALIZATION:**

Principal of MacDonald Environmental Sciences Limited, which was established to provide scientific consulting services in the fields of fisheries and aquatic resource management, stream ecology, environmental quality guidelines and policy development, environmental risk and hazard assessment, and information and technology transfer.

Specialist environmental toxicology and chemistry, ecosystem-based resource management, water quality/water use interactions, and sediment quality assessment.

**PROFESSIONAL MEMBERSHIPS:**

American Fisheries Society

President Western Division; Past-President, Canadian Aquatic Resources Section; Nominations Committee; Chair, Wetlands Conservation Committee; Newsletter Committee; Membership Committee.

Aquaculture Association of Canada

Association of Professional Biologists of British Columbia

Canadian Association on Water Pollution Research and Control

International Association on Water Pollution Research and Control

Society of Environmental Toxicology and Chemistry

**OTHER PROFESSIONAL ACTIVITIES:**

- 1986-1988 Newsletter Editor, North Pacific International Chapter, American Fisheries Society
- 1987-1989 Chair, Membership Committee, North Pacific International Chapter, American Fisheries Society
- 1992-1994 Chair, Wetlands Conservation Committee, Canadian Aquatic Resources Section, American Fisheries Society
- 1990-1994 Vice-President, President-Elect, President, and Past-President, Canadian Aquatic Resources Section, American Fisheries Society
- 1995-Present Canadian Director and Chair, Board of Directors, Sustainable Fisheries Foundation
- 1997-2001 Vice-President, President-Elect, President, and Past-President, Western Division, American Fisheries Society
- 2000-2001 Member, Membership Committee, American Fisheries Society

- 2003-2006 Award of Excellence Committee, American Fisheries Society  
2005-2006 Member, Science Advisory Board for Contaminated Sites in British Columbia  
2006-Present Board of Directors, Mid-Island Science, Technology & Innovation Council (MISTIC)

## PROFESSIONAL CERTIFICATIONS:

- Fisheries Professional-Certified (American Fisheries Society)  
Registered Professional Biologist (Association of Professional Biologists of British Columbia)

## EXPERIENCE:

### *AQUATIC BIOLOGIST - February 1989 to Present*

**MacDonald Environmental Sciences Limited, #24 - 4800 Island Highway North, Nanaimo, B.C. V9T 1W6** Independent consulting on environmental impact assessment, natural resource damage assessment, ecological risk assessment, fisheries and aquatic resource management, environmental quality, stream ecology, computer data management, and information and technology transfer. Projects include the development of water quality guidelines, sediment quality guidelines, tissue residue guidelines, environmental quality monitoring programs, fisheries co-management programs, ecosystem-based management, ecological risk assessments, natural resource damage assessments, and the assessment of environmental quality.

### *WATER QUALITY OBJECTIVES OFFICER - September 1984 to February 1989*

**Water Quality Branch, Inland Waters, Environment Canada, 502 - 1001 West Pender Street, Vancouver, B.C. V6E 2M9** Compilation, management and statistical analysis of existing and new information generated to support the formulation of water quality objectives in waters of significant federal interest; generation of water quality criteria information through toxicological, water quality, and other studies; design and implementation of monitoring programs to assess compliance with water quality objectives; preparation of reports and other publications on information developed to formulate water quality objectives; organization of workshops and information exchange sessions on water quality guidelines and objectives; provision of information and advice to technical committees established to resolve the International Joint Commission reference on the Flathead River. Supervisor: Dr. D. Valiela, Head Water Quality Objectives Division

### *TECHNICAL PLANNING COORDINATOR - November 1983 to September 1984*

**Water Quality Branch, Inland Waters, Environment Canada. 502 - 1001 West Pender Street, Vancouver, B.C. V6E 2M9** Planning and development of

regional water quality programs, including long- and short-term logistics and budgetary requirements and inter-project coordination; planning, organization, expedition, and supervision of special field studies and sampling projects for water quality analysis; pollution surveillance and sediment sampling; planning and implementation on national water quality monitoring programs to assess national trends and conditions. Supervisor: Dr. W.E. Erlebach, Chief Water Quality Branch

**PUBLICATIONS AND TECHNICAL REPORTS:***Journal/Book Publications*

MacDonald D.D., D. Moore D, C.G. Ingersoll, D.E. Smorong, R.S. Carr, R. Gouguet, D. Charters, D. Wilson, T. Harris, J. Rauscher, S. Roddy, and J. Meyer. 2011. Baseline ecological risk assessment of the Calcasieu Estuary, Louisiana: 1. Overview and problem formulation. *Archives of Environmental Contamination and Toxicology*.

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<p>15 <b>IN THE MATTER OF:</b></p> <p>16 17 TENTATIVE CLEANUP AND 18 ABATEMENT ORDER NO. R9-2010-0002</p>	<p>19 <b>NASSCO'S SECOND AMENDED</b> 20 <b>NOTICE OF VIDEOTAPED</b> 21 <b>DEPOSITION OF STEVE BAY</b></p> <p>22 Date: September 27, 2010 23 Time: 8:00 a.m. 24 Place: Latham &amp; Watkins LLP 25 650 Town Center Drive, 26 20<sup>th</sup> Floor 27 Costa Mesa, CA 92626</p>
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28 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

NOTICE IS HEREBY GIVEN that, pursuant to the Presiding Officer's Order Issuing Final Discovery Plan dated February 18, 2010 and agreement with counsel for the witness, that National Steel and Shipbuilding Company ("NASSCO") will take the deposition of Steve Bay ("Deponent") on September 27, 2010, at 8:00 a.m. This deposition will take place at the law offices of Latham & Watkins LLP, 650 Town Center Drive, 20th Floor, Costa Mesa, California, 92626, upon oral examination before a Certified Shorthand Reporter duly authorized to administer oaths, and will continue from day to day, Saturdays, Sundays and holidays excepted, until completed.

PLEASE TAKE FURTHER NOTICE that the deposition may also be videotaped, stenographically recorded, and recorded through such means as to provide the instant display of  
///

1 the testimony. NASSCO reserves the right to use any videotaped portion of the deposition  
2 testimony at a hearing in this matter.

3 A copy of the previously served subpoena and document requests is attached.  
4

5 Dated: September 10, 2010

LATHAM & WATKINS LLP

6  
7 By \_\_\_\_\_

  
8 Jeffrey J. Carlin  
9 Attorneys for Designated Party  
10 National Steel and Shipbuilding Company  
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1 **PROOF OF SERVICE**

2 I am a resident of the State of California, over the age of eighteen years, and not a  
3 party to the within action. My business address is Latham & Watkins, 600 West Broadway,  
4 Suite 1800, San Diego, California 92101. On September 10, 2010, I served the within  
5 document(s):

6 **NASSCO'S SECOND AMENDED NOTICE OF VIDEOTAPED DEPOSITION OF**  
7 **STEVE BAY**

8  **BY E-MAIL:** I caused the above-referenced documents to be converted in digital  
9 format (.pdf) and served by electronic mail to the addresses listed below.

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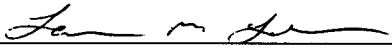
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I declare under penalty of perjury according to the laws of the State of California  
that the above is true and correct. Executed on September 10, 2010, at San Diego, California.

  
\_\_\_\_\_  
Lauren M. Luhmann