

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

**In the matter of Tentative Cleanup
and Abatement Order No. R9-2010-
0002 (Shipyard Sediment Cleanup)**

**US Navy's Response to NASSCO's
Motion to Exclude**

The U.S. Navy encourages the RWQCB to exercise its discretion and consider all relevant evidence in this proceeding, including the evidence and comments submitted by the Navy on May 26, 2011.

1) The RWQCB has ultimate discretion to consider all relevant evidence, and should consider the relevant evidence submitted by the U.S. Navy

Cal. Gov. Code §11513(c) gives the Regional Board ultimate discretion in evidentiary matters, and requires that "all relevant evidence shall be admitted." The RWQCB has been given extraordinary flexibility to ensure that all relevant evidence is considered in its decision making process. The Code section reads as follows:

The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, 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.

Cal. Gov. Code §11513(c). The Navy's evidentiary and comment submission of May 26, 2011 is certainly relevant to these proceedings, as it touches on numerous areas of the Tentative Cleanup and Abatement Order and the Draft Technical Report. In addition, it provides additional analysis and data regarding potential contributions from Chollas Creek to the Shipyard Sediment Site.

In addition to the California Code section cited above, State Water Resources Control Board Resolution 79-42 states that it is the "policy of the Board to ensure consideration of all relevant evidence." The Resolution also makes it clear that "[i]t is the intent of the State Board that no person be prevented from presenting relevant evidence to a Regional Board." *See* State Board Resolution 79-42. As such, the RWQCB should deny NASSCO's motion to exclude the relevant evidence submitted by the U.S. Navy in this proceeding.

2) **The U.S. Navy's submission was proper under the Third Amended Order of Proceedings and the RWQCB's Notice of Opportunity for Designated Parties to Submit Comments, Evidence and Legal Argument**

On April 12, 2011 the Presiding Officer issued a "Notice of Opportunity for Designated Parties to Submit Comments, Evidence and Legal Argument and for Interested Persons to Submit Non-Evidentiary Comments" (hereinafter "Notice") and providing a due date of May 26, 2011 for such submissions. This Notice was not issued until *after* the "discovery period" closed on March 11, 2011. In accordance with this Notice, the U.S. Navy provided an evidentiary and comment submission on May 26, 2011. NASSCO (and all other designate parties) was given an opportunity to submit rebuttal evidence and argument, which NASSCO did, on June 23, 2011. The Navy's submission was timely under the Notice, and the Third

Amended Order of Proceedings also supports the Navy's position that the Notice provided the parties an opportunity to submit "comments, evidence and legal argument" for consideration by the RWQCB. The Third Amended Order states that "[s]ubmittal of evidence and comments previously provided for under Phase IV is now provided for in Phase V, below." Phase V discusses the Notice and sets timelines for submission of comments, evidence, rebuttal evidence and reply comments. *See* Third Amended Order, Page 11, "Phase IV," Phase V." Because the Navy's submission is relevant to the proceedings and timely under the April 12, 2011 Notice, it should be considered by the Board.

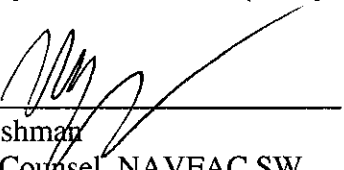
3) NASSCO's arguments regarding prejudice can be dismissed

NASSCO submitted extensive rebuttal comments and evidence to counter the Navy's submission, including critiques from its own experts. *See* NASSCO's Reply Comments submitted June 23, 2011, including *Exponent, Critique of the U.S. Navy's Apportionment Report* (June 23, 2011) and *Exponent, Critique of Comments and Untimely Expert Evidence Offered by the Environmental Health Coalition and Coastkeeper, City of San Diego, San Diego Unified Port District, San Diego Gas & Electric, and the U.S. Navy* (June 23, 2011). As such, NASSCO has not been unfairly prejudiced by the Navy's submission of relevant comments and evidence. NASSCO will have further opportunity to address the Navy's submission either in pre-hearing briefs or at the hearing itself. Even if the Navy's submission had been made before the Notice of Opportunity for Designated Parties to Submit Comments, Evidence and Legal Argument was issued, NASSCO would not have been able to conduct discovery regarding the submission because under the prior order of proceedings the discovery cutoff date coincided with the date for submission of expert reports that were part of the discovery phase.

CONCLUSION

The RWQCB should deny NASSCO's Motion to Exclude the relevant evidence submitted by the U.S. Navy in this matter. The evidence and comments were submitted by the Navy (a designated party in this proceeding) in accordance with the timelines and procedures established in the "Notice of Opportunity for Designated Parties to Submit Comments, Evidence and Legal Argument." The evidence is also extremely relevant to the proceeding and the final decision to be made by the Board following the hearing in this matter. Applicable statutes and State Board Resolutions encourage (and perhaps even *require*) the RWQCB to consider all relevant evidence. Finally, NASSCO had nearly a month to consider the Navy's submission and to submit rebuttal evidence and arguments, which they did. As such, the RWQCB should consider the evidence submitted by the U.S. Navy and deny NASSCO's motion so that the final Order in this matter is made after considering all relevant evidence.

Respectfully submitted this 12 Day of July, 2011



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