



**Matthew Rodriguez**  
Secretary for  
Environmental Protection

# California Regional Water Quality Control Board San Diego Region

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**TO: DESIGNATED PARTIES, TENTATIVE ORDER NO. R9-2011-0001  
(See Enclosed List) Via E-Mail and U.S. Mail**

**FROM:** Grant Destache   
Chair and Presiding Officer for Prehearing Proceedings  
**SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD**

**DATE:** November 1, 2011

**SUBJECT: SAN DIEGO BAY SHIPYARD SEDIMENT CLEANUP, TENTATIVE CLEANUP  
AND ABATEMENT ORDER NO. R9-2011-0001 AND DRAFT TECHNICAL  
REPORT; RULING ON NATIONAL STEEL AND SHIPBUILDING COMPANY'S  
MOTION TO EXCLUDE TESTIMONY OF DONALD MACDONALD**

On October 26, 2011, I denied National Steel and Shipbuilding Company's (NASSCO) motion to exclude from the record in the above matter testimony of Donald MacDonald, the person designated by San Diego Coastkeeper and Environmental Health Coalition as their expert witness in this proceeding. My October 26, 2011, ruling stated that a written explanation would follow.

## INTRODUCTION

NASSCO, joined by BAE Systems San Diego Ship Repair, the City of San Diego and San Diego Gas & Electric Company, moves to exclude from the record in this matter the anticipated hearing testimony and previously submitted reports (October 2009 ("Development of Sediment Remediation Footprint to Address Risks to Benthic invertebrates and Fish in the Vicinity of the Shipyards Site in San Diego Bay, California") and March 2011 ("Review and Evaluation of Tentative Cleanup and Abatement Order (No. R9-2011-0001) for the Shipyard Sediment Site, San Diego Bay, San Diego, California")) of Mr. Donald MacDonald. San Diego Coastkeeper and Environmental Health Coalition (collectively Environmental Parties) designated Mr. MacDonald as their expert witness in June 2010. The Environmental Parties filed a response opposing NASSCO's motion, to which NASSCO filed a reply.

NASSCO asserts two primary bases as support for its requested relief. First, NASSCO asserts that Mr. MacDonald unreasonably failed to produce requested reports and writings of expert witnesses under Code of Civil Procedure section 2034.270. According to NASSCO, this alleged "destruction of evidence" warrants sanctions in the form of excluding Mr. MacDonald's testimony and reports from the record of this proceeding.<sup>1</sup> Second, NASSCO asserts that the

<sup>1</sup> NASSCO offers claims, disputed by the Environmental Parties, that Mr. MacDonald was excluded as an expert in an unrelated federal district court case for "unethical exclusion of a report contradicting his conclusions." (NASSCO Motion, p. 8.) The circumstances and disputed facts about a wholly unrelated

San Diego Water Board is obligated by Evidence Code sections 720, 801 and 803 to exclude Mr. MacDonald's expert opinion testimony because he lacks "special knowledge, skill, experience, training or education" on the subject of sediment remediation engineering and design in California and is therefore unqualified to provide expert testimony on these topics.

In considering this motion, I am mindful that despite the February 2010 order making the Code of Civil Procedure's discovery statutes *generally* applicable to this matter to provide a framework for the discovery phase of this proceeding, this is an administrative proceeding with less formality in terms of witnesses and evidence than a civil trial. (See Gov. Code § 11513, subd. (c).) I address the asserted bases for excluding Mr. MacDonald's participation in this proceeding in turn.

#### **Alleged Destruction of Evidence.**

NASSCO claims that Mr. MacDonald was obligated to provide his complete expert file pursuant to CCP sections 2034.210 and 2034.270 and pursuant to NASSCO's deposition subpoena issued to Mr. MacDonald on or about October 2010. (NASSCO Motion, p. 6.) Mr. MacDonald's alleged "destruction of key evidence" prevents NASSCO from "fully defend[ing] its interests in these proceedings." (NASSCO Motion, p. 7.) NASSCO disputes the Environmental Parties' position that if the October 2009 report was prepared for their use in mediation, it must be excluded as a confidential mediation document. NASSCO therefore asserts that the Chair is required to exclude Mr. MacDonald's October 2009 and March 2011 reports, any comments or argument based thereon, and to preclude oral testimony at the hearing.

Code of Civil Procedure, section 2034.210 provides in relevant part:

"After the setting of the initial trial date for the action, any party may obtain discovery by demanding that all parties simultaneously exchange information concerning each other's expert trial witnesses to the following extent:

(c) Any party may also 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 described in subdivision (b) in the course of preparing that expert's opinion."

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case are irrelevant to this proceeding and the Board will not expend its already strained resources trying to determine what may or may not actually have occurred in that case. Similarly, the Board will not address the Environmental Parties' request that the Board take "appropriate action" to address disparaging allegations made by Mr. Kelly Richardson, counsel for NASSCO, about Mr. MacDonald in the Motion. The issue before this Board in addressing this Motion is whether Mr. MacDonald's testimony and reports should be excluded because (1) he unreasonably destroyed reports and writings relied upon and/or (2) because he is not qualified to provide the proffered expert testimony.

Code of Civil Procedure, section 2034.230 provides in part that “a demand for an exchange of information concerning expert trial witnesses shall be in writing and shall identify, below the title of the case, the party making the demand. *The demand shall state that it is being made under this chapter.*” (Emphasis added.)

California Code of Civil Procedure, section 2034.270, provides: “If a demand for an exchange of information concerning expert trial witnesses includes a demand for production of reports and writings as described in subdivision (c) of Section 2034.210, 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 described in subdivision (b) of Section 2034.210.”

Finally, Code of Civil Procedure, section 2034.300 provides in part: “[O]n objection of any party who has made a complete and timely compliance with Section 2034.260, the trial court shall exclude from evidence the expert opinion of any witness that is offered by any party who has unreasonably failed to do any of the following: \* \* \* (c) Produce reports and writings of expert witnesses under Section 2034.270.”

NASSCO claims that Code of Civil Procedure section 2034.300 requires exclusion of Mr. MacDonald’s reports and oral testimony in this case and that NASSCO has been deprived of the ability to defend itself in these proceedings. Mr. MacDonald concedes that some portions of his expert file were destroyed but that this occurred prior to or contemporaneously with the completion of the October 2009 report. The Environmental Parties state they had already requested Mr. MacDonald to prepare the October 2009 Report to assist and advise them in their participation in the mediation in this matter prior to retaining him as an expert for the hearing. (Environmental Parties’ Response, p. 8.)

NASSCO has not established or even asserted that it made the requisite “demand for mutual and simultaneous production and copying of all discoverable reports” under section 2034.210, subdivision (c) or the statement under section 2034.230 that would permit application of the remedy provided in Code of Civil Procedure section 2034.300. Moreover, even if NASSCO had made a proper demand under the civil discovery statutes, several factors support the conclusion that Mr. MacDonald’s failure to retain and disclose certain documents was not necessarily unreasonable under the circumstances.

First, the civil discovery statutes were not made generally applicable to this proceeding until February 18, 2010, months after Mr. MacDonald allegedly intentionally destroyed relevant reports and writings relating to the October 2009 report. Second, Mr. MacDonald was not retained by the Environmental Parties as an expert for purposes of preparing an expert report and providing testimony at hearing until June 22, 2010, at which time Mr. MacDonald acknowledges he was advised to retain all documents. (Environmental Parties’ Response, p. 11.) It is not clear whether Mr. MacDonald was previously on notice of a requirement to retain all draft documents. Thus, the Board lacks any basis to conclude that the destruction was intentional. Third, even where the discovery statutes strictly apply, the “purpose of the expert

witness discovery statute is to give fair notice of what an expert will say at trial. This allows the parties to assess whether to take the expert's deposition, to fully explore the relevant subject area at any such deposition, and to select an expert who can respond with a competing opinion on that subject area." (*Bonds v. Roy* (1999) 20 Cal.4th 140, 146-47.) Nothing about the Environmental Parties' conduct in this case frustrates this purpose.

NASSCO's claim that Mr. MacDonald's actions have made NASSCO tunable to defend itself is not persuasive. Under the Joint Discovery Schedule adopted by Order dated February 18, 2010, NASSCO had the opportunity to conduct written discovery and to depose Mr. MacDonald about his October 2009 report, drafts thereof, and other related issues. Through the discovery process, NASSCO received copies of written comments made by two peer-reviewers of the October 2009 Report and deposed the third peer reviewer (Steve Bay).<sup>2</sup> (Id.) Additionally, the Environmental Parties point out that following dispute resolution with discovery referee Timothy Gallagher, Mr. MacDonald's documents retained in his office were indexed and made available to NASSCO for review or copy but NASSCO did not take advantage of the opportunity to review those documents. NASSCO will have the opportunity to cross-examine Mr. MacDonald on November 9, 2011, in front of the San Diego Water Board, about the basis for his reports and testimony. Finally, the fact that Mr. MacDonald submitted an expert report on March 11, 2011, after depositions were concluded, is hardly surprising or unique to the Environmental Parties. The discovery schedule proposed by the designated parties and adopted in February 2010 clearly contemplated that expert reports would be submitted after the close of discovery.

As an added basis for exclusion, NASSCO also claims in its reply<sup>3</sup> that the October 2009 Report must be excluded as a confidential, mediation document if it was initially prepared to assist the Environmental Parties in mediation. Even if the 2009 report was at one time a confidential document, it became a public document when the Environmental Parties provided it for use at Mr. MacDonald's deposition in October 2010. From a brief review of the deposition transcript on this point, it appears that Mr. MacDonald was questioned extensively about the report at the deposition. The fact that the Environmental Parties decided after the mediation to make the document public does not compel the conclusion Mr. MacDonald must have been on notice to retain all draft writings or reports prior to October 2009.

The San Diego Water Board's adjudicative proceedings are governed by the Administrative Procedures Act set forth in Government Code, Chapter 4.5, sections 11400, et seq. Government Code section 11513 provides at subdivision (c):

"The hearing need not be conducted according to the 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

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<sup>2</sup> I note that Code of Civil Procedure section 2034.210 only requires disclosure of reports and writings of the expert, not of third parties that may have been consulted by the expert.

<sup>3</sup> Although not invited, I will allow NASSCO's reply for completeness of the record.

of any common law or statutory rule which might make improper the admission of the evidence over objection in a civil action.”

Nothing in the February 2010 Final Discovery Plan considered whether the statutory exclusion sanction would be appropriate under these circumstances. General application of the civil discovery statutes to this proceeding was not intended to convert this administrative proceeding before an administrative tribunal into a matter with all attendant formalities of a judicial proceeding.

### **Disqualification**

NASSCO seeks to disqualify Mr. MacDonald’s testimony on sediment remediation plans and remedial footprint on the basis that Mr. MacDonald is not qualified to render expert opinions on these topics.

Evidence Code section 801, which applies to adjudicative proceedings before the San Diego Water Board,<sup>4</sup> provides:

If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:

- (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and
- (b) Based on matter (including his special knowledge, skill, experience, training and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion on the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

The totality of Mr. MacDonald’s deposition testimony, through excerpts provided by NASSCO and the Environmental Parties, other information contained in the Environmental Parties’ Response including Mr. MacDonald’s declaration and qualifications, and Mr. MacDonald’s qualifications set forth in the March 11, 2011, MacDonald Report, supports a finding that he is sufficiently qualified to testify as an expert on issues of sediment assessment, remedial design and remedial footprint. NASSCO has not established that Mr. MacDonald “clearly lacks qualification” as an expert on one or more of these topics or that his expertise is only “vaguely” related to the issues at hand. (NASSCO Motion, p. 8, citing *California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 66-67). Therefore, it is not necessary to preclude Mr. MacDonald from testifying on the proposed topics. The degree of Mr. MacDonald’s knowledge affects the weight, and not the admissibility, of his testimony. (See, e.g., *Los Altos El Granada*

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<sup>4</sup> See Cal. Code Regs., tit. 23, § 648.4. Evidence Code section 800, which precludes lay witnesses from testifying about certain opinions, is inapplicable.

*Investors v. City of Capitola* (2006) 139 Cal.App.4<sup>th</sup> 629; *Pfingsten v. Westenhaver* (1952) 39 Cal.2d 12.)

## **CONCLUSION**

For the reasons stated above, NASSCO's Motion is denied. I will allow Mr. MacDonald's reports to remain in the record and will not preclude Mr. MacDonald from testifying during the evidentiary hearing. The Board will carefully consider the extent of Mr. MacDonald's, as well as other witnesses', expertise in deciding what weight, if any, to give the reports' conclusions and expert testimony.