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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 Only**

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

DATE: November 3, 2011

**SUBJECT: SAN DIEGO BAY SHIPYARD SEDIMENT CLEANUP, TENTATIVE CLEANUP
AND ABATEMENT ORDER NO. R9-2011-0001 AND DRAFT TECHNICAL
REPORT; ADDITIONAL RULINGS ON MOTIONS; REVISED DATE FOR
SUBMISSION OF ELECTRONIC PRESENTATIONS**

This memorandum provides rulings on all outstanding motions, including the San Diego Coastkeeper's and Environmental Health Coalition's October 31, 2011, motion to exclude excess pages from National Steel and Shipbuilding Company's (NASSCO) hearing brief. The Designated Parties are reminded that "[n]o written motions or objections will be accepted after October 19, 2011." Oral motions or objections will be allowed at the hearing if the moving or objecting party demonstrates that "the motion or objection could not, with the exercise of reasonable diligence, have been brought in writing" on or before October 19, 2011. (Notice of Public Hearing,¹ September 19, 2011, (NOPH) p. 11.)

1. (a) BAE Motion in Limine to Exclude Expert Opinions Offered by Non-Designated or Unqualified Experts; (b) NASSCO Motion in Limine, joined by Star and Crescent, BAE and San Diego Gas & Electric Company, to Preclude Untimely Designated Experts.

Ruling: The motions are granted, subject to the clarification provided below. The moving parties are generally correct that: (1) witnesses who were not timely designated as experts pursuant to the discovery schedule are precluded from offering expert testimony; and (2) expert witnesses may not offer *expert* testimony that is beyond the scope of that witness' expert qualifications. Even under technical rules of evidence, however, non-expert opinion testimony is allowed where the testimony is rationally

¹ In prior recent communications, I have referred to the Notice of Public Hearing in this matter as if it had been issued on September 16, 2011, rather than on September 19, 2011, the date which appears on the header and on which the notice was published. Some Designated Parties have also attributed the September 16, 2011, date to the Notice of Public Hearing. To minimize confusion about the date of the Notice of Public Hearing, I will refer prospectively to the Notice of Public Hearing as having been issued September 19, 2011. I recognize that past references to the Notice as issued September 16 or September 19, whether by the San Diego Water Board or parties/public, are to the same document.

based on the witness' perception and is helpful to a clear understanding of the witness' testimony (Evid. Code § 800.) While Evidence Code section 800 is not directly applicable to the San Diego Water Board's adjudicative proceedings (see Cal. Code Regs., tit. 23, § 648(b)), I will not preclude a non-expert witness from providing testimony that would likely be allowed in a civil trial under Evidence Code section 800. With respect to testimony that goes beyond what section 800 would allow, the failure to designate a witness as an expert may affect whether the testimony is hearsay, but does not make the testimony inadmissible. Similarly, a lack of qualification as an expert on a particular topic goes to the weight of the opinion testimony. Oral testimony is limited to the scope of written submissions and all parties have submitted lists of expert and non-expert witnesses. It is therefore unlikely that any witness will offer surprise testimony that could prejudice other parties. This ruling is without prejudice to any party's ability to object to any testimony on the grounds that it exceeds the scope of written submissions or otherwise violates the Notice of Public Hearing or other procedural rulings.

2. NASSCO Motion in Limine to Preclude Mention of Designated Parties' Financial Condition (Joined by BAE, Star & Crescent and SDG&E).

NASSCO is concerned that some Designated Parties "may seek to prejudice the [San Diego Water Board] members by improperly highlighting the financial condition of the dischargers, including but not limited to their balance sheets, corporate lineage and insurance assets." Therefore, NASSCO seeks an order prohibiting "any party from introducing evidence of, or making reference to, any other parties' financial condition."

Ruling: NASSCO's motion is denied. First, the San Diego Unified Port District (Port District) has argued that it should be secondarily liable if its present and former tenants have sufficient financial resources to carry out the cleanup. The tenants' financial condition is relevant to this defense. Second, the deadlines to submit evidence have passed and oral testimony that goes beyond the scope of written submissions will be excluded (see NOPH, p. 5.) No written materials submitted into the record besides the July 12, 2011, San Diego Gas & Electric Company Sur-Reply have been excluded from the record to date (see Rulings Memorandum dated October 26, 2011). Thus, any testimony regarding the financial condition of other Designated Parties may not go beyond the scope of evidence already in the record. Third, I will allow each Designated Party leeway in referring to evidence in the record, which in the presenting party's opinion, is relevant to support its position in this proceeding. The San Diego Water Board is capable of disregarding evidence that is irrelevant to a particular issue or otherwise offered for an improper purpose. Finally, I note that Government Code section 11513, subdivision (f), gives the Presiding Officer discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate an undue consumption of time. Evidence Code section 352 is inapplicable to this proceeding. (Gov. Code § 11513, subd. (c).)

3. NASSCO Motion in Limine to Exclude All References to Confidential Settlement and Mediation Negotiations. (Joined by BAE, Star & Crescent and SDG&E.)

NASSCO seeks an order excluding all “evidence, references to evidence, testimony or argument relating to any confidential settlement communication between the Designated Parties during mediation.” (Motion, p. 2)

Ruling: NASSCO’s motion is granted. California Government Code section 11420.30 protects communications made during mediation of San Diego Water Board adjudicative proceedings. Section 11420.30, subdivision (a) provides: “Anything said, any admission made, and any document prepared in the course of, or pursuant to, mediation under this article is a confidential communication, and a party to the mediation has a privilege to refuse to disclose and to prevent another from disclosing the communication, whether in an adjudicative proceeding, civil action, or other proceeding. This subdivision does not limit the admissibility of evidence if all parties to the proceedings consent.” I agree that Government Code section 11420.30 and relevant Evidence Code provisions support a policy of fostering candid discussions among opposing parties and that introduction of such evidence over the objection of a party to confidential mediation would frustrate that policy. To my knowledge, no evidence alleged to improperly reveal confidential mediation discussions has been submitted in this matter. Since the deadlines to submit evidence have passed and since oral testimony that goes beyond the scope of written submissions will be excluded (see NOPH, p. 5.), NASSCO’s motion is likely unnecessary. Nonetheless, I will grant the motion to make clear that Designated Parties are precluded from seeking to introduce new evidence (including rebuttal evidence) of confidential mediation discussions.

4. San Diego Coastkeeper and Environmental Health Coalition Motion to Exclude Excess Pages from NASSCO’s Hearing Brief.

San Diego Coastkeeper and Environmental Health Coalition (Environmental Parties) submitted an October 31, 2011, Motion to Exclude Excess Pages from NASSCO’s Hearing Brief. The NOPH limited hearing briefs to fifteen (15) pages and provides: “Hearing briefs are allowed for the purpose of summarizing previously submitted technical comments, evidence and argument only. Hearing briefs that go beyond the purpose for which they are allowed will be excluded from the record.” (NOPH, p. 6.)

Ruling: The Environmental Parties’ motion is denied. To the extent hearing briefs include attachments to support references in the brief and those attachments are already in the record for this matter, attachments are not part of the page limit and will not be excluded for that reason.

5. Oral request for reconsideration of NOPH deadline for submitting PowerPoint and other electronic presentations. The Advisory Team received an oral request from San Diego Gas & Electric Company for reconsideration of the November 4, 2011, deadline for submission of PowerPoint or other electronic presentations for use during the hearing. I am granting the request and extending the deadline for all Designated Parties until **5 p.m. on November 7, 2011**. The hearing procedures in the NOPH are modified accordingly.