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August 3, 2005

John Minan, Esq.  
Chairman  
California Regional Water Quality Control Board  
San Diego Region 9  
9174 Sky Park Court, Suite 100  
San Diego, CA 92123

File No. 030815-0000

Re: Tentative Cleanup and Abatement Order No. R9-2005-0126

Chairman Minan:

On behalf of National Steel and Shipbuilding Company ("NASSCO"), we are filing the attached Statement of Objections to Proposed Procedures.

Please contact me if you have any questions or comments.

Very truly yours,



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of LATHAM & WATKINS LLP

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*Melann to provide these*  
*to Board Member for item*  
*#12 on 10 Aug agenda.*

8 CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

9 SAN DIEGO REGION

11 **IN THE MATTER OF:**

12 NATIONAL STEEL AND  
SHIPBUILDING COMPANY  
13 CLEANUP AND ABATEMENT  
14 ORDER NO. R9-2005-0126

ORDER NO. R9-2005-0126  
FOR  
CLEANUP AND ABATEMENT

PUBLIC HEARING  
AUGUST 10, 2005

**STATEMENT OF OBJECTIONS TO  
PROPOSED PROCEDURES**

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1       **I.       INTRODUCTION AND SUMMARY**

2                       National Steel and Shipbuilding Company (“NASSCO”) appreciates the improved  
3 approach the Regional Board Water Quality Control Board (“Regional Board” or “Board”) has  
4 taken in its July 14, 2005 Proposed Procedures For Issuance of Cleanup and Abatement Order  
5 No. R9-2005-0126 (“Proposed Procedures” or “Procedures”), and recognizes that the Regional  
6 Board has responded to concerns raised in various motions and letters to the Board regarding the  
7 Draft Cleanup and Abatement Order (“Draft CAO”) and associated procedures (see e.g., Letter  
8 to John Robertus, dated June 15, 2005; Motion to Compel, dated June 1, 2005; Objections to  
9 Public Workshop Agenda, submitted May 12, 2005). NASSCO nonetheless objects to several of  
10 the procedural mechanisms proposed in the Procedures, and requests certain additional  
11 safeguards be added to the Proposed Procedures in order to ensure protection of NASSCO’s  
12 constitutional, statutory, and regulatory rights. These objections and procedural requests are  
13 presented in detail below.

14                       As general matter, NASSCO reserves all procedural rights available to it under  
15 federal and state constitutions, statutes, and regulations to the extent they are not expressly  
16 protected in the Proposed Procedures. The Regional Board members, in their role as adjudicator  
17 of these proceedings, must ensure that these rights are afforded to NASSCO and other parties in  
18 an open process, and the Regional Board staff, in its role as a party to these proceedings, must  
19 also adhere to all procedural standards and limitations. The role of the Regional Board’s  
20 Executive Officer should be limited in order to minimize the risk of impermissibly tainting these  
21 proceedings. Under relevant statutes and fundamental principles of due process, NASSCO has a  
22 right to full discovery, including the right to subpoena Regional Board e-mails and other  
23 documents that are germane to these proceedings, and a right to depose Regional Board staff that  
24 have been or are currently involved in this matter. NASSCO and other parties must be afforded  
25 adequate time both to submit written materials, and to fully present their case before the  
26 Regional Board at all hearings. Neither written materials nor oral testimony should be arbitrarily  
27 limited to the six key issues identified by the Regional Board staff, so long as the proffered  
28 evidence is relevant to the proceedings. Finally, the San Diego Bay Council and other interested

1 persons cannot be named parties to these proceedings, as they have no substantive rights at stake.  
2 The ability to present a case-in-chief, cross-examine witnesses, and participate in full discovery  
3 must be limited to the persons with a direct legal and financial interest that may be affected in  
4 this matter, i.e. those parties at whom the Draft CAO is directed.

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7 **II. ANY REGIONAL BOARD PROCESS SEEKING TO IMPOSE A \$100 MILLION**  
8 **CLEANUP ORDER MUST AFFORD FULL STATUTORY AND DUE PROCESS**  
9 **RIGHTS TO THE POTENTIALLY RESPONSIBLE PARTIES**

10 **A. The Full Rights Provided In The Code Of Regulations And Administrative**  
11 **Procedure Act Must Be Provided In These Proceedings**

12 **1. The Regional Board Must Follow Its Own Statutory And Regulatory**  
13 **Mandate**

14 As noted in the Proposed Procedures, Regional Board hearings such as this one  
15 are governed by Title 23 of the California Code of Regulation (“CCR”), Division 3, Chapter 1.5,  
16 Sections 648, *et seq.* These regulations and the Proposed Procedures themselves expressly  
17 incorporate Chapter 4.5 of the California Administrative Procedure Act (“APA”) (Cal. Gov’t  
18 Code § 11400, *et seq.*), as well as Section 11513 of Chapter 5 of the APA (Cal. Gov’t Code §  
19 11513). NASSCO hereby reserves its rights to every procedural and due process safeguard  
20 guaranteed by these provisions as well as the state and federal constitutions. NASSCO generally  
21 objects to any aspects of the Proposed Procedures that purport to limit its procedural or due  
22 process rights.

23 **2. The Regional Board Is A Party To These Proceedings And Must**  
24 **Abide With Its Own Deadlines And Procedural Requirements**

25 The procedural requirements of the CCR and APA sections incorporated by the  
26 Proposed Procedures apply to “all *parties* intending to present evidence at a hearing.” Cal. Code  
27 Regs. tit. 23 § 648.4(b) (2005) (emphasis added). California’s APA defines “party” to include  
28 “the agency that is taking action.” Cal. Gov’t Code § 11405.60. Thus, as the Procedures  
properly recognize, the Board staff, like NASSCO, is a party to these proceedings, and as such,  
is subject to the same procedural requirements applicable under the CCR and APA and Proposed

1 Procedures themselves. Therefore, for example, any testimony or witnesses the Board plans on  
2 presenting should be submitted by the appropriate deadlines (i.e., the same deadlines applicable  
3 to NASSCO). Board witnesses should also be prepared to be cross-examined by NASSCO and  
4 other parties.

5 **3. The Role Of The Executive Officer In Advising The Regional Board**  
6 **Should Be Strictly Limited**

7 The Proposed Procedures summarize the separation of functions of the Regional  
8 Board. While on the whole NASSCO welcomes this separation of functions and in fact  
9 considers it a prerequisite to conducting a fair and just proceeding, there are certain aspects of  
10 the arrangement to which NASSCO objects. According to the Proposed Procedures, the  
11 Shipyard Sediment Advisory Team (“Advisory Team”) will be responsible for (1) “assist[ing]  
12 the Regional Board Chair<sup>1</sup> in matters such as evaluating requests for designated party status,  
13 enforcing deadlines and other limitations on written and electronic submissions and exhibits, and  
14 preparing for and conducting the proceedings;” and (2) “provid[ing] advice to the Regional  
15 Board Chair and other Regional Board members in their deliberations on the evidence presented  
16 in the proceedings.” Proposed Procedures, at pp. 3-4.

17 NASSCO does not object to the Executive Officer’s role as an advisor with  
18 respect to the first category of Advisory Team tasks – those unrelated to the substantive issues of  
19 the case. However, NASSCO does object to the Executive Officer advising the Regional Board  
20 as to the second category, their deliberations on the evidence presented in the proceedings.  
21 Under the Administrative Adjudication Bill of Rights in the Government Code, “[t]he  
22 adjudicative function [of the Board] shall be separated from the investigative, prosecutorial, and  
23 advocacy functions within the agency as provided in Section 11425.30.” Cal. Gov’t Code §  
24 11425.10(a)(4). While Section 11425.30 of the Government Code is limited in applicability to  
25 presiding officers, due process requires a similar separation for the Executive Officer when  
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27 <sup>1</sup> To the extent that this statement implies that it is the Regional Board Chair, and not the full  
28 Regional Board, that will decide on designated party status, we object to the provision. The  
decision to allow parties to intervene is to be decided by the entire board, and the decision is  
to be issued in the form of an appealable order, as described more fully below.

1 acting in the manner set forth in the Proposed Procedures. See Nightlife Partners, Ltd. v. City of  
2 Beverly Hills, 108 Cal. App. 4th 81, 93 (2003) (“California courts, too, recognize that the  
3 combination of prosecutorial and adjudicative functions is the most problematic combination for  
4 procedural due process purposes.”).

5           The Executive Officer has headed up the Regional Board staff’s investigatory,  
6 prosecutorial, and advocacy efforts to date with respect to the Draft CAO. He has actively  
7 participated in the public processes to date, and he signed the first Draft CAO. His placement on  
8 the Advisory Team and separation from contact with the Cleanup Team henceforth does not  
9 somehow erase those earlier efforts or the knowledge and opinions that the Executive Officer  
10 developed prior to the adoption of these Procedures. This predisposition on the part of the  
11 Executive Officer with respect to the technical issues of this matter permanently taints his ability  
12 to advise the Regional Board members on these issues.

13           The Proposed Procedures laudably recognize the separation of functions by noting  
14 that “[s]taff assigned to the Advisory Team will not include individuals . . . who actively  
15 *participate* in formulating the terms and conditions of a tentative cleanup and abatement order or  
16 a supporting Technical Report in this matter.” (emphasis added) The use of the present tense of  
17 the word “participate” cannot disguise the fact that the Executive Officer has actively  
18 *participated* in this matter for many years, and may be continuing to do so pending the adoption  
19 of the Proposed Procedures. For this reason, NASSCO objects to the Executive Officer’s role on  
20 the Advisory Team to the extent that it encompasses the second category of tasks assigned to the  
21 Advisory Team (advising the Board on the evidence presented in the proceedings). Mike  
22 McCann and Phil Wyels can more than adequately advise the Board on the evidence presented at  
23 the hearing without jeopardizing the deliberative process. However, in no instance can the  
24 Executive Officer, Mr. McCann, or anyone else act as a super fact-finder for the Board. It is  
25 incumbent on the Board itself to weigh the evidence and make a determination on this matter.

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**4. NASSCO Requests Full Discovery, Including After The Issuance Of The Draft Technical Report And After The Tentative Documents Are Released**

**a. NASSCO Must Be Afforded The Right To Subpoena All Documents, Including E-Mails**

Due process requires a full right of discovery in administrative proceedings, especially where \$100 million and a potentially massive and far reaching cleanup are at stake. See Mohilef v. Janovici, 51 Cal. App. 4th 267, 302 (1996) (“[B]ecause the due process clause ensures that an administrative proceeding will be conducted fairly, discovery must be granted if in the particular situation a refusal to do so would so prejudice a party as to deny him due process.”) (internal citations and quotations omitted). While the Proposed Procedures provide for disclosure of some documents by the Board staff, discovery mechanisms are not expressly authorized by the Procedures.

For example, it is not entirely clear what documents will be made available to the Parties for review. At different places in the Proposed Procedures, it is stated variously that parties will be invited to review “technical information in the files of the Regional Board”; “a draft technical report providing the rationale and factual information supporting the proposed findings;” and “copies of any exhibits, evidence, and supporting technical documentation cited in the Technical Report” on the Regional Board’s website. NASSCO requests that the Regional Board clarify precisely what level of document review is being authorized by the Procedures. Equally important is NASSCO’s right to understand what evidence the Regional Board staff considered and rejected in formulating the Draft CAO. To date, the staff has not provided *all* of the evidence in the record, including the evidence, if any, that it discounted.

NASSCO objects to any document production or review that does not include all files and documents the Regional Board possesses that pertain to the Draft CAO and these proceedings. The production must include relevant e-mails of staff members that have been involved in the sediment investigation or the development of the Draft CAO.

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**b. NASSCO Requests Regional Board Staff To Be Available For Depositions**

NASSCO further demands that Regional Board staff be available for depositions prior to the hearing, and indeed, prior to the deadlines for submitting evidence. NASSCO has a right to depose Regional Board staff, including if necessary the Executive Officer, based on the generalized due process need for discovery in a proceeding of this magnitude. See Mohilef v. Janovici, 51 Cal. App. 4th 267, 302 (1996) (“[B]ecause the due process clause ensures that an administrative proceeding will be conducted fairly, discovery must be granted if in the particular situation a refusal to do so would so prejudice a party as to deny him due process.”) (internal citations and quotations omitted).

The right to depose witnesses in Regional Board proceedings is also specifically conferred by California Water Code (“CWC”) Section 1100. Section 1100 states:

The board or any party to a proceeding before it may, in any investigation or hearing, cause the deposition of witnesses residing within or without the state to be taken in the manner prescribed by law for depositions in civil actions in the superior courts of this state....

Section 1075 of the CWC defines proceeding as “any inquiry, investigation, hearing, ascertainment, or other proceeding ordered or undertaken by the board pursuant to this code.”

The Draft CAO proceedings unquestionably fit this definition, and as such, the Proposed Procedures must allow for depositions.

Depositions will allow Respondents to utilize more efficiently the allocated time at the hearing. Specifically, testifying witnesses and Board staff most knowledgeable about sediments, the drafting of the CAO, and the preparation of technical reports and supporting documents must be available to be deposed. In addition, any witnesses planning to testify or submit evidence, including San Diego Bay Council (“Bay Council”), must be made available for depositions. Though NASSCO presumes that such a right exists under the Proposed Procedures, there is no explicit mention in the Procedures of the right to depose witnesses, nor is an accounting made for the time that will be required to schedule and take the depositions. As

1 discussed below, the time required for conducting depositions should be factored into the  
2 schedule of Proposed Procedures.

3 **B. The Regional Board Must Clarify Or Modify Several Aspects Of The**  
4 **Proposed Procedures In Order To Ensure Due Process Is Afforded To The**  
5 **Parties**

6 **1. Time Schedules, Including The Time Allotted To Submit And**  
7 **Respond To Written Comments, Should Be Established Through The**  
8 **Pre-hearing Conferences**

9 Without knowing what the Draft Technical Report and supporting documents will  
10 consist of, it is impossible for the parties (including the Regional Board Cleanup staff) to know  
11 how much time will be required for submission of written materials. It is similarly impossible to  
12 know how much time will be required for response and rebuttal to written submittals, or for  
13 submitting comments on the Tentative Technical Report and CAO. Rather than attempt to  
14 arbitrarily set time periods now, the Regional Board should establish the deadlines for written  
15 submittals at the pre-hearing conference(s), taking into account the input from the parties. At  
16 that stage, the parties, including the Regional Board, will have a better understanding of the time  
17 that will be needed to complete adequate written submittals.

18 **2. At A Minimum, NASSCO Requests Additional Time For Submittal**  
19 **Of Comments After Issuance Of The Draft Technical Report And**  
20 **Again After The Tentative Documents Are Released**

21 NASSCO respectfully requests that the Regional Board provide additional time  
22 for submittal of written comments, both after the draft Technical Report is released, and after the  
23 Tentative Agenda Documents are released. In current form, the Proposed Procedures allow 45  
24 days from the release of the draft Technical Report, 45 days for response and rebuttal to  
25 submitted comments, and 30 days from the release of the Tentative Agenda Documents, before  
26 which comments must be submitted to the Board and other parties. NASSCO objects to the  
27 limits imposed at each stage of the proceedings.<sup>2</sup>

28 <sup>2</sup> Although it is impossible at this stage of the proceedings to determine how much time will be  
needed to file comments, it should in no event be less than 90 days.

1 As discussed in Section II(A)(4) of this brief, these proceedings will require  
2 extensive discovery, including review of all Regional Board documents and e-mails pertaining to  
3 this matter, and the taking of depositions. The discovery cannot take place until after the draft  
4 Technical Report and supporting documents are made available to the parties. Forty-five days is  
5 not sufficient to perform discovery, including depositions, and submit written comments to the  
6 Board. The analysis is similar with respect to the Tentative Agenda Documents. Though  
7 discovery will likely be less of a factor at this stage in the proceedings (this cannot be known  
8 with certainty until the Tentative Documents are released), NASSCO and the other parties will  
9 require more than 30 days to craft written responses to a CAO which at least in current form  
10 contemplates a \$100 million cleanup.

11 Moreover, the situation does not demand urgency. The *NASSCO and Southwest*  
12 *Marine Detailed Sediment Investigation* (“Sediment Report”), prepared under the direction and  
13 guidance of the Regional Board, was submitted in October 2003. In light of the 18-month period  
14 for the Regional Board staff to review that report and prepare the Draft CAO, there is no reason  
15 to deny Parties the additional time they need and deserve under principles of due process to  
16 adequately respond. We therefore respectfully ask for additional time for submittal of written  
17 comments on the Draft and Tentative Documents. The precise amount of additional time needed  
18 should be determined in connection with the pre-hearing conference.<sup>3</sup>

19 **3. NASSCO Requires Sufficient Time To Present Evidence At The**  
20 **Proceedings Before The Board**

21 NASSCO is not opposed to many of the suggested procedures governing the  
22 Public Hearing, including the concepts that written testimony need not be read into the record,  
23 that written testimony affirmed by a witness is direct testimony, and that oral testimony does not  
24 fall outside the scope of previously submitted written materials. However, oral testimony cannot  
25 be limited to merely “summarizing written submittals previously submitted.” At any proceeding  
26 in this matter, the PRPs must receive sufficient time to present evidence regarding the Draft

27 \_\_\_\_\_  
28 <sup>3</sup> Once appropriate deadlines for written submittals are established, the deadlines should be  
enforced by the Regional Board on the basis of the date the submittal is received by the  
Board, not the date identified on the document by the person submitting it.

1 CAO. See Cal. Gov't Code § 11425.10(1) (2005) ("The agency shall give the person to which  
2 the agency action is directed notice and an opportunity to be heard, including the opportunity to  
3 present and rebut evidence."); see also Matthews v. Eldridge, 424 U.S. 319, 333 (1972) ("The  
4 fundamental requirement of due process is the opportunity to be heard at a meaningful time and  
5 in a meaningful manner."). The amount of time to be provided to NASSCO at any hearing must  
6 correspond with the complexity of the record, the enormous potential impact to NASSCO, as  
7 well as the extensive defects and shortcomings of the Draft CAO and supporting documentation.  
8 Anything less would fail to provide NASSCO with an "opportunity to be heard" and would not  
9 be "meaningful."

10 To be clear, parties must be allowed to do more than "summarize" direct  
11 testimony. Because of the adjudicatory nature of the proceedings, due process principles require  
12 a meaningful opportunity to be heard.<sup>4</sup> Under Sections 648(b) and 648.5, and Section 11513(b)  
13 of the Government Code, the Board must allow Parties to present their own evidence; this  
14 includes the calling and questioning of witnesses. Section 648.5 states that the order of  
15 proceedings shall include the "[p]resentation of evidence by the parties." Cal. Code Regs. tit. 23,  
16 § 648.5(a)(5) (2005). The Government Code states that each party shall have the right "to call  
17 and examine witnesses." Cal. Gov't Code § 11513(b). Designated parties, then, must be given  
18 the opportunity to present and question witnesses, and cross-examine opposing witnesses, not  
19 simply "summarize" the evidence.

20 The Code of Regulations states,

21 The hearing notice may require that all parties intending to present  
22 evidence at a hearing shall submit the following information to the  
23 Board prior to the hearing: the name of each witness whom the  
24 party intends to call at the hearing, the subject of each witness'  
25 proposed testimony, *the estimated time required by the witness to  
26 present direct testimony*, and the qualifications of each expert  
27 witness.

28 <sup>4</sup> See Cal. Gov't Code § 11425.10(a)(1), *supra*; see also Horn v. County of Ventura, 24 Cal. 3d 605, 612 (1979)  
("Due process principles require reasonable notice and opportunity to be heard before governmental deprivation  
of a significant property interest.")

1 Section § 648.4 (emphasis added). It is not yet possible for NASSCO to make an estimate of the  
2 time it will need at the various hearings, nor is it required to make an estimate at this time. At a  
3 minimum, due process requires that NASSCO and the other PRPs receive at least the same  
4 opportunity as Regional Board staff and other parties to address the Draft CAO and forthcoming  
5 Technical Report. NASSCO will make a specific request for a sufficient amount of time at an  
6 appropriate time prior to any hearing in these proceedings. If at that time the Board does not  
7 provide the appropriate amount of time to constitute a reasonable opportunity to be heard,  
8 NASSCO will make an offer of proof.

9 **4. The Issues Cannot Be Arbitrarily Limited To Just The Six Issues**  
10 **Proposed By The Regional Board Staff**

11 **a. The Issues Mistakenly Presume Some Level Of Cleanup Is**  
12 **Required, And Additional Issues May Arise**

13 Evidentiary submittals and testimony cannot be limited to the six issues pre-  
14 selected by Regional Board staff. The Parties at whom this order is directed were not given any  
15 opportunity to provide input as to the issues. It is particularly prejudicial to limit the issues of  
16 the proceeding before any party has had the opportunity to review the forthcoming Technical  
17 Report and evidence in support thereof, not to mention the information that may be obtained  
18 during the discovery phase of these proceedings. Similarly, upon issuance of the revised  
19 Tentative CAO, a host of new issues and concerns may arise.

20 The issues identified in the Proposed Procedures are further flawed because all of  
21 them *presume* that it is appropriate to issue a Cleanup and Abatement Order. There are several  
22 threshold issues that must first be addressed before the Board ever reaches the six issues  
23 described in the Procedures. They include, but are not limited to:

- 24 (1) Should *any* Cleanup and Abatement Order be issued for the shipyard  
25 sediment?
- 26 (a) What, if any, legal authority does the *Regional Board* have to  
27 regulate *sediment* quality, as opposed to *water* quality?
- 28 (b) What evidence, if any, in the record would support the issuance of  
the tentative CAO?

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(c) What evidence, if any, contradicts the evidence, findings, and conclusions of the Sediment Report?

(2) Assuming any cleanup or abatement is legally and factually justified:

(a) Does State Board Resolution 92-49 provide a supportable legal basis for requiring cleanup of *sediment*, and if so, how should the factors for alternative cleanup levels be evaluated in light of the significant distinctions between sediment and water quality?

(b) Is there a supportable legal basis requiring a presumption of cleanup to background *sediment* conditions?

(c) Should cleanup be required where sources unrelated to the shipyards have not been controlled?

(d) Is there a supportable legal basis for the Regional Board to require remediation (dredging) of sediment where the effects of discharge can be abated through other means?

(e) Can the Regional Board discriminate in enforcement in adopting markedly different cleanup levels (by orders of magnitude) for marine sediments at similar sites within San Diego Bay?

Finally, the issues as drafted by the Regional Board staff must be revised. For example, the fifth issue should state “What is the incremental benefit between the least stringent cleanup level (natural attenuation), and each increment of attaining more stringent cleanup levels compared with the incremental cost of achieving those levels.” Moreover, in light of the preliminary issues defined above, the text of the existing issues in the Procedures should be preceded with the phrase “Assuming any cleanup or abatement is legally and factually justified....”

Thus, NASSCO objects to any attempt by the Regional Board to exclude an offer of evidence or testimony simply because it does not fit into one of the six categories, so long as it is relevant to the proceeding.

**b. Parties That Are Potentially Subject To The Duties And Conditions Of The Order Need Not Distinguish Policy Statements From Evidentiary Offerings**

Item number 6 on Page 9 of the Proposed Proceedings suggests that Parties must “clearly identify” portions of their written submittals that are non-evidentiary policy statements.

1 This requirement, like the requirement to assign evidence and testimony to one of six pre-  
2 assigned categories, is unnecessary and creates significant logistical challenges. For example, a  
3 NASSCO submission about the appropriate level of cleanup based on the available evidence is at  
4 once a statement about cleanup policy and an analysis of the evidence. Therefore, NASSCO  
5 objects to any attempts by the Regional Board to penalize NASSCO or exclude an offer of  
6 evidence or testimony based on the label applied to the proffered evidence or testimony. Under  
7 the Board's regulations, only the testimony of interested persons can be limited on the basis that  
8 it is a policy statement.<sup>5</sup>

9 **5. NASSCO Must Be Allowed To Question Interested Persons**  
10 **Presenting Evidence**

11 Respondents further object to certain provisions regarding the conduct of the  
12 hearing with respect to interested persons. Respondents reserve the right to cross examine  
13 "interested persons" that provide, in their comments, any testimony other than general policy  
14 statements (e.g., if they present evidence). Under the Code of Regulations,

15 The Board or presiding officer may provide an opportunity for  
16 presentation of *policy* statements or comments, either orally or in  
17 writing, by interested persons who are not participating as parties  
18 in the proceeding. Persons presenting *nonevidentiary* policy  
19 statements will not be subject to cross-examination but may be  
asked to respond to clarifying questions from the Board, staff, or  
others, at the discretion of the Board or presiding officer.

20 Cal. Code Regs. tit. 23, § 648.1(d) (2005) (emphasis added). It follows, then, that interested  
21 persons presenting more than policy statements (e.g., evidence) may be cross-examined.  
22 NASSCO reserves the right to do so.<sup>6</sup>

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25 <sup>5</sup> CCR § 648.1(d).

26 <sup>6</sup> For example, if any person wishes to appear before the Board and argue the quality of the  
27 sediment at the shipyards, any alleged impacts of the sediment on human health or the  
28 environment, or anything other than general policy statements, NASSCO reserves the right to  
cross examine that person (and to depose the person prior to the hearing). Without such  
right, NASSCO will be unable to test the witnesses' bases for their statements, their veracity,  
etc.



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**6. NASSCO Requests Additional Limitations On The Number Of Copies That Must Be Submitted**

NASSCO appreciates the provisions of the Proposed Procedures which attempt to streamline the document reproduction and distribution process, including the use of electronic service, administrative notice of public records, and the option for parties to waive service of voluminous documents. The Proposed Procedures nonetheless require each Party to submit twenty paper copies to the Board of all direct testimony, exhibits, excerpts of documents or evidence, and all other documents to be added to the administrative record. Moreover, each designated party must be served copies of the same items. This currently requires NASSCO to provide an additional eight copies, and the Board is considering granting other interested persons "Party" status. In total, the Parties are being asked to provide roughly 30 total copies of every document submitted to the Board. This is extremely burdensome and unnecessary.

While NASSCO is willing to provide 20 copies to the Board and a copy to each designated party of their direct testimony and supporting legal and policy arguments (i.e., each affidavit or legal brief), NASSCO objects to the requirement to provide 30 copies of all supporting materials. Two copies of all such materials for the Board should be sufficient. This would allow one original copy for Board review, and one copy for the Board staff to make available for copying by other designated parties or interested persons pursuant to Board policy. As suggested on page 8 of the Proposed Procedures, each party can provide to all other designated parties a completed Exhibit Identification Index of all documents produced to allow each party to determine which documents they would like to obtain from the Board. NASSCO is also agreeable to providing electronic copies of larger documents. Furthermore, NASSCO understands that all documents currently in the record, including the Sediment Report, will not be subject to re-distribution by NASSCO.

**7. Board Deliberation Must Be In The Public Forum, And The Board Must Disclose All Comments To All Parties, Not Merely To The Cleanup Team**

On page 6, the Proposed Procedures suggest (although it is unclear) that the Board

1 may meet separately to discuss the case following the first evidentiary hearing. NASSCO  
2 objects to any such closed door discussions by the Board members. Agency proceedings such as  
3 this one must be conducted in the public forum; deliberations cannot take place in a closed  
4 session.

5           The California Attorney General has issued an opinion on this specific issue in the  
6 air quality context, finding such conduct would violate the Ralph M. Brown Act (Cal. Gov't  
7 Code §§ 54950, et seq.), which requires open public meetings. See 71 Op. Atty Gen. Cal. 96.

8           The specific issues addressed by the Attorney General were:

9           Does the Ralph M. Brown Act require the deliberations of a hearing board of an  
10 air pollution control district, after it has conducted a public hearing on a variance,  
11 order of abatement, or permit appeal, to be conducted in public? If so, may the  
12 board deliberate in private after such public hearings with the board's legal  
13 counsel, or the board's attorney member?

14 Id. at 96. The Attorney General concluded that:

15           The Ralph M. Brown Act does require the deliberations of a hearing board of an  
16 air pollution control district, after it has conducted a public hearing on a variance,  
17 order of abatement or permit appeal, to be conducted in public. The act prohibits  
18 the hearing board from conducting such deliberations in private with the board's  
19 counsel or the board's attorney member.

20 Id.

21           The decision was cited favorably in subsequent Attorney General Opinions. See  
22 73 Cal. Op. Att'y Gen. 1, at 2; 80 Cal. Op. Att'y Gen. 231, at 234. The AG opinion is equally  
23 persuasive in this context. Deliberation by an air pollution control district hearing board on an  
24 order of abatement is nearly identical to deliberation by the Regional Board on a Cleanup and  
25 Abatement Order. Hence, the Regional Board's deliberations on this matter must take place in  
26 the public forum.

27           Similarly, the Board members' communications on all matters, whether  
28 characterized as a preliminary conclusion or final decision, must be directed to all Parties, not  
just to the Cleanup Team. In numbered paragraph 3 at the bottom of page 6 of the Proposed  
Procedures, the Regional Board notes that after the first hearing, the Regional Board "will  
communicate any issues of concern to the Cleanup Team and direct the Team to prepare a

1 technical analysis<sup>7</sup> and tentative Cleanup and Abatement Order....” It is not clear whether the  
2 contemplated communication would be oral or written, or what the nature of the communication  
3 might be. NASSCO requests a clarification of this sentence, and objects to any communication  
4 from Board members to Staff that is in the nature of a decision or conclusion on the evidence  
5 then before the Board that is not directed to all parties.

6  
7 **8. NASSCO Requests That The Regional Board Clarify Various**  
8 **Provisions Of The Proposed Procedures**

9 On Page 1 of the Proposed Procedures, the Regional Board states that “the  
10 purpose of the public hearings is for the Regional Board to receive final comments from Parties  
11 and interested persons and to ask questions regarding written submittals.” This does not  
12 accurately characterize the nature and purpose of these proceedings, which are adjudicatory. The  
13 purpose of the public hearings is to allow the Parties to present evidence concerning the draft  
14 CAO and the basis (or lack thereof) for it, and to permit direct and cross-examination of  
15 witnesses, including Regional Board staff. NASSCO requests that this sentence regarding the  
16 purpose of the proceedings be modified or stricken from the Proposed Procedures.

17 Page 2 of the Proposed Procedures mentions that a pre-hearing conference will be  
18 held to address procedural matters. NASSCO welcomes the opportunity for a pre-hearing  
19 conference, and simply requests that the Regional Board clarify when and how it will take place.  
20 It is not clear whether the pre-hearing conference referred to will be held prior to the August 10,  
21 2005 hearing on the Proposed Procedures, whether “pre-hearing conference” is a reference to the  
22 August 10, 2005 meeting itself, or whether it is referring to a conference to be held before one or  
23 both of the hearings scheduled in the Proposed Procedures. NASSCO requests that pre-hearing  
24 conferences be held before both of the proposed hearings and any other hearing at which the  
25 parties will be given an opportunity to present testimony and evidence.

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28 <sup>7</sup> We presume this to mean a revision of, or addendum to, the draft Technical Report that the  
Cleanup Team is to issue prior to the first hearing, though this assumption should be clarified  
by the Board.

1           **C.   Persons Designated As Parties To These Proceedings Should Be Strictly**  
2           **Limited To Persons That Are Potentially Subject To The Provisions Of The**  
3           **Draft Order**

4           NASSCO objects to the designation or proposed designation of Bay Council as a  
5 party to these proceedings. Bay Council has not met or even attempted to meet the statutory  
6 standard that the Regional Board must apply when determining whether to designate parties in  
7 addition to the persons to whom the Board's action is directed. Moreover, the Regional Board  
8 should not grant party status to any person whose legal rights would not be substantially affected  
9 by the outcome of these proceedings. Stated another way: only persons that are at least  
10 potentially affected by the obligations and conditions of the Draft CAO should be granted party  
11 status and be permitted to participate in these proceedings alongside those already named  
12 potentially responsible parties ("PRPs").

13           **1.   The Regional Board Has Not Adhered To Its Own Standards In**  
14           **Designating The San Diego Bay Council A Party To These**  
15           **Proceedings**

16           The Regional Board staff has suggested that the San Diego Bay Council ("Bay  
17 Council") "should be designated as a party" to these proceedings (Transmittal Letter For  
18 Proposed Procedures). The Proposed Procedures go further and state that Bay Council is  
19 "currently designated" as a Party in these proceedings. (Proposed Procedures, at 3) In  
20 purporting to make this designation, the Regional Board staff has failed to adhere to its own  
21 regulatory and statutory mandate with respect to designating parties, and the Cleanup Team has  
22 gone beyond its role as advocate and has assumed a role that only the Board members  
23 themselves can assume.

24           Other than the Regional Board's assertion in its transmittal letter that Bay Council  
25 has "demonstrated intense interest in the issues involved," the Regional Board has given no  
26 indication why it has granted Bay Council Party status. However, in Footnote 1 to the Proposed  
27 Procedures, the Regional Board defines "Parties" to the proceeding as "the persons to whom the  
28 tentative cleanup and abatement order is directed, and any other person whom the Regional  
Board determines should be designated as a party." This language is nearly identical to that in

1 Section 648.1(a) of the CCR sections that govern State and Regional Board adjudicatory  
2 proceedings. Regional Board is no doubt relying on this broad language in Section 648.1(a) to  
3 support its assertion that Bay Council, or other groups, may qualify as Parties to this proceeding.

4           This reliance is misplaced. While the Regional Board may be authorized to  
5 “determine” the additional persons that should be designated as parties, they do not have a  
6 boundless discretion to do so, nor are they relieved from their obligation to make an actual  
7 determination. The Regional Board cannot grant any person that shows an interest, intense or  
8 otherwise, “party” status and allow that person to cross-examine NASSCO and other parties that  
9 are potentially subject to the Draft CAO. The Board’s discretion necessarily is limited by  
10 provisions in California’s Administrative Procedure Act (“APA”). As previously noted, both the  
11 CCR sections governing these proceedings and the Proposed Procedures themselves expressly  
12 incorporate Chapter 4.5 of the APA (Cal. Gov’t Code § 11400, *et seq*). Chapter 4.5 of the APA  
13 includes Section 11440.50, which states “section [11440.50] applies in adjudicative proceedings  
14 of an agency if the agency by regulation provides that this section is applicable in the  
15 proceedings.” Again, the regulations governing Regional Board proceedings expressly make  
16 Section 11440.50 applicable. Section 11440.50 establishes a three-prong test for determining  
17 whether a person may intervene into an agency’s adjudicative proceedings.

18           First, the applicant for intervention must submit a written motion to the agency,  
19 with copies served on all parties named in the agency’s pleading. The motion is to be made as  
20 early as practicable in advance of the hearing, and if there is a prehearing conference, the motion  
21 to intervene should be served in advance of the conference, and be resolved at the conference.  
22 Cal. Gov’t Code §§ 11440.50(b)(1), (2). To our knowledge, Bay Council has never submitted  
23 any written motion to the Regional Board requesting status as a Party. If such a motion exists,  
24 then it was not properly submitted since, as described above, any such request should have been  
25 served upon all Parties to these proceedings. NASSCO has never received a copy of any motion  
26 from Bay Council requesting intervention; if NASSCO had received a motion from Bay Council,  
27 it would have immediately objected.

28

1           If designation as a party were as simple as submitting a written request, then the  
2 Regional Board could theoretically cure its procedural error by having Bay Council submit a  
3 motion requesting intervention. However, the second prong of the APA intervention standard  
4 requires a person wishing to intervene to present facts “demonstrating that the applicant’s legal  
5 rights, duties, privileges, or immunities will be substantially affected by the proceeding or that  
6 the applicant qualifies as an intervenor under statute or regulation.” Cal. Gov’t Code §  
7 11440.50(b)(3). Bay Council’s alleged “intense interest in the issues involved” simply cannot  
8 suffice to meet this prong of the APA standard. Environmental groups, industry groups, and  
9 other organizations throughout the country conceivably could have a strong interest in the  
10 “issues involved” in these proceedings. However, they should not all be designated as Parties to  
11 these proceedings. Shipbuilders, port authorities, petroleum terminal operators, trade groups,  
12 associations, municipalities, and other entities throughout the region undoubtedly have “an  
13 intense interest in the issues involved” in these proceedings. Logic dictates that a mere interest  
14 in the issues involved is not sufficient to bestow Party status on Bay Council or any person not  
15 potentially subject to the conditions or consequences of the Draft CAO. Bay Council does not  
16 own property in or around the proposed cleanup area. Its interests are not sufficiently distinct  
17 from the public-at-large. Bay Council plainly cannot meet the APA’s requirement that an  
18 intervenor’s “legal rights, duties, privileges, or immunities will be substantially affected by the  
19 proceeding,” nor have they even attempted to state facts demonstrating that they satisfied this  
20 prong.

21           Moreover, any generalized interest that Bay Council has in the outcome of these  
22 proceedings is adequately protected by the staff of the Regional Board’s Sediment Cleanup  
23 Team. Under the Porter-Cologne Water Quality Control Act (CWC § 13000 et seq), it is the  
24 State and Regional Water Boards that are charged with regulating waters “to attain the highest  
25 water quality which is reasonable, considering all demands being made and to be made on those  
26 waters and the total values involved, beneficial and detrimental, economic and social, tangible  
27 and intangible.” (CWC § 13000) Since groups like Bay Council are neither responsible for  
28 performing the delicate balance required by CWC Section 13000, nor substantially affected by

1 the outcome of this proceeding, they cannot be afforded Party status in these proceedings.  
2 Rather, they are properly granted a role as an interested person, as per CCR Section 648.1(d).

3           The third and final prong of the APA standard for intervention requires the  
4 presiding officer to make a determination “that the interests of justice and the orderly and prompt  
5 conduct of the proceeding will not be impaired by allowing the intervention.” Cal. Gov’t Code §  
6 11440.50(b)(4). On this prong as well, the Regional Board has not and cannot make the  
7 determination that the designation of groups like Bay Council will not impair orderly and prompt  
8 conduct of the proceeding. As already noted, the Regional Board Cleanup Team is statutorily  
9 authorized and fully capable of representing any interests Bay Council may have in the water  
10 quality of San Diego Bay. Adding additional parties with no financial or legal stake in the matter  
11 necessarily takes time away from the ability of the true parties to this matter (the PRPs and the  
12 Regional Board) to present their cases in chief, rebut testimony, and cross-examine witnesses.  
13 Scheduling depositions, reviewing evidentiary submittals, and distributing documents to  
14 additional parties is unwieldy and disruptive, and detracts from the true parties’ ability to  
15 develop and present their cases. See, Sanders v. Pacific Gas & Elec. Co., 53 Cal.App.3d 661,  
16 669 (1975) (“An intervention will not be allowed when it would retard the principal suit.”).

17           As indicated above, if the Regional Board’s standard for designation of parties is  
18 whether they possess an “intense interest in the issues” of this proceeding, then the number of  
19 potential parties to these proceedings is infinite. Numerous trade groups, associations, and other  
20 entities undoubtedly have an intense interest in these proceedings and have been following them  
21 closely. If the Regional Board is willing to extend its same standard for intervention to these  
22 entities, they likely will exercise their right to generally challenge the Regional Board’s technical  
23 report, Draft CAO, and overall approach. The generalized but intense interest of these industry  
24 groups and private entities is no different than Bay Council’s, and the types of testimony they  
25 might present are no different from that which Bay Council is capable of presenting. It seems  
26 clear that, taken to its logical conclusion, allowing these types of groups full party status, when  
27 they have no “legal interest” at stake, will unnecessarily impair “the orderly and prompt conduct  
28 of the proceeding,” whether their position is for or against the Draft CAO. More importantly, the

1 “interests of justice,” from the perspective of both the Regional Board and the PRPs, are  
2 impaired if the time the true parties have to present their cases is disrupted or whittled away by  
3 the participation of groups like Bay Council whose legal rights or duties are not affected by these  
4 proceedings.<sup>8</sup> Thus, the third prong of the APA intervenor standard provides additional reason  
5 why Bay Council and other similarly situated groups should only enjoy “interested person”  
6 status in these proceedings.

7 Bay Council and similar groups need not be excluded from these proceedings.  
8 They are free to participate as interested persons. The Regional Board has the right to allocate  
9 additional time at the hearing to those interested persons whose interest in these proceedings is  
10 particularly “intense.”

11 **2. No Other Person That Is Not Potentially Subject To The Terms Of**  
12 **The Draft CAO Should Be Permitted To Intervene In These**  
13 **Proceedings**

14 All of the reasons given above as to why Bay Council fails the statutorily-  
15 mandated standard for intervention as a party would similarly apply to other groups that are not  
16 likely to be “substantially affected” by these proceedings. Granting party status to *any* person  
17 that is not potentially, substantially obligated under the terms and conditions of the Draft CAO  
18 would unnecessarily disrupt the orderly and prompt conduct of the proceeding.

19 This is not to say that only persons who can potentially be made to “cleanup and  
20 abate” can intervene in the proceedings. For example, an appropriate use of the right of  
21 intervention in this proceeding might be where one of the parties at whom the Regional Board’s  
22 action is directed had previously contracted with a third person who indemnified the named party  
23 for all costs incurred respecting cleanup of sediments. That third person’s financial interest in  
24 the outcome of the proceedings might be a legitimate reason to allow the third person to  
25 intervene. Another example of proper intervention may be where cleanup actions potentially

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27 <sup>8</sup> The injustice and potential disruption to the parties named in the Draft CAO is magnified when  
28 one considers the fact that Bay Council is merely an umbrella organization for numerous  
environmental groups. If the Regional Board grants Bay Council party status, it is effectively  
granting party status to numerous interested persons, none of whom have “legal rights” at  
stake in these proceedings.



1 prescribed by the Regional Board could directly disrupt the person's legal right to conduct  
2 business (e.g., the cleanup activities interfered with an entity's ability to conduct business at the  
3 10<sup>th</sup> Avenue Terminal). However, Bay Council and similarly situated groups cannot demonstrate  
4 that they possess these types of interest, let alone that the interests would be substantially  
5 affected by these proceedings. Unless a person will potentially have to spend money, take  
6 action, or forego rights or privileges as a result of these proceedings, they should not be afforded  
7 party status.

8 **3. To The Extent The Regional Board Proposes To Designate Additional**  
9 **Parties To These Proceedings, NASSCO Must Have A Full**  
10 **Opportunity To Oppose Such Designations**

11 According to the Proposed Procedures (at page 3), other persons wishing to  
12 participate in the proceedings as "Parties" must submit a written request for designation as a  
13 party by 4:00 p.m. on the second Friday following "promulgation" of the Procedures. By  
14 "promulgation," it not clear whether the Board intends for the deadline to be the second Friday  
15 after circulation of these Procedures on July 14, 2005, or the second Friday after "adoption" of  
16 the Procedures. Regardless, any person submitting such a request (more properly referred to as a  
17 motion for intervention) should be obligated to serve a copy of the motion on NASSCO and all  
18 other parties.<sup>9</sup> Cal. Gov't Code § 11440.50(b)(1), (2). At a minimum, the Board should  
19 promptly furnish all parties a copy of any motion received, including any post hoc request  
20 received from Bay Council.

21 Due process and the APA then require that NASSCO and the other parties be  
22 given an opportunity to object to any motions for intervention, both in writing and at a hearing  
23 before the Regional Board members that will be making the determination on the motions.

24 In its determination on the motion, the agency cannot merely provide a one-  
25 sentence explanation asserting that the intervenor has an "intense interest," or give a footnote  
26 explanation in a hearing notice. Rather, the APA requires that "[a]s early as practicable in

27 \_\_\_\_\_  
28 <sup>9</sup> Under the current Proposed Procedures, only parties have to serve copies of documents on  
other parties. By definition, persons attempting to intervene in the proceedings would be  
relieved of this obligation since they are not parties.

1 advance of the hearing the presiding officer shall issue an order granting or denying the motion  
2 for intervention, specifying any conditions, and briefly stating the reasons for the order . . . The  
3 presiding officer shall promptly give notice of an order granting, denying, or modifying  
4 intervention to the applicant and to all parties.” (§ 11440.50(d)) This order will provide the  
5 basis upon which NASSCO and other parties can challenge, if necessary, the designation of  
6 additional parties or the conditions imposed on intervening parties.

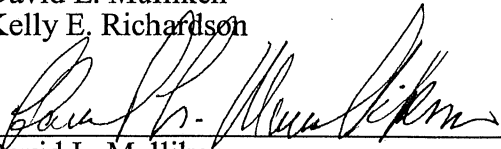
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**III. CONCLUSION**

As currently written, the Draft CAO contemplates a tremendous and unjustified commitment of time, money, and resources from the parties at whom it is directed, and the potential for large-scale disruption of human activity and the marine environment in the vicinity of the shipyard. With so much at stake, it is absolutely critical that the Regional Board grant NASSCO every procedural right due to it under the federal and state constitutions, and applicable statutes and regulations. The only way the Regional Board can guarantee a fair and just proceeding is by affording NASSCO and other potentially responsible parties full procedural due process. And the only way the Regional Board can guarantee full procedural due process is by responding to the concerns raised in these Objections, and modifying the Proposed Procedures accordingly.

For the foregoing reasons, NASSCO respectfully requests that the Regional Board grant the motions and objections that are requested herein.

Dated: August 3, 2005

Respectfully submitted,  
  
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By   
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