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File No. 030815-0000

SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD
2005 SEP 20 P 3:54

September 20, 2005

Frank Melbourn
California Regional Water Quality Control Board
San Diego Region 9
9174 Sky Park Court, Suite 100
San Diego, CA 92123

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

Dear Mr. Melbourn

On behalf of National Steel and Shipbuilding Company ("NASSCO"), we are filing the attached Comments Regarding Pre-Hearing Conference Issues.

Please contact me if you have any questions or comments.

Very truly yours,

Kelly E. Richardson
of LATHAM & WATKINS LLP

cc: John Robertus
John Minan

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Attorneys for National Steel and Shipbuilding Company

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION

IN THE MATTER OF:

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

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

PRE-HEARING CONFERENCE
September 26, 2005

COMMENTS REGARDING PRE-HEARING CONFERENCE ISSUES

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I. INTRODUCTION AND SUMMARY

National Steel and Shipbuilding Company ("NASSCO") appreciates the measures taken thus far by the Regional Board Water Quality Control Board ("Regional Board" or "Board") regarding the proceedings surrounding Cleanup and Abatement Order No. R9-2005-0126, as well as the use of pre-hearing conferences to resolve disputed procedural issues to the extent possible.

As a general matter, NASSCO reserves all procedural rights available to it under federal and state constitutions, statutes, and regulations to the extent they are not expressly protected in the July 14, 2005 Proposed Procedures For Issuance of Cleanup and Abatement Order No. R9-2005-0126 ("Proposed Procedures" or "Procedures"). The Regional Board members, in their role as adjudicator of these proceedings, must ensure that these rights are afforded to NASSCO and other parties in an open process, and the Regional Board staff, in its role as a party to these proceedings, must also adhere to all procedural standards and limitations.

While the Regional Board has thus far responded to several of NASSCO's concerns raised in various motions and letters to the Board regarding the Draft Cleanup and Abatement Order ("Draft CAO") and associated procedures, NASSCO hereby incorporates by reference all prior submissions. Furthermore, NASSCO offers the following comments below regarding the issues to be considered at the pre-hearing conference on September 26, 2005. NASSCO regrets any repetition of earlier comments and, as a result, the length of this submittal. However, the Regional Board's Notice of Pre-Hearing Conference ("Notice") states that "all previously-written comments and objections must be resubmitted."[1] NASSCO has chosen to resubmit our earlier remarks (in conjunction with our comments on the pre-hearing conference issues) to ensure that the Board considers these important procedural issues.

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[1] NASSCO maintains that this language in the Notice does not and cannot apply to substantive comments, only procedural. Due to the Regional Board's concerns about incomplete service and the nature and timing of previous Regional Board agenda items, NASSCO will provide the Board or any Designated Party a copy of its prior submittals, substantive or procedural, if requested.

II. ISSUES TO BE CONSIDERED AT THE PRE-HEARING CONFERENCE

A. The Executive Officer's Participation On The Advisory Team Must Be Consistent With His Role Prior To, And Culminating In, The Issuance Of The Draft Cleanup And Abatement Order

1. The Role Of The Executive Officer In Advising The Regional Board Should Be Strictly Limited

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

NASSCO does not object to the Executive Officer's role as an advisor with respect to the first category of Advisory Team tasks – those unrelated to the substantive issues of the case. However, NASSCO does object to the Executive Officer advising the Regional Board as to the second category – the Board's deliberations on the evidence presented in the proceedings. Under the Administrative Adjudication Bill of Rights in the Government Code, "[t]he adjudicative function [of the Board] shall be separated from the investigative, prosecutorial, and advocacy functions within the agency as provided in Section 11425.30." Cal. Gov't Code § 11425.10(a)(4). While Section 11425.30 of the Government Code is limited in applicability to presiding officers, due process requires a similar separation for the Executive Officer when acting in the manner set forth in the Proposed Procedures. See Nightlife Partners,

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[2] To the extent that this statement implies that it is the Regional Board Chair, and not the full 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.

Ltd. v. City of Beverly Hills, 108 Cal. App. 4th 81, 93 (2003) ("California courts, too, recognize that the combination of prosecutorial and adjudicative functions is the most problematic combination for procedural due process purposes.").

The Executive Officer has headed up the Regional Board staff's investigatory, prosecutorial, and advocacy efforts to date with respect to the shipyard sediment matter and Draft CAO. He has actively participated in the public processes, and signed the first Draft CAO. His placement on the Advisory Team and separation from contact with the Shipyard Sediment Site Cleanup Team ("Cleanup Team") henceforth does not erase those earlier efforts or the knowledge and opinions that the Executive Officer developed prior to the adoption of these Procedures. These past efforts on the part of the Executive Officer with respect to the technical issues of this matter permanently taint his ability to advise the Regional Board members on these issues as a member of the Advisory Team.

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

B. The Designation Of Parties

1. The Standard For Designating Parties

The standard for designating parties comes from the California Government

Code, which contains the Administrative Procedures Act ("APA"). Chapter 4.5 of the APA (Cal. Gov't Code § 11400, *et seq*) applies to the Regional Board via the California Code of Regulation ("CCR") sections governing these proceedings. There are three requirements that must be met to obtain designated party status under the APA.

First, the applicant for intervention must submit a written motion to the agency, with copies served on all parties named in the agency's pleading. The motion is to be made as early as practicable in advance of the hearing, and if there is a pre-hearing conference, the motion to intervene should be served in advance of the conference, and be resolved at the conference. Cal. Gov't Code §§ 11440.50(b)(1), (2). The second prong of the APA standard requires a person wishing to intervene to present facts "demonstrating that the applicant's legal rights, duties, privileges, or immunities will be substantially affected by the proceeding or that the applicant qualifies as an intervenor under statute or regulation." Cal. Gov't Code § 11440.50(b)(3). Finally, the APA standard for intervention requires the presiding officer to make a determination "that the interests of justice and the orderly and prompt conduct of the proceeding will not be impaired by allowing the intervention." Cal. Gov't Code § 11440.50(b)(4).

2. The Regional Board's Standard Is Inconsistent With The APA

The Regional Board's Notice incorrectly applies its standard for persons seeking designated party status, as discussed below. However, a threshold issue is whether the Regional Board has applied the correct standard. It has not.

The Regional Board's Notice states that persons seeking party status must submit a request, in writing, that "explain[s] the basis for party status, a general description of the evidence that will be presented, and the reason why the proposed designated parties to this hearing do not adequately represent the person's interest."

Despite the existence of the APA provisions above, the Notice cites to no legal authority for its standard for designating parties. Moreover, the Regional Board's standard is inconsistent with that of the APA, and would, if utilized, completely eliminate the meaning and intent of those provisions. As an example of the fundamental flaws in the Board's approach,

persons are not required under the Notice to make a showing of how they will be substantially affected by the proceedings. Further, the Regional Board's standard does not fully implement the third prong, because, while the Board does ask if the person seeking party status is already represented by an existing party, there are other "interests of justice and the orderly and prompt conduct of the proceeding" to be considered.

Finally, the Board's standard inappropriately seeks a description of the evidence to be presented by the party seeking designated party status. First, the APA requires nothing more than a demonstration of how such a party's legal rights, duties, privileges, or immunities would be substantially affected by the proceeding. Second, without issuance of the draft Technical Report, it is unfair to ask anyone, including current designated parties, to provide such information.

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

The Regional Board staff has suggested that the San Diego Bay Council ("Bay Council") "should be designated as a party" to these proceedings (Transmittal Letter for Proposed Procedures). The Proposed Procedures go further and state that Bay Council is "currently designated" as a Party in these proceedings. (Proposed Procedures, at 3) The recent Notice also lists Bay Council as a designated party despite NASSCO's previous objections. In purporting to make this designation, the Regional Board staff has failed to adhere to the governing regulatory and statutory law with respect to designating parties. Moreover, the Regional Board has ignored its own standards for the designation of parties. Finally, the Cleanup Team has gone beyond its role as advocate and has assumed a role that only the Board members themselves can assume.

NASSCO objects to the designation of Bay Council as a party to these proceedings. Bay Council has not met or even attempted to meet the statutory standard that the Regional Board must apply when determining whether to designate parties in addition to the persons to whom the Board's action is directed. The Regional Board should not grant party status to any person whose legal rights would not be substantially affected by the outcome of

these proceedings. Stated another way: only persons that are at least potentially affected by the obligations and conditions of the Draft CAO should be granted party status and be permitted to participate in these proceedings alongside those already named potentially responsible parties ("PRPs").

Other than the Regional Board's assertion in its transmittal letter that Bay Council has "demonstrated intense interest in the issues involved," the Regional Board has given no indication why it has granted Bay Council Party status. However, in Footnote 1 to the Proposed Procedures, the Regional Board defines "Parties" to the proceeding as "the persons to whom the 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 Section 648.1(a) of the CCR sections that govern State and Regional Board adjudicatory proceedings. Regional Board is no doubt relying on this section to support its assertion that Bay Council, or other groups, may qualify as Parties to this proceeding.

This reliance is misplaced. While the Regional Board may be authorized to "determine" the additional persons that should be designated as parties, they do not have a boundless discretion to do so, nor are they relieved from their obligation to make an actual determination. The Regional Board cannot grant any person that shows an interest, intense or otherwise, the same status as NASSCO and other parties that are potentially subject to the Draft CAO. Such a broad reading would eliminate the meaning of other controlling regulations. The Board's discretion necessarily is limited by provisions in California's APA. As previously noted, both the CCR sections governing these proceedings and the Proposed Procedures themselves expressly incorporate Chapter 4.5 of the APA (Cal. Gov't Code § 11400, *et seq*). Chapter 4.5 of the APA includes Section 11440.50, which states "section [11440.50] applies in adjudicative proceedings of an agency if the agency by regulation provides that this section is applicable in the proceedings." Again, the regulations governing Regional Board proceedings expressly make Section 11440.50 applicable. Section 11440.50 establishes a three-prong test for determining whether a person may intervene into an agency's adjudicative proceedings.

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

If designation as a party were as simple as submitting a written request, then the Regional Board could theoretically cure its procedural error by having Bay Council submit a motion requesting intervention. However, the second prong of the APA intervention standard requires a person wishing to intervene to present facts "demonstrating that the applicant's legal rights, duties, privileges, or immunities will be substantially affected by the proceeding or that the applicant qualifies as an intervenor under statute or regulation." Cal. Gov't Code § 11440.50(b)(3). Bay Council's alleged "intense interest in the issues involved" simply cannot suffice to meet this prong of the APA standard. Environmental groups, industry groups, and other organizations throughout the country conceivably could have a strong interest in the "issues involved" in these proceedings. However, they should not all be designated as Parties to these proceedings. Shipbuilders, port authorities, petroleum terminal operators, trade groups, associations, municipalities, and other entities throughout the region undoubtedly have "an intense interest in the issues involved" in these proceedings. Logic dictates that a mere interest in the issues involved, albeit "intense," is not sufficient to bestow Party status on Bay Council or any person not potentially subject to the conditions or consequences of the Draft CAO. Unlike the San Diego Unified Port District[3], Bay Council does not own property in or around the

[3] NASSCO concurs with the treatment of the Port District as a designated party due to its property interest at the shipyard site.

proposed cleanup area.[4] Its interests are not sufficiently distinct from those of the public-at-large. Bay Council plainly cannot meet the APA's requirement that an intervenor's "legal rights, duties, privileges, or immunities will be substantially affected by the proceeding," nor have they even attempted to state facts demonstrating that they satisfy this prong.

In addition, Bay Council cannot be a designated party because it is not a legal entity and consequently does not have any "legal rights, duties, privileges, or immunities." The Regional Board's Notice states that Bay Council is a coalition of five entities. A review of the California Secretary of State's on-line web site[5] reveals that each entity is itself a recognized corporation (or a sub-chapter of one) with an address for service of process. However, Bay Council is not a recognized corporation, nor is there any evidence that Bay Council has any legal status of its own. Consequently, it does not and cannot have legal rights, duties, etc. of its own. Moreover, the purpose of requiring organizations to take a legal form ensures that entities with whom they do business know that legal form, the agent for service of process, etc. Bay Council's lack of legal status makes it impossible for other parties to actually deal with Bay Council as a separate entity in these proceedings, and requires the Board to recognize a legal fiction.

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

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[4] See Horn v. County of Ventura, 24 Cal. 3d 605 (1979) (holding that landowners adjacent to land to be subdivided were at risk of a "governmental deprivation of a significant property interest," and that, therefore, they deserved "reasonable notice and an opportunity to be heard" in the subdivision proceeding in accordance with "due process requirements ... compelled by the ... force of constitutional principle.").

[5] http://kepler.ss.ca.gov/list.html

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

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

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

against the Draft CAO. More importantly, the "interests of justice," from the perspective of both the Regional Board and the PRPs, are impaired if the time the true parties have to present their cases is disrupted or whittled away by the participation of groups like Bay Council whose legal rights or duties are not affected by these proceedings.[6] Thus, the third prong of the APA intervenor standard provides additional reason why Bay Council and other similarly situated groups should only enjoy "interested person" status in these proceedings.

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

4. The Regional Board Has Not Even Adhered To Its Own Standards In Designating The San Diego Bay Council A Party To These Proceedings

As mentioned above, any entity seeking designated party status must submit a written motion to the agency, with copies served on all parties named in the agency's pleading. Not only is this a *statutory* requirement, but the Regional Board's own Notice states that "[a]ny other persons who wish to participate in the hearing as designated parties must request party status in writing." This request "must explain the basis for party status, a general description of the evidence that will be presented, and the reason why the proposed designated parties to this hearing do not adequately represent the person's interest."[7]

Bay Council does not meet the Regional Board's (improper) standard for party status. First, having failed to submit any written motion, Bay Council obviously cannot demonstrate that it meets the Regional Board's criteria for designated party status, which

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[6] The injustice and potential disruption to the parties named in the Draft CAO is magnified when 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.

[7] A review of other regional board notices reveals that other boards have followed the directives of the Government Code and APA. According to the Central Valley RWQCB's procedures, a request for designated party status "must explain the basis for status as a designated party and in particular how the person is *directly affected* by the discharge." (emphasis added). See http://www.waterboards.ca.gov/centralvalley/tentative/index.html

requires a written submission. Moreover, as discussed above, Bay Council does not have a basis for party status, the first prong of the Board's criteria. Its interest does not qualify for intervention pursuant to the APA. Nor has Bay Council satisfied the second prong by providing a general description of evidence to be submitted, as it has submitted no written motion seeking party status. Finally, Bay Council cannot satisfy the third prong of the Board's standard, as the interests of Bay Council, however intense, are fully represented by and indistinguishable from those of the Cleanup Team.[8] Bay Council cannot satisfy a single prong of the Regional Board's own criteria.

Moreover, the Regional Board proposes to apply this standard to every other entity seeking designated party status despite the Regional Board's failure to subject Bay Council to the same standards. The generalized but intense interests of other potential designated parties, such as industry and trade groups and private entities, are similar in nature to those of Bay Council in that neither interest is directly affected in the same way that the PRPs are. Moreover, any overlap of interests with those of the PRPs is no greater than the overlap between Bay Council and the Cleanup Team. As mentioned, the types of testimony other potential parties might present (though not their viewpoints) are no different from that which Bay Council is capable of presenting. Consequently, the Board has improperly favored Bay Council in these proceedings to the detriment of the PRPs and potential designated parties by adopting a stricter standard than that which was applied to Bay Council (which was improperly granted party status under no standard at all).

5. No Other Person That Is Not Potentially Subject To The Terms Of The Draft CAO Should Be Permitted To Intervene In These Proceedings

All of the reasons given above as to why Bay Council fails the statutorily-mandated standard for intervention as a party would similarly apply to other groups that are not likely to be "substantially affected" by these proceedings, including the individual Bay Council

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[8] Moreover, each member of Bay Council has an interest aligned with every other member of the coalition.

members. Granting party status to *any* person that is not potentially, substantially obligated under the terms and conditions of the Draft CAO would unnecessarily disrupt the orderly and prompt conduct of the proceeding.

This is not to say that only persons who can potentially be made to "cleanup and abate" can intervene in the proceedings. For example, an appropriate use of the right of intervention in this proceeding might be where one of the parties at whom the Regional Board's action is directed had previously contracted with a third person who indemnified the named party for all costs incurred respecting cleanup of sediments. That third person's financial interest in the outcome of the proceedings might be a legitimate reason to allow the third person to intervene. However, Bay Council and similarly situated groups cannot demonstrate that they possess these types of interest, let alone that the interests would be substantially affected by these proceedings. Unless a person will potentially have to spend money, take action, or forego rights or privileges as a result of these proceedings, they should not be afforded party status.

6. To The Extent The Regional Board Proposes To Designate Additional Parties To These Proceedings, It Must Do So In A Formal Order Providing The Basis For Such Designation, And NASSCO Must Have A Full Opportunity To Oppose Such Designations

According to the Notice, other persons wishing to participate in the proceedings as "Parties" must submit a written request for designation as a party by September 20, 2005. Due process and the APA then require that NASSCO and the other parties be given an opportunity to object to any motions for intervention, both in writing and at a hearing before the Regional Board members that will be making the determination on the motions.

In its determination on the motion, the agency cannot merely provide a one-sentence explanation asserting that the intervenor has an "intense interest" or give a footnote explanation in a hearing notice. Rather, the APA requires that "[a]s early as practicable in advance of the hearing the presiding officer shall issue an order granting or denying the motion for intervention, specifying any conditions, and briefly stating the reasons for the order . . . The presiding officer shall promptly give notice of an order granting, denying, or modifying intervention to the applicant and to all parties." (Cal. Gov't Code § 11440.50(d)) This order will

provide the basis upon which NASSCO and other parties can challenge, if necessary, the designation of additional parties or the conditions imposed on intervening parties.

C. Comments On The Specific Procedures To Be Used For The Hearing

Any Regional Board process seeking to impose a $100 million cleanup order must afford full statutory and due process rights to the potentially responsible parties.

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

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

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

The procedural requirements of the CCR and APA sections incorporated by the Proposed Procedures apply to "all *parties* intending to present evidence at a hearing." Cal. Code Regs. tit. 23 § 648.4(b) (2005) (emphasis added). California's APA defines "party" to include "the agency that is taking action." Cal. Gov't Code § 11405.60. Thus, as the Procedures properly recognize, the Cleanup Team, 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 Procedures themselves. Therefore, for example, any testimony or witnesses the Board plans on presenting should be submitted by the appropriate deadlines (i.e., the same deadlines applicable to NASSCO). Board witnesses should also be prepared to be cross-examined by NASSCO and other parties.

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3. 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 production and 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. E-mails have been the primary form of communication by Board staff both within the Regional Board and with outside parties.

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 at 302.

The right to depose witnesses in Regional Board proceedings is also specifically conferred by CWC Section 1100, which is applicable to the regional water boards via CWC Section 13221.[9] 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....

(emphasis added). 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. As such, the Proposed Procedures must allow for depositions.

Depositions will allow NASSCO and other PRPs 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 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

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[9] Section 13221 of the CWC says that certain provisions, including Section 1100, "shall apply to regional boards within their own regions, where they shall have the same power as the state board within the state."

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

4. NASSCO Must Be Allowed To Question Interested Persons Presenting Evidence

NASSCO further objects to certain provisions regarding the conduct of the hearing with respect to interested persons and specifically reserves the right to cross examine "interested persons" that provide, in their comments, any testimony other than general policy statements (e.g., if they present evidence). Under applicable regulations,

> The Board or presiding officer may provide an opportunity for presentation of *policy* statements or comments, either orally or in writing, by interested persons who are not participating as parties in the proceeding. Persons presenting *nonevidentiary* policy 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.

Cal. Code Regs. tit. 23, § 648.1(d) (2005) (emphasis added). It follows, then, that interested persons presenting more than policy statements (i.e., evidence) may be cross-examined (and must be available for depositions prior to hearing). NASSCO reserves the right to do so.[10]

This procedural safeguard has a specific application. For example, in April 2004, Environmental Health Coalition ("EHC") conducted a survey of people fishing from piers in San Diego Bay ("EHC Angler Survey"). Nearly one year later, in March 2005, EHC issued a report entitled "Survey of Fishers on Piers in San Diego Bay, Results and Conclusions" summarizing the results of this survey (the "Fisher Report"). Issuance of the report obviously was timed to coincide with staff's issuance of a Draft CAO.[11] NASSCO suspects that Bay Council plans to

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[10] For example, if any person wishes to appear before the Board and argue the quality of the sediment at the shipyards, any alleged impacts of the sediment on human health or the 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.

[11] NASSCO renews its opposition (April 5, 2005 letter from Lane McVey to David Barker) to the use of the Fisher Report, in any manner, in the ongoing proceedings and strongly urges Regional Board staff to exclude the study. The EHC Angler Survey is scientifically unsound and the conclusions drawn in the Fisher Report are neither supported by the survey nor grounded in legitimate, scientifically acceptable data collected or analyzed by EHC. Because the survey was conducted without regard for

introduce witnesses that were the subject of the EHC Angler Survey, or persons who will provide similar generalized, unsupported allegations in their testimony. To the extent the Regional Board allows such persons to present non-policy statements, as a party witness or as an interested person, NASSCO and the other PRPs must be afforded their procedural rights. Any witness should be listed in advance and be made available for a deposition. At the hearing these witnesses must be subject to cross-examination. These procedural safeguards apply to any witness presenting facts, and the Regional Board must strictly enforce this rule even if it entails the cross-examination of persons who purport to present themselves as merely interested parties.

5. 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 ten 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 its 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

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standard scientific methodologies, and because the Fisher Report draws wholly unsupported conclusions, both the Angler Study and accompanying Fisher Report cannot be relied upon by the Regional Board as expert scientific evidence. See People v. Kelly, 17 Cal. 3d 24, 31 (1976). Moreover, because of the great risk of misleading Regional Board members, the Regional Board Staff should not allow the Fisher Report to become a part of the administrative record as lay testimony.

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-submittal and re-distribution.

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

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

The specific issues addressed by the Attorney General were:

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

Id. at 96. The Attorney General concluded that:

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

Id.

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

Similarly, the Board members' communications on all matters, whether 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 technical analysis[12] and tentative Cleanup and Abatement Order...." It is not clear whether the contemplated communication would be oral or written, or what the nature of the communication might be. NASSCO requests a clarification of this sentence, and objects to any communication from Board members to the Cleanup Team that is in the nature of a decision or conclusion on the evidence then before the Board that is not directed to all parties.

7. 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. This requirement, like the requirement to assign evidence and testimony to one of six pre-assigned categories, is unnecessary and creates significant logistical challenges. For example, a NASSCO submission about the appropriate level of cleanup based on the available evidence is at once a statement about cleanup policy and an analysis of the evidence. Therefore, NASSCO again objects to any attempts by the Regional Board to penalize NASSCO or exclude an offer of

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[12] 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.

evidence or testimony based on the label applied to the proffered evidence or testimony. Under the Board's regulations, only the testimony of interested persons can be limited on the basis that it is a policy statement.[13]

D. A Comprehensive List Of Contested Issues Of Fact And Law

1. A Comprehensive List of Issues Is Not Possible At This Time

Because the Regional Board has not yet released the alleged evidentiary basis for the Draft CAO (the draft Technical Report), a complete list of issues of either fact or law is not possible at this time. However, such issues could be determined prior to the hearing when the parties have had adequate time to review the Draft Technical Report and complete discovery. NASSCO reserves the right to raise issues of law and fact at such a later time.

2. The Issues Cannot Be Arbitrarily Limited To Just The Six Issues Proposed By The Regional Board Staff

While a complete list of contested issues cannot be compiled at this time, evidentiary submittals and testimony cannot be limited to the six issues pre-selected by Regional Board staff. It is particularly prejudicial to limit the issues of the proceeding before any party has had the opportunity to review the forthcoming Technical Report and evidence in support thereof, not to mention the information that may be obtained during the discovery phase of these proceedings. Similarly, upon issuance of the revised Tentative CAO, a host of new issues and concerns may arise.

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

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

(1) Should *any* Cleanup and Abatement Order be issued for the shipyard sediment?

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[13] CCR § 648.1(d)

(a) What, if any, legal authority does the *Regional Board* (as opposed to the State Board) have to regulate *sediment* quality (as opposed to *water* quality)?

(b) What evidence, if any, in the record would support the issuance of the tentative CAO?

(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 and where such extensive dredging would result in other significant environmental impacts?

(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.

E. The Timing Of Submission Of Evidence And Briefs

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

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

NASSCO respectfully requests that the Regional Board provide additional time for submittal of written comments, both after the draft Technical Report is released, and after the Tentative Agenda Documents are released. In current form, the Proposed Procedures allow 45 days from the release of the draft Technical Report, 45 days for response and rebuttal to submitted comments, and 30 days from the release of the Tentative Agenda Documents, before which comments must be submitted to the Board and other parties. NASSCO objects to the limits imposed at each stage of the proceedings.[14]

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[14] 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.

These proceedings will require substantial discovery, including review of all Regional Board documents[15] and e-mails pertaining to this matter, and the taking of depositions. The discovery cannot take place until after the draft Technical Report and supporting documents are made available to the parties. Forty-five days is not sufficient to perform discovery, including depositions, submit written comments to the Board and respond to other comments. The analysis is similar with respect to the Tentative Agenda Documents. Though discovery will likely be less of a factor at this stage in the proceedings (this cannot be known with certainty until the Tentative Documents are released), NASSCO and the other parties will require more than 30 days to craft written responses to a CAO which at least in its current form contemplates a $100 million cleanup.

Moreover, the situation does not demand urgency. The *NASSCO and Southwest Marine Detailed Sediment Investigation* ("Sediment Report"), prepared under the direction and guidance of the Regional Board, was submitted in October 2003. In light of the 18-month period for the Regional Board staff to review that report and prepare the Draft CAO, and the additional 4-month period for the staff to draft a technical report purporting to justify the Draft CAO, there is no reason to deny Parties the additional time they need and deserve under principles of due process to adequately respond. NASSCO therefore respectfully asks for additional time for submittal of written comments on the Draft and Tentative Documents. The precise amount of additional time needed should be determined in connection with the pre-hearing conference(s) after the draft Technical Report is published.[16]

F. The Length And Date Of The Hearing

1. The Length of The Hearing

Without knowledge of the contents of the draft Technical Report, it is impossible to estimate a time that will be sufficient to properly address the issues. However, given the complexity of the technical issues and enormity of the consequences because of both the

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[15] NASSCO reserves the right to seek all relevant documents from the Regional Board.

[16] 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.

significant cost of compliance with the CAO and the precedential impact of the outcome of these proceedings, more than several days of hearing time will be required. However, the Regional Board must focus not on the total days of the hearing but what is required to provide NASSCO and the other Parties sufficient time to present evidence.

NASSCO is not opposed to many of the suggested procedures governing the Public Hearing that will reduce the necessary hearing time, including the proposals that written testimony need not be read into the record, that written testimony affirmed by a witness is direct testimony, and that oral testimony does not fall outside the scope of previously submitted written materials.[17] However, oral testimony cannot be limited to merely "summarizing written submittals previously submitted." At *any* proceeding in this matter, the PRPs must receive sufficient time to present evidence regarding the Draft CAO. See Cal. Gov't Code § 11425.10(1) (2005) ("The agency shall give the person to which the agency action is directed notice and an opportunity to be heard, including the opportunity to present and rebut evidence."); see also Matthews v. Eldridge, 424 U.S. 319, 333 (1972) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner."). The amount of time to be provided to NASSCO at any hearing must correspond with the complexity of the record, the enormous potential impact to NASSCO, and the extensive defects and shortcomings of the Draft CAO and supporting documentation. Anything less would fail to provide NASSCO with an "opportunity to be heard" and would not be "meaningful."

To be clear, parties must be allowed to do more than "summarize" direct testimony. Because of the adjudicatory nature of the proceedings, due process principles require a meaningful opportunity to be heard.[18] Further, that right is conferred by applicable statutes and regulations. Under Sections 648(b) and 648.5, and Section 11513(b) of the Government Code, the Board must allow Parties to present their own evidence; this includes the calling and

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[17] Moreover, the scope and timing of discovery, including depositions, will reduce the time required for the evidentiary hearing(s).

[18] See Cal. Gov't Code § 11425.10(a)(1), supra; see also Horn v. County of Ventura, 24 Cal. 3d at 612 ("Due process principles require reasonable notice and opportunity to be heard before governmental deprivation of a significant property interest.")

questioning of witnesses. Section 648.5 states that the order of proceedings shall include the "[p]resentation of evidence by the parties." Cal. Code Regs. tit. 23, § 648.5(a)(5) (2005). The Government Code states that each party shall have the right "to call and examine witnesses." Cal. Gov't Code § 11513(b). Designated parties, then, must be given the opportunity to present and question witnesses, and cross-examine opposing witnesses, not simply "summarize" the evidence.

The Code of Regulations states,

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

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

2. The Date Of The Hearing

As discussed above, the absence of a draft Technical Report complicates the timing of evidentiary submissions, discovery and other actions necessary before a hearing occurs. The hearing date will be determined by the Regional Board's deadlines regarding pre-hearing deadlines. However, NASSCO requests the hearing be held no earlier than 30 days after the submission of all response and rebuttal submissions.

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G. The Location Of The Hearing

NASSCO does not have a preference for the location of the hearing as long as it is convenient to the designated parties and would provide adequate space and technical capabilities (Power Point, video, etc.). NASSCO appreciates the fact that members of the public may be benefited by having the hearing, or at least part of it, at a location other than the Regional Board's office and would appreciate and consider specific suggestions for possible locations from the Regional Board.

H. Participation By Non-English Speakers

While NASSCO welcomes the views of the community in the form of interested persons, if non-English speakers are presented as witnesses by a designated party, a certified translator should be provided and compensated by that party. To the extent that a non-English speaking interested person unaffiliated with a party wishes to present comments, the Regional Board should bear the burden of the cost of the translator.

I. The Logistics For Workshops, Tours, And Other Methods For Providing Background Information To The Board Members And The Public

1. Workshops

A workshop in front of Regional Board members is inappropriate at this time. The proceedings surrounding the Draft CAO are adjudicatory in nature and have been for some time. The proper method of conveying information to the Board now is through a hearing, not a workshop. As discussed in our previously submitted Motion To Compel Production Of Evidence And Renewed Motion For Continuance Of Public Workshop, any discussion of the Draft CAO at a workshop before Board members is an adjudicatory proceeding under Cal. Gov't Code Section 11405.20 and will influence Board members in formulating and ultimately issuing a decision. Moreover, previous attempts at a workshop were fraught with serious procedural deficiencies; consequently, any proceeding from this point forward should take the form of a hearing to ensure that the Regional Board respects all procedural rights and privileges of the parties.

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2. Tours

NASSCO supports the use of a tour but emphasizes that an in-person viewing of the shipyard may be difficult to manage due to the site's status as a secure Naval facility, and any such tour may have to be limited to Board members and parties.

3. "Other Methods"

NASSCO requests additional clarification from the Board as to what "other methods for providing background information" are contemplated. NASSCO does not have any comments on the logistics of such unknown methods at this time except to note that all "other methods" must be consistent with principles of due process and other procedural rights and privileges of the parties.

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 comments and our previous submittals. In addition, NASSCO reserves the right to ensure compliance with all procedural rights and privileges in the future even if not raised at this time.

Dated: September 20, 2005

Respectfully submitted,
LATHAM & WATKINS LLP
David L. Mulliken
Kelly E. Richardson

By _____
David L. Mulliken
Attorneys for NASSCO

PROOF OF SERVICE

I am employed in the County of San Diego, State of California. I am over the age of 18 years and not a party to this action. My business address is Latham & Watkins LLP, 600 West Broadway, Suite 1800, San Diego, CA 92101-3375.

On **September 20, 2005**, I served the following document described as:

Comments Regarding Pre-Hearing Conference Issues

by serving a true copy of the above-described document in the following manner:

BY U.S. MAIL

I am familiar with the office practice of Latham & Watkins LLP for collecting and processing documents for mailing with the United States Postal Service. Under that practice, documents are deposited with the Latham & Watkins LLP personnel responsible for depositing documents with the United States Postal Service; such documents are delivered to the United States Postal Service on that same day in the ordinary course of business, with postage thereon fully prepaid. I deposited in Latham & Watkins LLP' interoffice mail a sealed envelope or package containing the above-described document and addressed as set forth below in accordance with the office practice of Latham & Watkins LLP for collecting and processing documents for mailing with the United States Postal Service:

(See attached Service List)

BY HAND DELIVERY

I am familiar with the office practice of Latham & Watkins LLP for collecting and processing documents for hand delivery by a messenger courier service or a registered process server. Under that practice, documents are deposited to the Latham & Watkins LLP personnel responsible for dispatching a messenger courier service or registered process server for the delivery of documents by hand in accordance with the instructions provided to the messenger courier service or registered process server; such documents are delivered to a messenger courier service or registered process server on that same day in the ordinary course of business. I caused a sealed envelope or package containing the above-described document and addressed as set forth below in accordance with the office practice of Latham & Watkins LLP for collecting and processing documents for hand delivery by a messenger courier service or a registered process server.

California Regional Water Quality Control Board
San Diego Region
9174 Sky Park Court, Suite 100
San Diego, California 92123

I declare that I am employed in the office of a member of the Bar of, or permitted to practice before, this Court at whose direction the service was made and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **September 20, 2005**, at San Diego, California.

Marina Lukic

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