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August 25, 2006

File No. 030815-0000

San Diego Regional Water Quality Control Board
Attn: Michael P. McCann, Chief Engineer, Advisory Team
9174 Sky Park Court
Suite 100
San Diego, CA 92123

Re: Tentative Cleanup and Abatement Order No. R9-2005-0126
Request for Disbursement of Funds From the State Cleanup and Abatement Account

Dear Regional Board Advisory Team:

National Steel and Shipbuilding Company ("NASSCO") received notice that the San Diego Regional Water Quality Control Board ("Regional Board") plans to digitize and index a voluminous body of documents allegedly supportive of the above-referenced Tentative Cleanup and Abatement Order ("Tentative CAO"). While NASSCO appreciates any effort by the Regional Board to generate a clear and concise set of evidence in support of the Tentative CAO, NASSCO does not believe that it is fair or reasonable for the Regional Board to spend enormous sums of money scanning and indexing 130 linear feet of documents, most of which likely have but a tenuous connection to any alleged impacts on beneficial uses of San Diego Bay resulting from shipyard sediments, and then attempt to recover those costs from the dischargers. The Regional Board staff should focus its efforts on what documents *should* be in the administrative record, rather than what *form* the record should take.

It is not financially reasonable to index the volume of documents contemplated by the Regional Board in the May 26 letter from the Cleanup Team to the Advisory Team ("May 26th Letter") and the May 31, 2006 letter ("May 31st Letter") issued jointly by the Advisory Team and the Cleanup Team to the State Water Resources Control Board ("State Board"). In the May 31st Letter, the Advisory team indicated its intention to seek reimbursement for its oversight costs from NASSCO and other named dischargers. Under Section 13304 of the Porter-Cologne Water Quality Control Act, recoverable costs are limited to those which are "reasonable." Because we are not aware of any published court case or State Board opinion interpreting the meaning of "reasonable" recoverable costs under Section 13304(c)(1), the words of this subsection must be ascribed their plain meaning. *People v. Johnson* (2002) 28 Cal.4th 240, 244 ("Because the statutory language is generally the most reliable indicator of [statutory] intent, we look first at the

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words themselves, giving them their usual and ordinary meaning and construing them in context.”)

Webster’s Third New International Dictionary defines “reasonable” as “1 . . . b: being or remaining within the bounds of reason: not extreme: not excessive. . . .” Blacks Law Dictionary, Eight Edition (2004) defines “reasonable” as “1. Fair, proper, or moderate under the circumstances.” In other words, in the ordinary meaning of the word, reasonable costs do not include extreme or excessive costs. NASSCO believes it is excessive and extreme to archive and index such a large volume of documents, the majority of which have no bearing on whether there are adverse impacts from the shipyards to aquatic life, aquatic wildlife, or human health. It also not fair for the Regional Board to saddle NASSCO and the other named parties to the Tentative CAO with the funding of a pilot indexing pilot project of questionable utility (i.e., the State Board’s “Document Imaging and Services Project”).¹ NASSCO hereby objects and will object to any attempt by the Regional Board or State Board to seek reimbursement for costs associated with the roll out of the Document Imaging Services Project.

The Cleanup Team will also violate NASSCO’s due process rights and its right to fair hearing by indexing so many documents.² Either the Regional Board has the evidence to justify the Tentative CAO, or it does not. Compiling a mountain of documents (electronic or otherwise), does not constitute substantial evidence, *per se*, to support the issuance of a CAO. For that reason we have repeatedly asked the Regional Board staff over the past 16 months to develop a technical report (i.e., a coherent analysis of evidence and set of findings) that clearly connects the shipyard activities and the sediment conditions to actual, verifiable impacts on aquatic life, wildlife, or human health. Instead it appears that the staff is electing to create a convoluted database of documents, which apparently will be so large that the Board members, the parties, and any reviewing body will not have the time or capacity to review it. Regional Board members simply do not have the time to wade through bookshelves of supporting documents in this matter, and it is difficult to imagine how all of these documents are “directly relevant” to the issuance of the CAO, as the Cleanup Team suggests. May 26th Letter, p. 1. The sheer quantity of documents should not be able to obscure or take the place of actual, and substantial, evidence supporting the Tentative CAO. To steal from the appellate review context, “[t]he focus is on the quality, not the quantity of the evidence. Very little solid evidence may be ‘substantial,’ while a lot of extremely weak evidence might be ‘insubstantial.’ [Citations]” *Hope v. California Youth Authority* (2005) 134 Cal.App.4th 577, 589. The Cleanup Team must enable

¹ NASSCO understands that the State Board or Regional Board already planned to undertake a project to scan and index many, or all, of the Board’s existing files. Attempting to allocate the costs of this program to individual companies appears to be an afterthought -- an attempt to reduce the costs to the State of a program that it intended to undertake regardless of the tentative order.

² NASSCO hereby reserves its right to make evidentiary objections and motions to strike documents from the administrative record. We also note that under Section 13365 of the Water Code, governing Regional Board cost recovery, the Regional Board must identify a neutral party responsible for resolving disputes with respect to cost recovery efforts. § 13365(c)(4). The Cleanup Team has not yet done so. The Regional Board has also failed to adopt a resolution requesting reimbursement and follow related procedural requirements. See, e.g., State Board Administrative Procedures Manual, Chapter 4.4, p. 9.

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a decision-making body to focus its inquiry on that evidence which is directly relevant to the findings and conclusions of the CAO.

One thing remains clear: the Regional Board did not have a clear and concise record to justify the issuance of the Tentative CAO over 17 months ago. NASSCO remains concerned by the prolonged and continuing delay in the issuance of a Technical Report by the Cleanup Team that will allegedly support the conclusions in the Tentative CAO. The substantial delay in the issuance of the Technical Report raises a legitimate question whether, once issued, the Technical Report can be viewed as anything other than a post-hoc rationalization of a preordained policy decision by Regional Board staff to issue the Tentative CAO directing cleanup of shipyard sediments. In numerous contexts, California courts have upheld the principle articulated by the United States Supreme Court that an agency's after-the-fact explanation of its action "will, to some extent, be a 'post hoc rationalization' and thus must be viewed critically." *Citizens to Preserve Overton Park, Inc., v. Volpe*, 401 U.S. 402, 420 (1971). See, Letters to the Advisory Team and Chairman Minan, dated February 17, 2006 and March 31, 2006, respectively.

The Cleanup Team's May 26th Letter suggests that it will take a minimum of four months to complete the document indexing process, once the Cleanup Team organizes the documents. According to the Cleanup Team, the Technical Report will not be issued until after that process is completed.³ It is thus reasonable to assume that the Technical Report will not issue until more than a year and a half after the Tentative CAO was issued, and more than a year after the Regional Board *ordered* staff to produce it, further casting doubt on the legitimacy of the CAO and the process employed to develop it.

Finally, we continue to question the integrity of the "separation of powers" system put in place by the Presiding Officer to govern this proceeding. In concept, we wholeheartedly support the notion that the prosecutorial arm of the Regional Board (i.e., the Cleanup Team) should be separate from the body advising decision-making authority (i.e., the Advisory Team). However, it has repeatedly come to our attention that members of the Advisory Team and the Cleanup Team are regularly communicating. As a case in point, the Advisory Team and the Cleanup Team jointly composed and are signatories to the May 31st letter to the State Board. In a recent news article in the Union Tribune, John Robertus, a member of the Advisory Team, indicated that he is in communication on a weekly basis with the Cleanup Team, at least as regards the status of the Technical Report.⁴ In fairness, the separation of functions provisions adopted to govern these proceedings contemplated minor communications between the parties of a strictly procedural nature. But decisions regarding the imposition of a substantial financial burden on the parties to the Tentative CAO simply cannot be viewed as a minor procedural matter.

In summary, NASSCO objects to the Cleanup Team's plan to spend significant sums of money digitizing and indexing large quantities of documents that bear an insignificant relationship to alleged shipyard effects on water quality, and then attempt to pass the costs on to the dischargers. The Cleanup Team's proposed methodology is not reasonable, and their request

³ A recent email from Board staff states that the technical report will not be issued until November, 2006. See, email from C. Carlisle re Shipyard Sediment Site Cleanup Project Update (August 15, 2006).

⁴ "Water-Pollution Report on Bay Cleanup is Late," San Diego Union Tribune (May 15, 2006).

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to the State Board for reimbursement funds is procedurally deficient. Before it spends a lot of money, the Regional Board should give serious consideration to whether a CAO is needed at all.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "David Mulliken".

David L. Mulliken
of LATHAM & WATKINS LLP

cc: See Attached E-Mail Service List
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