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April 22, 2008

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

Re: Shipyard Sediment Site 2005 Tentative Cleanup and Abatement Order No. R9-2005-0126: Comments on Phase III

Dear Mr. McCann,

On behalf of General Dynamics NASSCO, we are in receipt of the notice from the Advisory Team in the above-captioned matter, dated April 15, 2008, notifying the designated parties of a pre-hearing conference to be held on April 25, 2008, to address Phase III of the proceedings. NASSCO greatly appreciates the opportunity to provide the following written comments in advance of the upcoming pre-hearing conference.

Completion of Phase II

In order to complete Phase II of these proceedings, and to comply with the Regional Board's directive issued in the June 2005 hearing,<sup>1</sup> the Cleanup Team must identify the evidence that supports the findings and conclusions of the tentative order. This requirement to provide the agency's analytical pathway is mandated by the California Supreme Court's decision in *Topanga v. County of Los Angeles*, in particular, its holding that agencies must support their conclusions with findings that "facilitate *orderly* analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions."<sup>2</sup> Although the Regional Board staff provided the parties with a massive administrative record, there has been no attempt to identify which, if any, of the documents are "directly relevant"<sup>3</sup> to each conclusion of the tentative order, as required by the First Amended Order of Proceedings.

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<sup>1</sup> "On the motion to compel evidence ... the request that staff's technical analysis be complete and available ... is correct as a matter of fundamental fairness." See Transcript of Regional Board Special Meeting, dated June 29, 2005, at 45:13-46:8 (*quoting* Chairman Minan).

<sup>2</sup> *Topanga Assn. for a Scenic Cmty. v. County of Los Angeles*, 11 Cal.3d 506, 514 (1974) (emphasis added).

<sup>3</sup> See First Amended Order of Proceedings, 1/30/06, at 4.

To comply with the Regional Board's directive and *Topanga*, the Cleanup Team must:

- Identify which documents in the record correspond to each of the findings under the tentative order and technical report; and
- Provide a complete and accurate index of files in the administrative record on the hard drive delivered to the parties on April 4, 2008, including identification of the roughly 1,500 files in the record that are not on the current index.<sup>4</sup>

### Schedule for Phase III

For the reasons detailed in our April 11, 2008 letter submitted to the Advisory Team (see attached), NASSCO respectfully requests that the Presiding Officer provide an initial one-hundred and twenty (120) days, after the steps described above for Phase II have been completed, for the parties to have a meaningful opportunity to review the approximately 375,000-page administrative record produced by Regional Board staff on April 4, 2008. At the conclusion of the 120-day period, a conference should be held to determine the appropriate schedule and process for discovery, in light of the parties' review of the record.<sup>5</sup> The parties will be better prepared to establish the timing and detailed pre-hearing process after they have been afforded a sufficient opportunity to review the contents of the record and identify areas that warrant further discovery.

However, if the Presiding Officer deems it necessary to establish a tentative schedule for the entire Phase III at this time, NASSCO requests that the Advisory Team adopt the following schedule and process:

- **Review of Administrative Record:** The parties shall have one-hundred and twenty (120) days after the Presiding Officer issues his ruling on modifications to the schedule and process for reviewing the administrative record and for determining the type, scope, and length of discovery needed.
- **Conduct Written Discovery:** The parties shall have thirty (30) days after the close of the initial 120-day record review period to serve written discovery requests, including, but not limited to, requests for the production of documents, requests for admissions, interrogatories, and identification of persons to depose. The parties shall

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<sup>4</sup> The hard drive properties indicate that there are approximately 8,800 files on the drive; however, only 7,330 of them are listed on the index (Excel spreadsheet).

<sup>5</sup> Indeed, NASSCO believes that periodic conferences likely will result in a more accelerated and efficient adjudication of the issues under the tentative order.

respond to, and complete their review of, all written discovery within ninety (90) days of service of such written discovery.

- **Conduct Depositions:** The parties shall have sixty (60) days to coordinate and conduct depositions at the conclusion of written discovery.
- **Preparation of Written Submittals after Completion of Discovery:** After depositions and other discovery have been completed, the parties shall have sixty (60) days to develop and file technical submittals based on the administrative record and the evidence obtained through discovery.
- **Submit Rebuttal Evidence:** In the First Amended Order of Proceedings, this step is identified as Phase IV, and commences upon completion of Phase III described above.
- **Submit Non-Binding Summary of Areas of Disagreement:** The First Amended Order of Proceedings contemplates the parties jointly submitting a non-binding summary of areas of disagreement. However, the parties will have a better understanding of the areas of disagreement *after* all discovery has been completed. Therefore, NASSCO recommends that the parties submit to the Advisory Team a non-binding summary of its areas of disagreement at the conclusion of all discovery.

This approach recognizes the sequential nature inherent in the pre-hearing process -- that the parties cannot conduct written discovery until they understand what already has been produced by the Cleanup Team, that some discovery is required before conducting depositions, and that further critical evidence, such as expert witness reports, cannot be developed until discovery is completed.

#### Other Items to Address

NASSCO further requests that the Regional Board provide certain information so that the parties can proceed with discovery as expeditiously as possible. Specifically, NASSCO requests that the Presiding Officer direct the Cleanup Team to provide the following as soon as possible to all designated parties:

- Confirmation that the Cleanup Team has provided all documents, including, but not limited to data, reports, logs, telephone records, notes, emails and other communications, that are relevant to the tentative order and technical report;
- A list of all Regional Board staff who were involved in the development of the tentative order, technical report or administrative record and a description of each staff member's involvement, including identification of the subject matter that each person addressed;
- A list of all agencies, organizations, experts and others who were consulted, or otherwise involved, in the development of the tentative order, technical report or administrative record and a description of each entity's involvement;

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- Confirmation that the Cleanup Team has produced all relevant documents and files of the agencies, organizations, or other persons identified under the previous item;
- A redline comparison showing revisions to the 700+ page Report;<sup>6</sup>
- A redline comparison showing revisions to the Order;
- Service list for all submittals; and
- Instructions on how to submit third-party subpoenas.

### Conclusion

The procedural safeguards adopted by the Presiding Officer should be commensurate with the magnitude, complexity, and precedent-setting nature of this proceeding. Such safeguards should ensure that all parties are afforded a meaningful opportunity to respond to the order and should protect fully the parties' rights to due process. The outcome of this matter will have significant and far-reaching effects on the parties to this proceeding and others. The Cleanup Team's delay in completing the technical report and providing the supporting administrative record is an obvious source of frustration to all parties. That delay and resulting frustration, however, should not result in an abbreviated and truncated pre-hearing process that neither affords the parties their due process rights nor ensures the Board will have a properly developed record on which to base its final decision.

NASSCO is grateful for the opportunity to provide these comments on the Phase III schedule and process and looks forward to discussing these issues in more detail at the pre-hearing conference on April 25, 2008.

Very truly yours,



Kelly E. Richardson  
of LATHAM & WATKINS LLP

cc: Advisory Team, c/o Michael P. McCann (12 copies)  
Vice-Chair and Presiding Officer, David King, Regional Water Quality Control Board  
Christopher Barnes, Esq., General Dynamics NASSCO  
See Attached E-Mail Service List

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<sup>6</sup> The parties should not be required to re-review the entire 700+ page Report to locate the Cleanup Team's revisions.

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April 11, 2008

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

File No. 030815-0011

Re: Shipyards Sediment Site 2005 Tentative Cleanup and Abatement  
Order No. R9-2005-0126: Request for Extension of Schedule

Dear Mr. McCann:

On behalf of General Dynamics NASSCO, we received the San Diego Regional Water Quality Control Board Advisory Team's Notice of Commencement of Phase III of Proceeding for the shipyard sediment matter dated April 4, 2008. We also received a hard drive that purportedly contains the administrative record ("Record"), as well as the revised Tentative Order ("Order") and revised Technical Report ("Report"). Upon review of the Record, we found that it consists of a convoluted database of documents, which is so large and unorganized that the Board members, the parties, and any reviewing body will not have the time or capacity to review it, conduct discovery and prepare for the hearing under the proposed schedule. As such, pursuant to Paragraph 3 of the First Amended Order of Proceedings, NASSCO requests an extension of the schedule proposed for Phase III.

### Administrative Record and Timing for Phase III

The Record for the Order and Report consists of 375,000 pages of indexed documents, which amounts to 7,333 files on the index. In addition, there are approximately 1,500 files on the hard drive that are not indexed, for a total of approximately 8,800 files for the parties to review. Not only is the Record voluminous, there is no efficient or easy way to review it to locate relevant documents. The hard drive does not have a search engine that allows searches across all documents. Therefore, the parties will be required to open each individual document to search for relevant terms, which will be an extraordinarily time consuming and tedious process. Further, it appears that some of the attachments, including reports, are missing from various documents, and, some of the files contain only a photocopy of the cover or title page of the attachment, such as the face of a CD. The parties have no way of determining what is contained in the actual CD or document, or knowing how to locate that information. Due to the overall size and format of the Record, the parties will need a significant amount of time to meaningfully review it.

Besides the fact that the Record is massive and unsearchable, the index does not indicate the section of the Order or Report to which the documents pertain. Therefore, the parties will be forced to review every document to decipher the relevance of each and its applicability to the Order or Report, which is a burden that the parties should not have to bear. Because the index does not identify how each document supports the Order or Report, the parties have no way of knowing which documents belong in the Record. In fact, it appears as if the Regional Board staff dumped any and all documents relating to the parties and their facilities into the Record, rather than limiting the Record to those items that actually support the Order and Report. The process of sorting through each document to determine its relevance will add to the amount of time necessary for the parties to adequately review the Record.

NASSCO's procedural due process rights would be violated if it is not provided a reasonable and sufficient time to review the Record so that it can meaningfully prepare for, and conduct discovery in preparation for the hearing on the Order. The action that the Regional Board proposes affects the substantive rights of NASSCO, constitutes formal agency enforcement, and subjects NASSCO and the other parties to material risk (on the order of a hundred million dollars). Consequently, the constitutionally-mandated opportunity to be heard must be meaningful. *See generally, 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."). To be meaningful, the opportunity to respond requires provision of adequate preparation time. *See Brady v. Gebbie*, 859 F.2d 1543, 1555 (9th Cir. 1988) (finding that defendant did not have sufficient time to prepare for the hearing; thus, he did not have a "meaningful" opportunity to respond to the charges and was denied due process); *see also Kempland v. Regents of University of California*, 155 Cal. App. 3d 644, 649 (1984).

Accordingly, NASSCO hereby requests that the proposed schedule for Phase III be extended, to protect its procedural due process rights. The proposed hearing schedule renders it impossible for NASSCO and the other parties to exercise their procedural rights in proper fashion. NASSCO is entitled to a full and fair opportunity to prepare and present a defense, including exercising the rights to offer witnesses and depose and cross-examine those agency personnel involved in this action. Phase III is a sequential process: NASSCO must have adequate time to review the Record in order to sufficiently prepare for discovery, propound discovery, schedule depositions, conduct depositions, and provide the results of the discovery to its own experts to prepare their reports and testimony. Such measures require time. Instead of ensuring that NASSCO and the other parties have been provided a full and fair opportunity, the currently proposed schedule has the pretense of due process but is, in reality, simply an example of an agency inappropriately going "through the motions." *See Kempland*, 155 Cal. App. 3d at 650.

As discussed above, a decision by the Regional Board to proceed according to its current timetable will result in manifest prejudice to NASSCO. Additionally, there is no potential prejudice to the Regional Board associated with an extension on the proposed Phase III schedule. Data demonstrate that there is a thriving benthic community in the shipyard sediment site that is comparable to other areas of San Diego Bay. In addition, the Regional Board's own conduct in is evidence of a lack of any imminent harm. It has been nearly five years since NASSCO submitted its technical report as required by the Regional Board. After the first tentative order

was issued, the Regional Board staff took another three years to prepare its Report, develop the Order and compile the 375,000 page Record. It is now requiring NASSCO to review, understand and respond to the enormous Record, and complete all necessary discovery in ninety days. The five year period is evidence not only of a lack of urgency, but also of the amount of time necessary to address the complex issues and facts arising out of the vast amount of information compiled in the Record.

NASSCO is not requesting additional time for the sake of delay. To the contrary, NASSCO submitted several letters complaining about the delay in the Regional Board staff's issuance of the Record for the Order.<sup>1</sup> Indeed, more than two years ago, NASSCO stated that it "remains concerned, however, with 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 Cleanup and Abatement Order."<sup>2</sup> NASSCO is not interested in unnecessarily delaying these proceedings; however, as described above, it is reasonable for the parties to obtain more time to review the voluminous Record, determine relevancy of the documents, prepare for discovery, schedule and complete depositions, and convey that information to their experts to prepare for the hearing.

There is no reason to deny the designated parties the additional time that they need and deserve under principles of due process to adequately prepare for, and conduct discovery. Based on the above, NASSCO would suffer irreparable harm if the Regional Board proceeds with the proposed Phase III schedule.

### Discovery Issues

Additional issues must be addressed by the Regional Board so that the parties can proceed with discovery as expeditiously as possible. Specifically, the parties require certain information to commence discovery, and hence, NASSCO requests that the Cleanup Team provide the following:

- Confirmation that the Cleanup Team has provided all documents that are relevant to the Order and Report;
- Identification as soon as possible of all agencies, organizations, experts and others that were involved in the development of the Order, Report or Record and a description of each entity's involvement;
- Confirmation that the Cleanup Team has produced all of the relevant documents and files of the identified agencies, organizations, or persons;

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<sup>1</sup> See letter from D. Mulliken to San Diego Regional Water Quality Control Board, Attn: Michal P. McCann (February 17, 2006); see also letter from D. Mulliken to San Diego Regional Water Quality Control Board, Attn: John Minan (March 31, 2006).

<sup>2</sup> Letter from D. D. Mulliken to San Diego Regional Water Quality Control Board, Attn: Michal P. McCann (February 17, 2006).

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- A redline comparison showing revisions to the 700+ page Report;<sup>3</sup>
- A redline comparison showing revisions to the Order; and
- Service list for all submittals.

For the foregoing reasons, NASSCO respectfully renews its request that the Regional Board extend the schedule proposed for Phase III and hold a case management conference to address the timing of Phase III and discovery issues generally.

Sincerely,



Kelly E. Richardson  
of LATHAM & WATKINS LLP

cc: Advisory Team, c/o Michael P. McCann (12 copies)  
David Barker, Regional Water Quality Control Board  
Vice-Chair and Presiding Officer, David King, Regional Water Quality Control Board  
Christopher Barnes, Esq., General Dynamics NASSCO  
See Attached E-Mail Service List

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<sup>3</sup> The parties should not be required to re-review the entire 700+ page Report to locate the Cleanup Team's revisions.



**NASSCO**  
**San Diego Bay Sediment Matter**

**Electronic Index Entry**  
**April 22, 2008**

<b>Date of Document</b>	<b>Type of Document</b>	<b>Title/Description of Document</b>	<b>Submitted By</b>	<b>Submitted To</b>		<b>Total Number of Pages</b>	<b>Titles of Attachments</b>
04/22/08	Letter	Response to 3rd pre-hearing conference notice	NASSCO	Advisory Team (c/o Michael P. McCann) Barker, David Barnes, Christopher Cloward, Sharon Dragna, James FitzGerald, Leslie George, Catherine Gonzalez, Marco Hunter, Laura King, David Klimas, Denise Ledger, Brian	Melbourn, Frank McNevin, Christopher Mulliken, David Ortlieb, Fritz Reznik, Bruce Robertus, John Schmidt, Peter Schwartz, Lloyd Silverstein, David Solmer, Gabriel Spiess, Erik Tracy, Jill Wyels, Philip	16	<ul style="list-style-type: none"> <li>• 4/11/08 Water Board Submittal</li> <li>• Electronic Index Entry</li> <li>• Certification</li> <li>• Service List</li> </ul>

### Tentative Cleanup & Abatement Order Comment Information

Document Name	Tentative CAO No. R9-2005-0126
Document Date	April 22, 2008
Finding or Directive Number	Not applicable; the comments address procedural issues regarding the First Amended Order of Proceedings
Page, Paragraph, and Sentence Number	Not applicable
Concise summary of Issue	Procedural issues regarding the First Amended Order of Proceedings

**NASSCO**  
**San Diego Bay Sediment Matter**

**Certification**  
**April 22, 2008**

I, Kelly E. Richardson, certify that the April 22, 2008 electronic submittal is a true and accurate copy of the submitted signed original.

Sincerely,

A handwritten signature in black ink, appearing to read 'KER', with a large loop at the end.

Kelly E. Richardson  
of LATHAM & WATKINS LLP

**NASSCO**  
**San Diego Bay Sediment Matter**  
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