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Michael P. McCann - Supervising Engineer San Diego Regional Water Quality Control Board (RWQCB) 9174 Sky Park Court, Suite 100 San Diego CA, 92123

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

Comments on Proposed Phase III Schedule and Administrative Record

Dear Mr. McCann:

This letter supplements the U.S. Navy's letter of April 22, 2008 requesting changes to the timing of Phase III of the above captioned proceedings. The Navy believes that there is an additional compelling reason to alter the current schedule: The Board has thus far failed to bridge the analytic gap between the documents in the Administrative Record and its conclusions in the Cleanup and Abatement Order and Technical Report. The Technical Report and CAO do not recite what portions of the Administrative Record the conclusions are grounded in, and the Administrative Record Index is similarly lacking. Given the Board's failure to tie its assertions and conclusions to any specific evidence in the Administrative Record, the Navy believes that the commencement of Phase III of these proceedings is premature.

The Navy's position is supported by the California Supreme Court's holding in Topanga Assn. for a Scenic Community v. County of Los Angeles, 11 Cal.3d 506, 522 P.2d 12 (1974), which recited the standard a reviewing court should apply when analyzing the basis for agency decision making. The Court concluded that "the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw_evidence and ultimate decision or order." Topanga, 11 Cal.3d at 515. The RWQCB has failed to "bridge the analytic gap" in this case. The Court in Topanga went on to note that such a requirement is intended "to facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions." Topanga, 11 Cal.3d at 516. Without any clear links between the documents in the voluminous Administrative Record and the Board's conclusions in the CAO and Technical Report it will be extremely difficult for the Parties and any reviewing Court to determine whether the Board's conclusions are supported by substantial

evidence in the Record. These considerations, coupled with the size of the Administrative Record and the issues relating to its usability discussed extensively in other correspondence to the Board, provide additional grounds for modifications to the existing schedule.

Sincerely,

NATE J. CUSHMAN Associate Attorney

Copy to:

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