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October 19, 2011

**VIA EMAIL AND HAND DELIVERY**

Catherine George Hagan, Senior Staff Counsel  
Office of Chief Counsel  
State Water Resources Control Board  
9174 Sky Park Court, Suite 100  
San Diego, California 92123-4340

Re: San Diego Regional Water Quality Control Board Cleanup and Abatement Order No. R9-2011-0001

Dear Ms. Hagan:

Pursuant to the San Diego Regional Water Quality Control Board’s (“San Diego Water Board”) hearing notice, dated September 16, 2011, NASSCO submits the following comments concerning the Cleanup Team’s recent revisions to Tentative Cleanup and Abatement Order No. R9-2011-0001 (“TCAO”) and the accompanying Draft Technical Report (“DTR”).

**A. The Cleanup Team Must Specify The Oversight Costs For Which It Seeks Recovery, and Demonstrate That Such Expenditures Were Actually Incurred and Reasonable**

The Cleanup Team revised the TCAO to include cost recovery provisions, which state that the San Diego Water Board and the State Water Board are entitled to, and will seek reimbursement for, all reasonable costs incurred to investigate and remediate the Shipyard Sediment Site (“Site”). TCAO, at ¶ 41. However, the Cleanup team does not reveal the specific amounts it intends to recover, nor does it provide any evidence, bills, or accounting records to enable an objective determination of whether or not such amounts are reasonable.

Under the plain terms of Water Code Sections 13304 and 13365, the Water Boards may not recover any amount without first providing the amount of the bill, and proving that the expenditure was “reasonable.” Specifically, Water Code Section 13304(c)(1) provides that the Water Boards may only recover “reasonable costs actually incurred in cleaning up the waste, abating the effects of the waste, supervising cleanup or abatement activities, or taking other remedial action.” Cal. Wat. Code § 13304(c) (emphasis added). Likewise, Water Code Section

13365 requires the Board to provide work estimates, billing rates, and expected charges to the responsible party before collecting oversight costs, and also requires the Board to provide invoices (and materials supporting such invoices, upon request).

In particular, Section 13365 provides that:

[A]ny charge imposed upon a responsible party by the agency, to compensate the agency for some, or all, of its costs incurred in connection with the agency's investigation, analysis, planning, implementation, oversight, or other activity related to a removal or remedial action or a corrective action to a release of a hazardous substance, shall not be assessed or collected unless all of the following requirements are met:

(1) . . . prior to commencing the work or service for which the charge is assessed, and at least annually thereafter if the work or service is continuing, the agency shall provide all of the following information to the responsible party:

(A) A detailed estimate of the work to be performed or services to be provided, including a statement of the expected outcome of that work, based upon data available to the agency at the time.

(B) The billing rates for all individuals and classes of employees expected to engage in the work or service

(C) An estimate of all expected charges to be billed to the responsible party by the agency, including, but not limited to, any overhead assessments that the agency may be authorized to levy.

Cal. Wat. Code § 13365(c). Section 13365(c) also sets forth detailed requirements for the agency's issuance of invoices, including the timing and content of the same. As a prerequisite to cost recovery, the agency must send accurate invoices, at least semi-annually, with a daily detail of work performed and time spent by each employee and contractor employee, using the program's billing and overhead rates and standardized description of work tasks. Cal. Wat. Code § 13365(c)(2). Further, "upon request and within a reasonable time, not to exceed 30 working days from the date of receipt of a request, the agency shall provide the responsible party with copies of time records and other materials supporting [such] invoices." Cal. Wat. Code § 13365(c)(3).

Because the Cleanup Team has not yet complied with these important requirements, NASSCO requests that the Cleanup Team either remove the cost recovery language from the TCAO, or enumerate the specific amounts for which recovery is sought, and provide the parties with copies of the materials supporting the recovery of the same, so that the parties can verify the expenses and evaluate whether or not the amounts claimed are reasonable.

**B. The Cleanup Team Must Clarify That Oversight Costs Related To Mediation Are Properly Shared Between All Parties To The Mediation**

In addition to failing to provide documentation and justification concerning the costs it seeks to recover, the Cleanup Team singles out NASSCO, and forecasts its intent to recover unspecified sums for “unpaid invoices billed to NASSCO,” noting that “NASSCO has not paid the entire amount billed to its cost recovery account.” TCAO, at ¶ 41(c). However, this statement is misleading.

The Cleanup Team omits the fact that such invoices relate entirely to costs incurred by Regional Board staff regarding the TCAO, including Staff’s participation in mediation, the CEQA process, and adjudicatory proceedings, which involved many parties other than NASSCO. Since numerous Designated Parties participated in mediation, and are named as dischargers at the NASSCO site under the TCAO, any oversight costs are properly shared by all parties on a per capita basis. NASSCO is concerned that the revised cost recovery language mistakenly fails to recognize that NASSCO has timely paid its portion of such oversight costs, and instead, appears to suggest that NASSCO is required to pay for all mediation costs, including the other mediation participants’ shares. NASSCO is the only named discharger at its site that has paid any oversight costs related to the TCAO and mediation, and NASSCO paid more than its share of costs for preparation of the Environmental Impact Report at a time when no other discharger at its site was paying anything towards that effort. NASSCO should not bear the burden of paying all oversight costs simply because the Cleanup Team billed only NASSCO out of convenience rather than billing all mediation parties.

Accordingly, NASSCO requests that the TCAO be further revised to enumerate and support the specific costs sought, and make clear that costs pertaining to the TCAO, mediation and related proceedings are properly billed to, and split amongst, all Designated Parties that participated in the same.

**C. NASSCO Renews Its Objection To The TCAO On The Basis That It Is Economically Infeasible, and Reaffirms That Monitored Natural Attenuation Should Be Selected As The Preferred Remedy**

In light of the revisions to Section 31 of the DTR, NASSCO reiterates its position that the proposed cleanup is economically infeasible, and notes that the revised economic feasibility analysis makes clear that any cleanup beyond \$24 million is economically infeasible—even when the “benefits” of cleanup are assessed using the unreasonable, overly-conservative analyses presented in the DTR. The revised DTR indicates that any cleanup beyond \$24 million is not economically feasible because “[t]he highest net benefit per remedial dollar spent occurs for the first \$24 million (12 polygons) . . . . Beyond \$24 million, however, exposure reduction drops consistently as the cost of remediation increases.” *Id.* But, when Site polygons are ranked on a “worst-first” basis, only NA17 and NA06 are within the group of 12 polygons that the DTR concludes are economically feasible to remediate. For that reason, and the other reasons discussed in NASSCO’s prior comments, NASSCO reaffirms that the preferred remedy for the Site should be monitored natural attenuation, as recommended by Exponent in the NASSCO and

LATHAM & WATKINS<sup>LLP</sup>

Southwest Marine Detailed Sediment Investigation Report (2003) conducted under the direction of Regional Board staff.

Thank you in advance for your attention to these important matters.

Respectfully submitted,

LATHAM & WATKINS LLP



Jennifer P. Casler-Goncalves  
Attorneys for Designated Party NATIONAL  
STEEL AND SHIPBUILDING COMPANY

**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 **October 19, 2011**, I served the following document described as:

**NASSCO'S COMMENTS ON REVISIONS TO TCAO/DTR**

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

**BY ELECTRONIC MAIL**

Upon written agreement by the parties, the above-described document was transmitted via electronic mail to the parties noted below on **October 19, 2011**.

**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.

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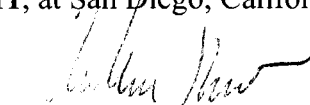
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<p>C. Scott Spear U.S. Department of Justice, Environmental Defense Section P.O. Box 23986 Washington, D.C. 20026-3986 <a href="mailto:scott.spear@usdoj.gov">scott.spear@usdoj.gov</a> Telephone: (202) 305-1593 Fax: (202) 514-8865</p>	<p>Suzanne Varco Opper &amp; Varco LLP 225 Broadway, Suite 1900 San Diego, California 92101 <a href="mailto:svarco@envirolawyer.com">svarco@envirolawyer.com</a></p>
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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 **October 19, 2011**, at San Diego, California.



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Andrea Rasco



## **Certification of Authenticity of Electronic Submittal**

I, Jennifer P. Casler-Goncalves, declare:

I am an associate at Latham & Watkins LLP, counsel of record for National Steel and Shipbuilding Company (“NASSCO”) in the Matter of Tentative Cleanup and Abatement Order R9-2011-0001 before the San Diego Regional Water Quality Control Board (“Water Board”). I am licensed to practice law in the State of California and make this declaration as an authorized representative for NASSCO. I declare under penalty of perjury under the laws of the State of California that the electronic version of National Steel and Shipbuilding Company’s Comments on Revisions to TCAO/DTR, submitted to the “Water Board” and served on the Designated Parties by e-mail on October 19, 2011, is a true and accurate copy of the submitted signed original. Executed this 19th day of October 2011, in San Diego, California.



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Jennifer P. Casler-Goncalves