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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: NASSCO Comments on September 16, 2011 Hearing Notice, San Diego Regional Water Quality Control Board Cleanup and Abatement Order No. R9-2011-0001

Dear Ms. Hagan:

NASSCO submits the following comments regarding the provisions and procedures set forth in the San Diego Regional Water Quality Control Board’s Notice of Public Hearing, dated September 16, 2011 (“Hearing Notice”). NASSCO respectfully requests that the Advisory Team amend the Hearing Notice to:

- Remove formal limits on the Designated Parties’ ability to cede time, or in the alternative, approve NASSCO’s request to accept time ceded from Star & Crescent Boat Company (“S&C”);
- Clarify that cross-examination will not count towards the Designated Parties’ allotted time for presentation on the Tentative Cleanup and Abatement Order No. R9-2011-0001 (“TCAO”) and the accompanying Draft Technical Report (“DTR”);
- Clarify that witnesses who submitted expert reports but do not intend to testify at the hearing, are not required to appear; or, in the alternative, order that Dr. Allen, Dr. Finley, and Mr. Templeton, may affirm their testimony telephonically;
- Set November 14, 2011, as the date certain on which NASSCO will present its case in chief;
- Clarify that Environmental Health Coalition (“EHC”) and San Diego Coastkeeper (“Coastkeeper”) will be subject to procedural and presentation time limits as a single entity, as they previously requested in their September 20, 2005 Motion For Designated Party Status;
- Set a date certain, occurring at least two weeks prior to the hearing, by which time the Chair will resolve timely-submitted motions;

- Clarify that interested persons must appear in person, and that unsworn, videotaped testimony will not be permitted;
- Provide an independent, certified interpreter to translate all interested party testimony or written statements submitted in foreign languages; and
- Modify the location and schedule of the November 9 hearing to facilitate public participation of working individuals, subject to the Advisory Team's ability to locate a suitable venue closer to the cleanup site.
- Clarify exactly what documents must be submitted in advance of the hearing, and require the parties to exchange witness and exhibits lists no later than October 27, 2011;
- Establish a separate portion of the hearing for presentations regarding CEQA issues, which will not count towards the Designated Parties' allotted time for presentation on the TCAO/DTR;
- Clarify that references to documents, reports, books, articles, treatises, etc. that have already been incorporated by reference are deemed part of the record in their entirety; and
- Increase NASSCO's allotted time from 2 hours to 5 hours, upon request.

These requests are discussed in detail, below.

## **I. THE CHAIR SHOULD NOT IMPOSE ANY LIMITS ON THE PARTIES' ABILITY TO CEDE TIME BY MUTUAL AGREEMENT**

Limits on the Designated Parties' ability to cede time are inappropriate. Designated Parties should be permitted to cede time freely, upon mutual agreement, without first obtaining permission from the Chair. The Chair has already recognized that it will be most efficient for Designated Parties to present jointly, where possible. Hearing Notice, at 7 ("Designated Parties are encouraged to consolidate their presentations to save hearing time and/or avoid duplication"). Likewise, it is in the Board's best interest to have coordinated, clear, and efficient presentations. Accordingly, the Hearing Notice should make clear that the Designated Parties are in the best position to coordinate their presentations, and determine how best to allocate the overall time allotted.

### **A. In The Alternative, The Chair Should Permit NASSCO To Accept Time Ceded By Other Designated Parties, Without Arbitrary Discounts**

Without waiving any of its objections to the arbitrary time limits set forth in the Hearing Notice, if the Chair is not amenable to lifting the restrictions on the Parties' ability to cede time, NASSCO alternatively requests that it be allowed to accept thirty minutes from Star & Crescent Boat Company ("S&C"), as agreed upon by and between NASSCO and S&C; thirty minutes from the San Diego Port Tenants Association ("SDPTA"), as agreed upon by and between NASSCO and SDPTA; and any time that may be ceded by any other Designated Party to

NASSCO so long as it does not exceed the total time allotted to those parties for the entire hearing.

The Cleanup Team has objected to the above request, and proposed that any time ceded to NASSCO be arbitrarily discounted by 50%—without providing any reasonable justification for such a limitation, or asking for similar limitations be placed on other Designated Parties. The Chair should refuse this request, and make clear that time voluntarily ceded by one party to another will not be subject to arbitrary discounting.

First, the Cleanup Team requests the Chair to prevent NASSCO from accepting time from BP, Chevron, or SDPTA “because time is limited” and BP, Chevron, and SDPTA have not “participated in the proceedings actively for nearly three years.” Cleanup Team Comments, at § 3. But the Cleanup Team’s own proposed schedule already assumes that BP, Chevron, and SDPTA will use three hours of hearing time; accordingly, allowing SDPTA to cede part of its time to NASSCO in order to present a coordinated presentation will not extend the total time required for the hearing. *Id.* Further, the Advisory Team has already accounted for BP, Chevron, and SDPTA’s reduced participation in this matter by allotting them *only one half the time given to the other parties*, even though each of these parties has a significant interest in the outcome of these proceedings. There is no basis for further limiting their participation by arbitrarily restricting their ability to cede time, and defend their shared interests, through coordination with other parties.

SDPTA intends to participate in the hearing, as it is entitled to do as a Designated Party. As previously recognized by the Board when it granted SDPTA Designated Party status, SDPTA represents the interests of many tidelands lessees, and has important interests in this matter that are not adequately represented by the other Designated Parties. Indeed, the Board at that time denied party status to other industrial associations, including IEA and San Diego Ship Repair Association, because the Board believed that SDPTA could adequately represent those interests. Limiting SDPTA’s participation by refusing to allow it to manage or cede its time as it deems appropriate further minimizes all of those associations participation in the proceedings, while granting other NGOs (Coastkeeper and EHC) full designated party status. Moreover, NASSCO and SDPTA’s interests are aligned with respect to certain issues, and permitting SDPTA to cede time to NASSCO will facilitate a more organized and coherent presentation on those issues.

Second, even though the Cleanup Team admits that “time could be saved and duplication avoided if an actively participating Designated Party ceded time to NASSCO,” the Cleanup Team requests that time ceded to NASSCO be discounted to prevent NASSCO from using ceded time to present arguments singular to its own interests. But the purpose of ceding time is to allow for better coordination of presentations on issues that affect *multiple* parties. Further, any “discount” on time ceded would be arbitrary, capricious, and contrary to the Cleanup Team’s goal of facilitating orderly and efficient proceedings.

Accordingly, the Advisory Team should grant NASSCO’s previous request to accept the full amount of time ceded from S&C and any other party who desires to facilitate a cohesive presentation by ceding time to NASSCO. If the Advisory Team agrees to do so, NASSCO will agree to forego the time ceded to it from SDPTA.

## **II. CROSS-EXAMINATION SHOULD NOT COUNT TOWARD A DESIGNATED PARTY'S TIME LIMIT**

The Hearing Notice should also be amended to make clear that cross-examination will not count towards a Designated Party's allotted time limit. The Chair has discretion to regulate cross-examination, and should exercise his discretion in this regard. 23 Cal. Code Regs. §§ 648(d), 648.5(a).

If the examination is deemed beneficial to the Board, the Chair should exercise his discretion to prevent it from counting against a Designated Party's time, and conversely, if the examination is not deemed beneficial to the Board, the Chair can and should limit it. Under either scenario, the proper exercise of discretion by the Chair will prevent any Designated Party from spending inappropriate time conducting cross-examination; consequently, a blanket rule that all cross-examination must count towards the parties' allotted time is unnecessary and serves only to exacerbate the due process concerns discussed below.

## **III. THE REQUIREMENT THAT WITNESSES APPEAR IN PERSON TO AFFIRM PRIOR TESTIMONY IS UNTIMELY AND VIOLATES NASSCO'S DUE PROCESS RIGHTS**

For the first time in these proceedings, the Hearing Notice requires that "written testimony from persons who do not appear to affirm their testimony and are not subject to cross-examination will not be made part of the record unless the Chair allows the unaffirmed testimony into the record as hearsay evidence." Hearing Notice, at 5. This requirement is untimely, unnecessary, and prejudices NASSCO.

NASSCO intends to produce its primary expert witness, Dr. Thomas C. Ginn, who authored the 2003 NASSCO and Southwest Marine Detailed Sediment Investigation Report, the data for which provides the basis for the TCAO, and he submitted an expert report addressing most of the key issues in this proceeding. However, due to personal and professional schedules, logistical difficulties, and the expense of flying experts across the country to testify, it would cause severe hardship to require all of NASSCO's experts to appear simply to affirm their expert reports—especially when all parties had ample opportunity to question NASSCO's experts during the discovery process, and chose not to do so.

Accordingly, NASSCO objects to the requirement that its experts appear in this matter for the following reasons.

### **A. The Physical Presence Requirement Is Inefficient, And Exacerbates The Prejudicial Impact Of The Two-Hour Time Limit**

The Hearing Notice only permits the main Designated Parties two hours to present their comments on the TCAO, DTR, and Draft EIR—including opening statements, affirmative comments, and cross-examination. Requiring each expert to affirm prior testimony in person during the hearing will be time-consuming and expensive. Furthermore, requiring Designated Parties to burn scarce presentation time to affirm testimony will exacerbate the prejudicial impact of the severe time-constraints on the parties' presentations, discussed in Section IX,

below. Accordingly, if the Chair requires such affirmation, either physically or telephonically, it should not count towards the parties' allotted time.

**B. The Physical Presence Requirement Is Unnecessary Because The Parties Had Ample Opportunity To Cross Examine Expert Witnesses During The Discovery Period**

Similarly, the physical presence requirement is unnecessary to preserve the rights of the Designated Parties to cross-examine those who have already submitted testimonial evidence into the record. The Designated Parties disclosed their expert witnesses on July 19, 2010, and discovery did not close until March 11, 2011, meaning that the parties had nearly *one year* during which to depose, or issue written discovery to, NASSCO's experts. The discovery process allowed Designated Parties the right to seek information from and cross-examine those who intended to introduce evidence into the record, but would not testify at the hearing. Nothing prevented any party from deposing designated experts during the discovery process. Accordingly, the parties will not be prejudiced if expert witnesses are not required to attend the hearing merely for the purpose of affirming their expert reports.

**C. The Chair Should Exercise His Discretion To Waive The Physical Presence Requirement Or Else Permit NASSCO's Experts To Affirm Testimony Telephonically**

The Chair has discretion to waive, or modify, the appearance requirement, particularly where strict adherence would create severe hardship. Specifically, the California Administrative Code states that the rule requiring the witness' appearance "may be modified where a party demonstrates that compliance would create severe hardship. 23 Cal. Code Regs. § 648.4. Additionally, the Chair has the inherent discretion to "waive any requirements . . . pertaining to the conduct of adjudicative proceedings including but not limited to the . . . examination or cross-examination of witnesses . . . so long as those requirements are not mandated by state or federal statute or by the state or federal constitutions." 23 Cal. Code Regs. § 648.

As explained in NASSCO's letter dated October 7, 2011, NASSCO is concerned that, given the late notice of this requirement, certain experts who filed expert reports but were not expected to testify in person at the hearing, may be unable to attend the hearing to affirm their testimony. For example, NASSCO expert Dr. Herbert Allen will be in Central Asia from October 10, 2011 through the evening of November 8, 2011, and will be unable to fly to San Diego by November 9, 2011. He is also scheduled to attend a conference in Boston, Massachusetts, from November 13 through November 18, 2011, during the same time as the hearing. Given the untimely announcement of this requirement, striking Dr. Allen's relevant expert witness report from the record, or characterizing it as hearsay evidence, solely on account of the witness' personal limitations is unreasonable and prejudicial.

Likewise, requiring NASSCO's other experts, including Dr. Brent Finley and Mr. David Templeton, to attend for the sole purpose of affirming their testimony would pose significant hardship, as it would require them to fly from as far as Seattle, for the sole purpose of performing an affirmation that could easily be accomplished telephonically. These hardships are further exacerbated by the Advisory Team's failure to set a date certain for NASSCO's presentation of its case in chief. There is no logical reason to require experts who will not be testifying at the

hearing to fly thousands of miles, and potentially attend multiple days of the hearing, in order to appear physically to affirm their prior expert reports. That the Advisory Team now seeks to impose this new requirement on the parties' experts on the eve of the hearing, and without regard to their scheduling concerns, is disturbing—particularly considering that the Advisory Team went as far as to *re-schedule the hearing* to accommodate the personal schedule of EHC and Coastkeeper's expert, Mr. Donald MacDonald.

Accordingly, NASSCO requests that the Chair clarify whether the physical presence requirement is intended to apply to the Designated Parties' previously submitted expert reports, and if so, exercise his discretion to either relieve Dr. Allen, Dr. Finley, and Mr. Templeton from the obligation to attend the hearing, or else permit them to affirm their testimony telephonically,<sup>1</sup> without counting it towards NASSCO's allotted time.

**D. The Chair Should Clarify That Designated Parties' Case In Chief Will Be Presented On A Date Certain**

The Hearing Notice sets forth the hearing dates and the order in which the parties will be permitted to present, but it does not indicate the time the hearing will begin, or which day NASSCO will be expected to present its case in chief. NASSCO requires predictability for scheduling purposes, and the uncertainty over when NASSCO will present its case in chief poses considerable hardships for NASSCO's testifying experts, many of whom will be traveling significant distances to attend the hearing.

The California Administrative Code provides that "adjudicative proceedings shall be conducted in a manner as the Board deems most suitable to the particular case with a view toward securing relevant information expeditiously without unnecessary delay and expense to the parties and the Board." 23 Cal. Code Regs. § 648.5. Considering that the hearing dates fall on non-consecutive days, spread out over the course of two weeks, requiring testifying experts to be present for all hearing days imposes significant logistical difficulties on NASSCO's experts, and unnecessary expense on NASSCO.<sup>2</sup>

To avoid the unnecessary expense of having testifying experts needlessly sit through multiple hearing days, and for the other reasons discussed herein and in NASSCO's letter to the Advisory team, dated October 7, NASSCO requests the Chair to set November 14, 2011 as the date certain on which NASSCO will begin its case in chief.

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<sup>1</sup> The Administrative Procedures Act specifically permits telephonic testimony, provided that no party objects, and the public has the opportunity to review the record and be physically present at the place where the Chair is conducting the hearing. *See* Cal. Gov. Code §§ 11425.20(b), 11440.30(a) and (b).

<sup>2</sup> NASSCO understands that the Cleanup Team has also requested a more definite schedule for the parties' presentations and that San Diego Gas & Electric Company ("SDG&E") is seeking permission for its expert to testify out of order, on November 9, due to scheduling conflicts on the remaining hearing dates. NASSCO supports both requests, to the extent that they are otherwise consistent with NASSCO's comments herein.

**E. The Chair Should Clarify That Environmental Health Coalition And San Diego Coastkeeper Will Be Treated As A Single Entity For Purposes Of Procedural And Presentation Time Limits**

The Hearing Notice lists EHC and Coastkeeper as two separate Designated Parties, and then provides that “each Designated Party is allotted two (2) hours.” Hearing Notice, at 4-5, 7. But previously, EHC and Coastkeeper specifically asked to be treated as one party for procedural and presentation time limits, despite seeking designation for both groups. In so doing, EHC and Coastkeeper agreed that they “will function as a single entity,” and should be limited “to the same procedural and *presentation time limits* as if they were a single entity.” Environmental Groups’ Motion For “Designated Party” Status And Opposition To Objections Of City Of San Diego And NASSCO, at 7-8 (emphasis added). EHC and Coastkeeper further recognized that “in the interests of orderly and prompt conduct of proceedings, procedures or orders should be adopted requiring the two parties to coordinate their presentations of witnesses, evidence, and arguments such that they effectively function as one party.” *Id.*, at 9; *see also* Transcript of Pre-Hearing Conference for Tentative Cleanup and Abatement Order No. R9-2005-0126, at 56:22 – 56:24 (acknowledging that EHC and Coastkeeper will function as a joint group with respect to evidentiary submissions).

NASSCO agrees that treating EHC and Coastkeeper as a single entity with respect to the two-hour time limit is necessary to conserve valuable hearing time, and prevent unnecessary duplication. Accordingly, the Chair should make clear that EHC and Coastkeeper will be treated as a single entity for purposes of the two-hour time limit.

**IV. DUE PROCESS REQUIRES THE CHAIR TO RESOLVE MOTIONS IN LIMINE IN ADVANCE OF THE HEARING**

The Hearing Notice states that “[t]he Chair *may* rule on previously submitted motions in limine and objections in advance of the hearing,” but does not indicate whether or when the Chair will resolve timely filed motions. Hearing Notice, at 11 (emphasis added).

It is critical for all Designated Parties to understand the state of the record and the scope of testimony that will be permitted in order to effectively prepare for the hearing. The phrasing of the Hearing Notice, however, leaves open the possibility that motions may not be resolved prior to the hearing. To enable the parties to adequately prepare their cases, NASSCO restates its request that the Chair (1) clarify that all motions will be resolved in advance of the hearing, and (2) schedule a date certain—no later than October 26, 2011 (two weeks before the hearing)—by which the Chair will resolve all timely filed motions.

**V. DUE PROCESS REQUIRES THAT INTERESTED PERSONS APPEAR IN PERSON, NOT BY VIDEOTAPE**

The Hearing Notice permits Interested Persons to present non-evidentiary policy statements, and contemplates that such persons may present written policy statements in advance of the hearing, or oral comments at the hearing. NASSCO requests that the Chair make clear that unsworn, videotaped statements by Interested Persons will not be accepted into the record, and that Interested Persons who wish to make a policy statement at the hearing must appear in person at the hearing.

The submission of videotaped testimony is a particular concern in light of certain events that occurred at a recent meeting hosted by EHC and Coastkeeper, entitled “Signs of the Tide ~ San Diego Bay’s Dirty Little Secret.” At this meeting, EHC and Coastkeeper representatives coached community members how to lobby the Board under the guise of teaching them how to “better tell their stories.” Ex, 1, Declaration of Pedro Anaya (“Anaya Decl.”), at ¶ 3. As part of this effort, EHC and Coastkeeper representatives encouraged attendees to record video messages pertaining to alleged sediment contamination in San Diego Bay. *Id.*, at ¶ 5. Moreover, during the recording of such testimony, the individuals providing testimony were being coached and prompted by EHC and Coastkeeper representatives to give examples of how pollution in San Diego Bay has negatively affected them and their families. *Id.* Such statements clearly exceed the permissible scope of “policy statements,” particularly to the extent that they purport to provide specific evidence of negative impacts to beneficial uses. Permitting unsworn, videotaped testimony is highly prejudicial to NASSCO because once played for the Board, it will be impossible to “un-ring the bell” if the tape contains improper evidentiary statements.

Additionally, there is reason to believe that these unsworn, videotaped statements do not represent the intended testimony of the witnesses. For example, in addition to the improper coaching and prompting by EHC and Coastkeeper representatives, it was observed that “a moderator purporting to translate video testimony from Spanish to English was not translating accurately, and in some instances was adding his own spin to the audience members’ ‘testimony.’” *Id.* For example when one community member identified issues of dirty bathrooms at Cesar E. Chavez Park, the moderator ignored that issue, and instead made up comments about parking difficulties caused by employees of the shipyards in San Diego Bay. *Id.*

The Chair must clarify that any such videotaped statements will not be accepted into the record, or played at the hearing, and require those wishing to make policy statements at the hearing to appear in person at the hearing. By requiring personal appearance, the Chair will preserve the Designated Parties’ right to object to, and, if necessary, cross-examine any Interested Person who improperly attempts to present evidence (as opposed to policy statements), and to make an offer of proof contradicting any evidence proffered.

## **VI. DUE PROCESS REQUIRES THAT AN INDEPENDENT, CERTIFIED TRANSLATOR BE PROVIDED TO TRANSLATE INTERESTED PARTY TESTIMONY OR WRITTEN STATEMENTS SUBMITTED IN FOREIGN LANGUAGES**

While the Hearing Notice indicates that Spanish language translation will be provided on November 9, the notice does not set forth any minimum standards regarding the skills or linguistic abilities that will be required of the translator, or describe any procedures or quality controls pertaining to the translation of written policy statements that may be submitted in foreign languages. NASSCO agrees that language assistance should be provided on November 9 to ensure that all testimony and written statements submitted by interested persons are accurately translated to English by a qualified professional not affiliated with any Designated Party.

Accordingly, NASSCO requests the Chair to clarify that (1) the Board-provided translator will be an independent, certified translator, in good standing, pursuant to Section



11435.30 of the California Government Code, and that (2) the Board will not accept any oral or written foreign language testimony by interested persons unless it is translated by the Board-certified, independent translator specified in the Hearing Notice.

NASSCO recognizes that the California Administrative Code does not mandate the Board to follow the language assistance provisions contained in the Administrative Procedures Act (*see* 23 Cal. Code Regs. § 648(c)), however, principles of due process and fundamental fairness require that an independent, certified translator translate all foreign language testimony and written statements in these proceedings, since the accurate translation of such testimony will be crucial to the Designated Parties' ability to respond, as well as to the Board's understanding of the same. This is particularly true considering that translations performed by EHC and Coastkeeper at their recent meeting proved inaccurate, and reflected the biases of parties' translator, rather than the true concerns of the Interested Person providing the statement. *See* Anaya Decl., at ¶ 5.

As a result, the Chair should clarify that any oral or written policy statements translated by persons whose qualifications are unknown, or who may be affiliated with the Designated Party proffering such testimony, will not be accepted into the record.

#### **VII. THE CHAIR SHOULD CHANGE THE LOCATION OF THE NOVEMBER 9 HEARING AND AMEND THE SCHEDULE TO ALLOW FOR EVENING PUBLIC COMMENT**

NASSCO supports EHC and Coastkeeper's request to hold the November 9 hearing date at a location near the cleanup site, provided that the Advisory Team is able to identify a suitable facility with appropriate access, adequate seating capacity and reliable technology for the Designated Parties to use in making their presentations. NASSCO also supports EHC and Coastkeeper's request to modify the November 9 schedule to provide a better opportunity for working Interested Persons to participate.

#### **VIII. THE CHAIR SHOULD SPECIFY WHICH CATEGORIES OF DOCUMENTS ARE REQUIRED TO BE SUBMITTED TO THE BOARD BY NOVEMBER 4**

The Hearing Notice sets forth deadlines for Designated Party written submissions, including comments on the Cleanup Team's recent revisions to the TCAO and DTR, the Cleanup Team's responses to comments on the Draft EIR, hearing briefs, motions in limine, and "electronic submissions," such as PowerPoints and other computer displays that will be used during the hearing. Hearing Notice, at 6, 11. The Hearing Notice also provides that "no documents will be accepted at the hearing whether they are new evidence or argument, summaries, or compilations, or any other materials. The Presiding Officer will strictly enforce deadlines, page limits, and limits on oral presentations and written submissions described herein."

Given the latter prohibition, NASSCO is confused about the scope of materials that are required to be submitted by November 4, and requests clarification from the Chair. Based on Section 648.4 of the California Administrative Code, NASSCO assumes that the Designated Parties will not be required to pre-submit large, hard copy demonstrative exhibits, or other similar visual aids by November 4. Cal. Admin. Code § 648.4(c) ("Copies of general vicinity

maps or large, nontechnical photographs generally will not be required to be submitted prior to the hearing.”). However, it remains unclear whether the Board contemplates that the Designated Parties must submit other types of non-electronic documents by November 4. For example, Section 648(c) also provides that the Board may require copies of written testimony and exhibits to be submitted to the Board and other parties prior to the hearing. Although the Hearing Notice does not appear to explicitly require advance submission of such documents, the above-quoted prohibition raises the possibility that such items may be rejected by the Board if not submitted by November 4.

Accordingly, NASSCO requests the Chair to clarify exactly what must be submitted by November 4, *including confirming that copies of opening statements, direct testimony, exhibits, demonstratives, and other similar hard copy materials are not required to be submitted in advance of the hearing*. Additionally, in order to prevent surprise testimony, NASSCO requests that the Chair require all Designated Parties to provide witness and exhibit lists<sup>3</sup> to the Board, and other Designated Parties, no later than October 26, 2011.

#### **IX. DOCUMENTS THAT HAVE ALREADY BEEN INCORPORATED BY REFERENCE SHOULD BE DEEMED PART OF THE RECORD**

The Chair should clarify that documents that have already been incorporated by reference are deemed part of the record in their entirety. For example, NASSCO has recently become aware that certain documents that the Cleanup Team references in the DTR are not included in the administrative record in excerpted format, not in their entirety. California Code of Regulations Section 648.2 permits the Board or presiding officer to take official notice of “such facts as may be judicially noticed by the courts of this state” and “any generally accepted technical or scientific matter within the Board’s field of expertise,” provided certain procedural requirements are met.

Rather than requiring the Cleanup Team to submit complete copies of all references to the record, NASSCO requests the Chair to clarify that any documents that have already been incorporated into the record by reference, or that have been included only in excerpted form, are deemed part of the administrative record, in their entirety.

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<sup>3</sup> To facilitate the provision of exhibit lists, as well as identification of exhibits during the hearing, NASSCO also requests the Chair to make available bates-stamped versions of all documents submitted to the record after the Supplemental Shipyard Administrative Record was released on November 5, 2010.

**X. LIMITING NASSCO'S ENTIRE PRESENTATION ON THE TCAO, DTR, AND CEQA DOCUMENTS TO TWO HOURS, INCLUDING OPENING STATEMENTS, PRESENTATION, AND CROSS-EXAMINATION, VIOLATES NASSCO'S DUE PROCESS RIGHTS**

**A. Due Process Requires That Designated Parties Receive A Reasonable Amount Of Time To Present, Given The Complex Legal, Technical, And Scientific Issues Involved With The TCAO And DTR**

Due process requires that adjudicatory proceedings be fundamentally fair, and provide a meaningful opportunity to be heard. *Matthews v. Eldridge*, 424 U.S. 319, 333 (1972). The California Government Code codifies this basic principle, and provides that an agency conducting an adjudicative proceeding "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." Cal. Gov. Code § 11425.10(a)(1).

The Hearing Notice allots only two (2) hours for NASSCO to present its case, including opening statements, presentation of witnesses, cross-examination, and discussion of related CEQA issues, and requires the parties to obtain formal approval from the Chair in order to cede time to another party. Hearing Notice, at 7. Considering the magnitude and complexity of issues at stake, NASSCO disputes that two hours is a meaningful opportunity to be heard, sufficient to satisfy the constitutional requirements of due process.

**B. Two Hours Is Insufficient To Properly Present A Case Of This Magnitude And Complexity**

The proposed TCAO will affect NASSCO's substantive rights and will subject NASSCO to material risk (on the order of tens of millions of dollars), and as such, constitutes formal agency enforcement action. Consequently, the constitutionally-mandated opportunity to be heard must be meaningful. *See, e.g., Matthews v. Eldridge*, 424 U.S. at 333 ("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 right to be heard requires provision of adequate time to present a defense.

The Hearing Notice sets forth a truncated schedule that puts up a pretense of due process but is, in reality, simply an example of an agency inappropriately going "through the motions." *See Kempland v. Regents of Univ. of Cal.*, 155 Cal. App. 3d 644, 650 (1984). While NASSCO recognizes the need to facilitate hearing management, two hours is simply insufficient to properly present a case of this complexity, and the current timetable will result in manifest prejudice to NASSCO.

This matter has been ongoing for over two decades, and involves a number of complicated legal and technical issues; yet, the Advisory Team has arbitrarily decided to allow NASSCO only two hours to synthesize nearly 20 years of complex scientific and legal analysis, with potential financial impacts of tens of millions of dollars. As a result, the proposed time limits render it impossible for NASSCO to exercise its 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 cross-examine opposing experts, and agency

personnel involved in this action. Such measures require time. Limiting NASSCO to only two hours will prejudice NASSCO by preventing NASSCO from being able to adequately present its case to the Board.

By contrast, there is no potential prejudice to the Regional Board associated with an extension of the time limits set forth in the Hearing Notice, nor is there any legitimate reason to deny NASSCO the additional time it needs and deserves under principles of due process to adequately present its case.<sup>4</sup> Accordingly, the Regional Board should expand the time allotted to NASSCO to 5 hours, which will protect the NASSCO's procedural due process rights.

**C. The RWQCB Should Establish A Separate Portion Of The Hearing For Testimony Concerning CEQA Issues, Which Does Not Count Towards The Parties' Allotted Time To Present On The TCAO And DTR**

The Hearing Notice provides that the Designated Parties' limited presentation time must also include their comments on the Draft Environmental Impact Report ("EIR"). It is appropriate for the Board to accept comments on the Draft EIR at the hearing. *See* 14 Cal. Code Regs. § 15202(b) (if an agency holds a public hearing on its decision to carry out a project, it should include environmental review as one of the issues). By requiring the Designated Parties to include their comments on the Draft EIR in the same inadequate time period provided for commenting on the TCAO and DTR, however, the Board is exacerbating the due process concerns set forth in Section X.A, above.

Given the particular circumstances of this matter, due process requires that NASSCO be allotted at least 5 hours, exclusive of cross-examination and CEQA issues. Furthermore, the Board should set aside an additional period of time to address comments on the Draft EIR.

In the alternative, and without waiving the rights discussed above, the Chair should, at a minimum, recognize that the Designated Parties are in the best position to determine the efficient allotment of time, and permit parties to cede time to each other, upon the agreement of counsel, without formal approval, as discussed above.

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<sup>4</sup> NASSCO recognizes the burden on, and limitations of, persons that serve as board members that have other full-time commitments; however, the inherent limitations on board members' available time cannot be allowed to impact NASSCO's right to have sufficient time to present a meaningful defense.

LATHAM & WATKINS<sup>LLP</sup>

**XI. CONCLUSION**

For the foregoing reasons, NASSCO respectfully requests that the Hearing Notice be amended as described herein.

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 COMMENTS ON SEPTEMBER 16, 2011 HEARING NOTICE**

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

**BY ELECTRONIC MAIL**

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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**

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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.

Frank Melbourn Catherine Hagan California Regional Water Quality Control Board, San Diego Region 9174 Sky Park Court, Suite 100 San Diego, CA 92123-4340 <a href="mailto:fmelbourn@waterboards.ca.gov">fmelbourn@waterboards.ca.gov</a> <a href="mailto:chagan@waterboards.ca.gov">chagan@waterboards.ca.gov</a> Telephone: (858) 467-2958 Fax: (858) 571-6972
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**BY ELECTRONIC MAIL**

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

<p>Raymond Parra Senior Counsel BAE Systems Ship Repair Inc. PO Box 13308 San Diego, CA 92170-3308 <a href="mailto:raymond.parra@baesystems.com">raymond.parra@baesystems.com</a> Telephone: (619) 238-1000+2030 Fax: (619) 239-1751</p>	<p>Michael McDonough Counsel Bingham McCutchen LLP 355 South Grand Avenue, Suite 4400 Los Angeles, CA 90071-3106 <a href="mailto:michael.mcdonough@bingham.com">michael.mcdonough@bingham.com</a> Telephone: (213) 680-6600 Fax: (213) 680-6499</p>
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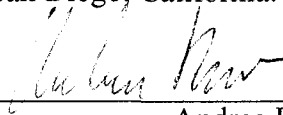
<p>Sharon Cloward Executive Director San Diego Port Tenants Association 2390 Shelter Island Drive, Suite 210 San Diego, CA 92106 <a href="mailto:sharon@sdpta.com">sharon@sdpta.com</a> Telephone: (619) 226-6546 Fax: (619) 226-6557</p>	<p>Duane Bennett, Esq. Ellen F. Gross, Esq. William D. McMinn, Esq. Office of the Port Attorney 3165 Pacific Highway San Diego, CA 92101 <a href="mailto:dbennett@portof sandiego.org">dbennett@portof sandiego.org</a> <a href="mailto:egross@portofsandiego.org">egross@portofsandiego.org</a> <a href="mailto:bmcminn@portofsandiego.org">bmcminn@portofsandiego.org</a> Telephone: 619-686-6200 Fax: 619-686-6444</p>
<p>Sandi Nichols Allen Matkins Three Embarcadero Center, 12<sup>th</sup> Floor San Francisco, CA 94111 <a href="mailto:snichols@allenmatkins.com">snichols@allenmatkins.com</a> Telephone: (415) 837-1515 Fax: (415) 837-1516</p>	<p>Laura Hunter Environmental Health Coalition 401 Mile of Cars Way, Suite 310 National City, CA 91950 <a href="mailto:laurah@environmentalhealth.org">laurah@environmentalhealth.org</a> Telephone: (619) 474-0220 Fax: (619) 474-1210</p>
<p>Gabe Solmer Jill Witkowski San Diego Coastkeeper 2825 Dewey Road, Suite 200 San Diego, CA 92106 <a href="mailto:gabe@sdcoastkeeper.org">gabe@sdcoastkeeper.org</a> <a href="mailto:jill@sdcoastkeeper.org">jill@sdcoastkeeper.org</a> Telephone: (619) 758-7743 Fax: (619) 223-3676</p>	<p>Mike Tracy Matthew Dart DLA Piper LLP US 401 B Street, Suite 1700 San Diego, California 92101-4297 <a href="mailto:mike.tracy@dlapiper.com">mike.tracy@dlapiper.com</a> <a href="mailto:matthew.dart@dlapiper.com">matthew.dart@dlapiper.com</a> Telephone: (619) 699-3620 Fax: (619) 764-6620</p>
<p>William D. Brown Chad Harris Brown &amp; Winters 120 Birmingham Drive, #110 Cardiff By The Sea, CA 92007 <a href="mailto:bbrown@brownandwinters.com">bbrown@brownandwinters.com</a> <a href="mailto:charris@brownandwinters.com">charris@brownandwinters.com</a> Telephone: (760) 633-4485 Fax: (760) 633-4427</p>	<p>David E. Silverstein Associate Counsel U.S. Navy SW Div, Naval Facilities Engineering Command 1220 Pacific Hwy San Diego, CA 92132-5189 <a href="mailto:david.silverstein@navy.mil">david.silverstein@navy.mil</a> Telephone: (619) 532-2265 Fax: (619) 532-1663</p>
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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	Suzanne Varco Oppen & Varco LLP 225 Broadway, Suite 1900 San Diego, California 92101 <a href="mailto:svarco@envirolawyer.com">svarco@envirolawyer.com</a>
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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.



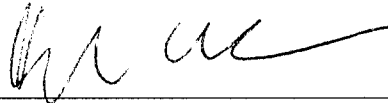
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Andrea Rasco

**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 September 16, 2011 Hearing Notice, 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

# **EXHIBIT 1**

## DECLARATION

I, Pedro Anaya, declare as follows:

1. I am personally familiar with the facts set forth herein and if called upon to do so, could and would testify competently thereto.

2. On August 9, 2011, I attended a meeting hosted by the Environmental Health Coalition (“EHC”) and San Diego Coastkeeper (“Coastkeeper”) entitled “Signs of the Tide ~ San Diego Bay’s Dirty Little Secret.” At that meeting, various representatives of EHC and Coastkeeper, as well as one other individual identified as an “environmental justice advocate,” spoke regarding alleged sediment contamination in San Diego Bay and associated threats to beneficial uses in San Diego Bay. Attached hereto as Exhibit A is a true and correct copy of an agenda that was distributed at the August 9, 2011 meeting.

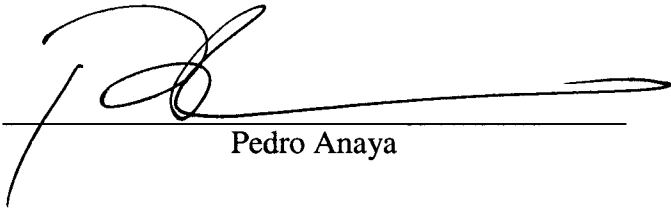
3. A portion of the meeting was dedicated to coaching community members how to lobby the California Regional Board Water Quality Control Board, San Diego Region (“Regional Board”) regarding alleged sediment contamination in San Diego Bay. This coaching was characterized by the representatives as teaching the audience how to “better tell their stories.”

4. During the meeting, EHC and Coastkeeper representatives distributed a template comment letter that could be used by audience members to send to the Regional Board, and which contended that beneficial uses in San Diego Bay are being harmed by toxic sediments. The letter template also reserves space for community members to include their own thoughts on why “[a] protective and effective cleanup plan” for sediments in San Diego Bay is important to them. Attendees were encouraged to send such letters to the Regional Board. Attached hereto as Exhibit B is a true and correct copy of the comment letter template that was distributed at the meeting.

5. EHC and Coastkeeper representatives also encouraged attendees to record video messages pertaining to alleged sediment contamination in San Diego Bay. During the recording of video testimony, I observed that individuals providing testimony were being coached and prompted by EHC and Coastkeeper representatives to give examples of how pollution in San Diego Bay has negatively impacted them and their families. In some instances, it was also clear that a moderator

purporting to translate video testimony from Spanish to English was not translating accurately, and in some instances was adding his own spin to the audience members' "testimony." For example, one community member identified issues of dirty bathrooms at Cesar E. Chavez Park. However, when the moderator translated the community member's comments, he ignored that issue and instead made up comments about parking difficulties caused by employees of the Shipyards in San Diego Bay.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on September 1, 2011, at San Diego, California.

  
Pedro Anaya

# EXHIBIT A



TEL: 619.758.7743  
FAX: 619.224.4638

ADDRESS:  
2825 DEWEY ROAD, SUITE # 200  
SAN DIEGO, CALIFORNIA 92106

www.sdcostkeeper.org

ONE ORGANIZATION PROTECTING 100% OF THE COAST

## Signs of the Tide ~ San Diego Bay's Dirty Little Secret

- 6:00 – 6:10           Appetizers and Meet and Greet
- 6:10 – 6:25           Introduction – *Beto Vasquez, San Diego Coastkeeper*
- 6:25 – 6:53           Speaker – *Joy Williams, Research & Community Assistance Director, Environmental Health Coalition; Pollution Problems to Water and Air Quality and Impacts to Human Health*
- 6:53 – 7:03           Speaker – *Jose Medina, Environmental Justice Advocate; The Need for Community Involvement in South Bay*
- 7:03 – 7:36           Questions and Discussion – *Beto Vasquez, San Diego Coastkeeper*
- 7:36 – 7:46           Speaker – *Gabriel Solmer, Legal Director, San Diego Coastkeeper; How to Get Involved*
- 7:46 – 8:00           Write Letters, Record Video Messages
- Speaker Bios

*Comm. Spokesperson*  
**Alberto "Beto" Vasquez** will moderate this Signs of the Tide. Beto is a current volunteer for San Diego Coastkeeper's water monitoring program and a very active advocate in his community for environmental stewardship. He's also a student at UCSD. Beto grew up in the communities most impacted by the toxic sediment and is extremely excited to bring this issue to the attention of his community.

**Joy Williams** is Research & Community Assistance Director at Environmental Health Coalition. She has been at Environmental Health Coalition for 23 years, working on issues such as the public's right to know about toxics used in their communities, alternatives to household hazardous materials, toxic air pollution, pesticides used at schools, and land use patterns that place homes and industries too close together. She has a bachelor's degree in biology and a master's degree in public health.

**Jose Medina** is a 42 year resident of National City's Old Town Neighborhood, Chair of the Old Town Neighborhood Council, and a Board Member of the Environmental Health Coalition. Jose has been an activist for many issues including environmental justice. He has worked with allies to help repeal Proposition 23, help shut down the obsolete and dangerous "South Bay Power Plant" in Chula Vista, and help rezone his neighborhood back from mixed industrial to residential status in National City.

**Gabriel Solmer** is Legal Clinic Director at San Diego Coastkeeper where she leads Coastkeeper's independent legal intern program and coordinates the organization's legal docket. Gabe joined Coastkeeper in January 2004, and has been working on litigation, legislation, and policy issues. She earned her law degree at the University of San Diego, and joined the California Bar in December, 2003.

# EXHIBIT B



August 9, 2011

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

**RE: Bay Cleanup – Safe for wildlife, safe for people, SAVED for future generations**

Dear Regional Board Members:

Toxic sediments threaten the health and safety of the people and wildlife using San Diego Bay. Contaminated sediments need to be permanently removed from the Bay so they don't threaten future generations. We want a Bay that is safe for swimming and fishing, and safe for the wildlife that depends on it. A protective and scientifically defensible cleanup is necessary to protect human health, fish, wildlife, and all the beneficial uses of the Bay.

I ask that you carefully consider all the evidence before you and adopt a cleanup plan that holds the responsible parties accountable. For too long the community has lived with the toxic legacy of others' actions. We need you to adopt a protective cleanup plan with an effective monitoring plan that will prove the cleanup is working.

A protective and effective cleanup plan is important to me because...

Thank you,