



California Regional Water Quality Control Board San Diego Region



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**TO: DESIGNATED PARTIES, TENTATIVE ORDER NO. R9-2011-0001
(See Enclosed List) Via E-Mail and U.S. Mail**

FROM: Grant Destache
Chair and Presiding Officer for Prehearing Proceedings
SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD

DATE: October 28, 2011

**SUBJECT: SAN DIEGO BAY SHIPYARD SEDIMENT CLEANUP, TENTATIVE CLEANUP
AND ABATEMENT ORDER NO. R9-2011-0001 AND DRAFT TECHNICAL
REPORT; ADDITIONAL RULINGS ON MOTIONS AND OBJECTIONS**

**RESPONSES TO OBJECTIONS/REQUESTS FOR CLARIFICATION REGARDING
SEPTEMBER 16, 2011, NOTICE OF PUBLIC HEARING AND RULINGS ON MOTIONS**

1. Use of Videotaped Testimony. In its October 19, 2011, Comments on the September 16, 2011, Notice of Public Hearing (NOPH), National Steel and Shipbuilding Company (NASSCO) requests that the Chair determine that interested persons must appear in person and that the board will not permit unsworn videotaped testimony. NASSCO, joined by Star and Crescent Boat Company (Star and Crescent), and BAE Systems San Diego Ship Repair, Inc. (BAE) submitted separate motions requesting the same relief. Use of videotaped statements, whether testimony or policy statements, is governed by the same provision in the Administrative Procedures Act as telephonic participation (see Gov. Code § 11440.30) and will not be allowed over objection by any party. Although no party has offered to submit videotaped statements, NASSCO, BAE and Star and Crescent have timely objected to the use of videotaped statements. Therefore, no videotaped statements will be allowed. Interested persons may submit non-evidentiary policy statements in person. It is also permissible for interested persons who are unable to personally attend to designate another individual to read a written statement on their behalf, as long as the written statement does not seek to introduce any evidence (e.g., photographs, eye witness testimony, monitoring data). (See NOPH, p. 5.) Addressing this comment resolves NASSCO's and BAE's motions and I will not rule upon them separately.
2. Certified Translation Services. In its October 19, 2011, Comments on the NOPH, NASSCO requests that the San Diego Water Board provide and allow only certified translation services. NASSCO, joined by Star and Crescent, filed a motion in limine requesting this same relief. NASSCO also expressed concern in its motion that other designated parties might seek to introduce unsworn videotaped statements that were improperly translated. The San Diego Water Board committed in the Notice of Public

Hearing to provide Spanish language translation services on November 9, 2011, and offered to provide additional language assistance upon request. The San Diego Water Board's Spanish language translator is court-certified. Moreover, since no videotaped statements will be permitted, NASSCO's concern about introduction of improperly translated video statements is moot. Addressing NASSCO's comment resolves NASSCO's motion on the issue of translation services and I will not rule upon it separately.

3. Incorporation by Reference. NASSCO requests clarification that documents that were incorporated by reference in timely written submissions are deemed part of the record in their entirety even if only excerpts of those documents were submitted. To the extent Designated Parties including the Cleanup Team referenced and intended to incorporate San Diego Water Board or State Water Board Plans and/or Policies, complete copies will be included in the record. Other documents proposed for incorporation by reference will only be included in the record as submitted, whether in excerpt or in their entirety.

4. Identification of Documents That Must Be Submitted in Advance of the Hearing. NASSCO requests clarification in its October 19, 2011, Comments as to what documents must be submitted in advance of the hearing. Whether or not a designated party will use the San Diego Water Board's computer equipment or provide its own, copies of PowerPoint or other electronic presentations a party intends to use during the hearing must be submitted to the San Diego Water Board and simultaneously provided to all other Designated Parties on or before 5 p.m. on November 4, 2011. The purpose of requiring these submissions in advance is to allow the Advisory Team and other parties to have an opportunity to object if an electronic presentation go beyond summaries of timely-submitted documents and contain any new testimony or evidence. Wherever feasible, the San Diego Water Board prefers to reject improperly submitted evidence before it is presented to the board. The Designated Parties are not precluded from making minor changes to their presentations after the November 4 deadline as long as no new substantive material is added.

NASSCO also asks for confirmation 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.*" (NASSCO Comments on Notice of Public Hearing, p. 10.) Written submissions by Designated Parties are limited to those specifically identified in the hearing notice. The deadlines for written testimony have passed and the NOPH precludes oral testimony that goes beyond the scope of previously submitted written testimony. (NOPH, p. 5.) Designated Parties are not required to prepare and submit written opening statements nor to submit written copies of oral testimony offered at the hearing. Designated Parties may introduce exhibits and demonstratives without prior submission as long as these documents or depictions do not include new substantive material beyond the scope of timely-submitted evidence.

1. Ceding time to other Designated Parties. NASSCO and BAE initially request that all Designated Parties have unrestricted ability to cede time to one another. Both NASSCO and BAE appear to assert a *right* to cede time among Designated Parties when in fact no such *right* exists. As Chair, I have allotted blocks of time to each Designated Party. Any allowance for one party to cede time to another is entirely within the discretion of the Chair in management of the orderly conduct of the proceeding. (See Cal. Code Regs., tit. 23, § 648.5(a).)

In its initial comments (October 13, 2011), the Cleanup Team supported allowing a Designated Party with a history of recent active participation in the proceeding such as Star & Crescent to cede time to NASSCO and/or BAE, but would oppose allowing a party like SDPTA (BP or Chevron) that has not participated actively in recent years to cede time. The Cleanup Team initially recommended that any time ceded should be "discounted" by 50%, such that Star & Crescent would have to give up an hour to give NASSCO 30 minutes.

In its October 19 submittal, the Cleanup Team withdrew its proposal for discounting ceded time and stated that it has reached agreement with NASSCO and BAE that neither NASSCO nor BAE would request time from SDPTA, BP or Chevron. The Cleanup Team now agrees with BAE and NASSCO that Designated Parties other than SDPTA, BP or Chevron, should be allowed to freely cede time. The Environmental Parties also oppose allowing SDPTA, BP or Chevron to cede time, but do not appear to object to other parties reaching agreements to cede time, although they support some form of discounting. Campbell Industries supports allowing Designated Parties to cede time without restriction indicating that BAE and Campbell should be permitted to combine presentations.

While the September 16, 2011, Notice of Public Hearing encourages consolidation of presentations "*to save hearing time and/or avoid duplication,*" I encourage such consolidation be accomplished by the Designated Parties while restraining themselves to each party's allotted block of time. It remains my hope that some of the parties who have not actively participated in recent years may not use all of the time allotted to them unless they find it necessary to do so, thus saving overall hearing time for this proceeding, for which four hearing days have already been set aside.

After considering the many comments on this issue, in lieu of considering requests to cede time, I will consider further modifications to the hearing procedures to allow Designated Parties to combine all or part of their allotted blocks of time to encourage efficiency and to avoid repetitiveness. **Not later than 5 p.m. on November 3, 2011,** Designated Parties wishing to combine time to make a joint presentation shall provide the Advisory Team and all other Designated Parties by e-mail with the following information: which Designated Parties are joining the request, how much of each Designated Party's time they request to combine, and the general subject of the joint

presentation.¹ The Advisory Team will notify the Designated Parties by **November 8, 2011** whether the request is granted.

In addition, at the hearing, as Chair I will consider requests for more time based upon a demonstration of good cause. Any Designated Party requesting additional time must describe what additional testimony they wish to present and demonstrate how the additional time allotment will assist the Board in deciding the issues before it. More time than expected may be available at the hearing if some Designated Parties choose not to use their full time allotment. The Chair will consider time availability among other factors in ruling on requests for extra time.

5. Limiting NASSCO's Presentation Time to Two Hours Instead of Five Hours Violates NASSCO's Due Process Rights. In the context of general due process objections, NASSCO objects to the time limits imposed for presenting its case. The Designated Parties and NASSCO in particular are reminded that from the beginning of this proceeding, the San Diego Water Board has characterized it as a largely paper hearing and the parties have been on notice that there would be limited time available for presentations and examination of witnesses. For these reasons, the Designated Parties have had extensive opportunity to engage in written discovery and depositions, multiple opportunities to submit unlimited comments, evidence and argument, and have been allowed to submit hearing briefs. Parties will be permitted to combine their allotted time to consolidate presentations presumably to make them more effective, efficient and less repetitive. In addition, Designated Parties will have the opportunity to cross-examine adverse witnesses and may request more time from the Chair in which to make their presentations upon a showing of good cause (see item 4, above). Designated Parties also have the right to seek administrative and judicial review of any final decision the San Diego Water Board may take in this matter. The procedures provide ample due process not only to NASSCO but to all Designated Parties in this proceeding.

Rulings on remaining motions in limine to preclude mention of Designated Parties' financial condition, to exclude all references to confidential settlement and mediation discussions and to exclude expert opinions offered by non-designated or unqualified experts will follow at a later date.

¹ For example, Parties A, B and C may request to make a joint presentation of one hour, of which 30, 20 and 10 minutes would be "charged" against the time allotments of Parties A, B and C, respectively.

BY ELECTRONIC MAIL

The above-described document was transmitted via electronic mail and U.S. mail to the parties noted below on October 26, 2011.

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