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File No. 030815-0000

VIA EXPRESS MAIL

February 17, 2006

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

Re: Tentative Cleanup and Abatement Order No. R9-2005-0126
Delay in Production of Technical Report

Dear Regional Board Advisory Team:

National Steel and Shipbuilding Company ("NASSCO") appreciates the Presiding Officer issuing the First Amended Order of Proceedings containing his rulings on the matters addressed at the 2nd Pre-Hearing Conference held on December 6, 2005 at the San Diego Regional Water Quality Control Board ("Regional Board"), and believes that establishing the procedural framework will promote a fair and reasonable adjudication. NASSCO 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 ("Tentative CAO"). The substantial delay in the issuance of the Technical Report raises a legitimate question whether, once issued, the Technical Report can be viewed as anything other than a post-hoc rationalization of a preordained policy decision by Regional Board staff to issue the Tentative CAO directing cleanup of shipyard sediments.

As you know, in pursuing prosecutorial actions like the Tentative CAO, the Regional Board must meet the standard set forth by the California Supreme Court in *Topanga v. County of Los Angeles*, in particular, its requirement that agencies support their conclusions with findings that "facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions." *Topanga v. County of Los Angeles*, 11 Cal.3d 506, 514 (1974). *Topanga* and a well-established body of law subsequent to *Topanga* make clear that the Cleanup Team cannot skip any of the three steps, nor can it complete any of them in an inadequate manner. NASSCO and the other named parties have previously pointed out[1] that the Regional

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[1] Immediately following the issuance of the Tentative CAO, NASSCO submitted its first written objection to the Regional Board's failure to comply with *Topanga* by issuing the Tentative CAO and scheduling a public workshop and public hearing on these matters without having issued a staff report or technical report in advance.

Board staff's failure to produce a stand-alone technical report with its findings *prior* to issuing the Tentative CAO raises serious concerns about whether the Regional Board has complied with the due process mandates of *Topanga*.

Moreover, the Regional Board's substantial *delay* in issuing the Technical Report creates a similar, but distinct set of concerns with respect to fundamental principles of administrative adjudication. Under the Regional Board's direction, NASSCO conducted the required scientific assessment, and, in September 2003, produced a comprehensive Sediment Investigation Report, which concluded that monitored natural attenuation was the appropriate remedy for the site. Inexplicably, in the absence of any findings, technical report or evidence, and in direct contradiction with the conclusions of the Sediment Investigation Report, the Regional Board issued the Tentative CAO on April 29, 2005.

In the ten months that have elapsed since the issuance of the Tentative CAO (and nine months since the Regional Board ordered staff to produce the Technical Report), there have been numerous agenda items, procedural orders, and pre-hearing conferences relating to the procedural aspects of this matter, but the Cleanup Team has yet to issue the Technical Report revealing the evidence and substantive findings purporting to support the issuance of the Tentative CAO. In numerous contexts, California courts have upheld the principle articulated by the United States Supreme Court that an agency's after-the-fact explanation of its action "will, to some extent, be a 'post hoc rationalization' and thus must be viewed critically." *Citizens to Preserve Overton Park, Inc., v. Volpe*, 401 U.S. 402, 420 (1971).[2] The Regional Board's delayed issuance of the Technical Report should be viewed in a particularly critical light given that the Regional Board Executive Officer admitted during *voir dire* at the first pre-hearing conference that he believed cleanup should be required, regardless of the conclusions of any yet-to-be-prepared technical analysis by the Cleanup Team.

NASSCO acknowledges the Regional Board's discretion to pursue those policies and goals that it deems important consistent with sound scientific evidence and analysis. However, it is not permitted to create and pursue policy via an enforcement action, and then craft the scientific justification or the environmental necessity for that policy after-the-fact.

If the Regional Board staff had evidence to support the findings and conclusions at the time the Tentative CAO was issued, it surely would have taken less than ten months to provide that evidence to the parties named in the Tentative CAO, particularly after being ordered to do so

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[2] *See, e.g.*, California Environmental Quality Act - *Laurel Heights v. Regents of U.C.* (1988) 47 Cal.3d 376, 394 (environmental review cannot be conducted after agency action to approve the project); California Coastal Act - *Sierra Club v. Coastal Commission* (2003) 133 Cal.Rptr.2d 182, 197 ("post hoc rationalizations arrived at only after an agency has made up its mind . . . do not satisfy *Topanga's* requirement that the agency reveal the analytical route actually taken."); City Approvals – *Horwitz v. City of Los Angeles* (2004) 124 Cal.App.4th 1344, 1350, FN3 ("[t]he record does not include a definition of 'in-line', and it appears to us to be little more than the City's post-hoc rationalization for its approval...."); Public Utilities Commission – *So. Cal. Edison Co. v. PUC* (2000) 85 Cal.App.4th 1086, 1111 (court could not consider PUC's after-the-fact explanation for its action); Board of Police Commissioners – *Bam, Inc. v. Board of Police Commissioners* (1992) 7 Cal.App.4th 1343, 1346 ("Findings are not supposed to be a post hoc rationalization for a decision already made.").

more than nine months ago by the Regional Board members. By first reaching a decision to issue a $100 million order, with conclusions contrary to the study ordered and supervised by the Regional Board staff, and then spending close to a year after-the-fact attempting to compile a document to support that decision, there is, at a minimum, a pervasive appearance of a "post hoc rationalization[] arrived at only after an agency has made up its mind . . . [which] do[es] not satisfy *Topanga's* requirement that the agency reveal the analytical route actually taken." Sierra Club v. Coastal Commission, 133 Cal.Rptr.2d 182, 197 (2003).

NASSCO has a difficult time understanding what new evidence the Cleanup Team has been examining for the past ten months, or what new rationale it is considering to substantiate the conclusions drawn in the Tentative CAO, that were not already understood by Regional Board staff when it issued the Tentative CAO ten months ago, and more than two-and-a-half years after the Sediment Investigation Report was submitted to the Board. If in fact there is significant new evidence or argument supporting the issuance of the Tentative CAO that did not exist ten months ago, then this is further proof that the Tentative CAO was originally issued as a policy instrument without a sound evidentiary or rational basis, in direct contravention of *Topanga's* requirements.

The Cleanup Team should have been in possession of any alleged evidence it believed could justify the Tentative CAO at least since it received the Sediment Investigation Report more than 30 months ago. If a Technical Report is ultimately issued by the Cleanup Team after this considerable delay, the Regional Board members, and any other fact-finder, must view this report with skepticism, and examine it critically to ensure that it is not merely a post-hoc rationalization of a predetermined course of action on the part of the Regional Board staff, and, indeed, to ensure that the report is not merely an attempt by staff to "reverse-engineer" an explanation for a policy-driven decision. Any order based on such an attempt would be legally deficient and in clear violation of *Topanga*.

Respectfully submitted,

David L. Mulliken
of LATHAM & WATKINS LLP

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