

FIRM / AFFILIATE OFFICES

Boston	New York
Brussels	Northern Virginia
Chicago	Orange County
Frankfurt	Paris
Hamburg	San Diego
Hong Kong	San Francisco
London	Shanghai
Los Angeles	Silicon Valley
Milan	Singapore
Moscow	Tokyo
New Jersey	Washington, D.C.

March 31, 2006

San Diego Regional Water Quality Control Board
Attn: John Minan, Presiding Officer and Chairman
9174 Sky Park Court
Suite 100
San Diego, CA 92123

Regional Board Code: MGMT:03:0284.05mccam

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

Dear Chairman Minan:

National Steel and Shipbuilding Company (“NASSCO”) submitted a letter dated February 17, 2006, to the Advisory Team of the San Diego Regional Water Quality Control Board (“Regional Board”), expressing its concern with the prolonged and continuing delay in the issuance of a Technical Report. NASSCO submitted copies of this letter to each Board member of the Regional Board. In a letter from the Executive Officer (a member of the Advisory Team), dated March 2, 2006, NASSCO was informed that its February 17th letter had been received but is being withheld from the Board members for an indefinite period of time. NASSCO’s letter did not violate rules governing *ex parte* communications and should not have been withheld from the Board members.

Nearly one year has passed since the Regional Board staff issued the Tentative Cleanup and Abatement Order (“Tentative CAO” or “Order”), and nearly nine months have passed since the Regional Board ordered the staff to produce a Technical Report. This substantial delay in the issuance of the Technical Report is compelling evidence that the Regional Board staff did not possess evidence to support the issuance of the Tentative CAO. The delay also signals that staff has spent nearly a year trying to provide some reasonable basis for the issuance of the Tentative CAO. Given the substantial delay, the Technical Report, when issued, cannot be viewed as anything other than an after-the-fact rationalization of a preordained policy decision by Regional Board staff to issue an order directing cleanup of shipyard sediments. In various 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 “be a ‘post hoc rationalization’ and thus must be viewed critically.”¹

¹ *Citizens to Preserve Overton Park, Inc., v. Volpe*, 401 U.S. 402, 420 (1971).

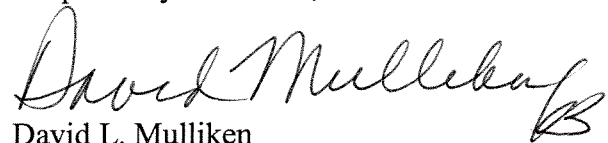
LATHAM & WATKINS LLP

NASSCO submitted its February 17th letter directly to the Regional Board members because, as the adjudicative body in these proceedings, they should be aware of the significant risk that the Technical Report is nothing more than a “post-hoc rationalization” for the issuance of the Tentative CAO. The substantial delay in the issuance of the Technical Report is strong evidence that the Regional Board staff did not have, and still does not have, a sound basis for the issuance of the Order. The Regional Board members need to understand that staff cannot make a decision that is not supported by facts or science, and then later try to reverse-engineer a justification for its decision. At this juncture, the Regional Board members may wish to inquire with the Cleanup Team as to the reasons for the delay, and as to exactly what support the Regional Board staff did have that led it to issue the Tentative CAO nearly one year ago. Previous orders that have been issued to govern these proceedings limit communications between the Advisory Team and any party, including the Cleanup Team; hence, these are inquiries that cannot be made by the Advisory Team.

The positions presented in NASSCO’s February 17th letter regarding the Cleanup Team’s prolonged delay in the issuance of the Technical Report go to the very crux of NASSCO’s position in these proceedings: whether the Regional Board staff ever had, or ever will have, a sound evidentiary basis upon which to issue the CAO. It is important that the Board members understand NASSCO’s position with respect to the Cleanup Team’s delay in the issuance of the Technical Report now, while the Cleanup Team’s delay persists, and not after the Technical Report is issued or whenever the “neutral” Advisory Team otherwise deems it to be appropriate.

The meaning and effect of the February 17th letter will be lost if it is not received by the Board members until after the release of the Technical Report. We therefore ask you to direct the Advisory Team to release NASSCO’s February 17th letter to you and the other Regional Board members.

Respectfully submitted,



David L. Mulliken
of LATHAM & WATKINS LLP

cc: See Attached E-Mail Service List

E-Mail Service List

NASSCO

Kelly Richardson, kelly.richardson@lw.com
Lane McVey, lmcvey@nassco.com
T. Michael Chee, mchee@nassco.com

BAE Systems

Shaun Halvax, Sandor.Halvax@baesystems.com
Christian Volz, cvolz@mckennalong.com

Port of San Diego

David Merk, dmerk@portofsandiego.org
jmathison@cox.net
wbotha@daley-heft.com

Navy

David Silverstein, david.silverstein@navy.mil

City of San Diego

Tim Miller, millert@sandiego.gov

SDG&E Sempra Energy

Vincent Gonzalez, vgonzales@sempra.com

Marine Construction and Design Company

H. Allen Fernstrom, afernstrom@marcoseattle.com

Chevron USA Inc.

Christopher J. McNevin, chrismcnevin@pillsburylaw.com
Brian Wall, bwall@chevrontexaco.com

BP West Coast Products LLC

Jim Dragna, jim.dragna@bingham.com
Mike McDonough, michael.mcdonough@bingham.com

San Diego Port Tenants Association

Tom Fetter, tom@tfetterco.com

Regional Board Advisory Team

Michael P. McCann, mmccann@waterboards.ca.gov
John Robertus, jrobertus@waterboards.ca.gov

Regional Board Cleanup Team

David Barker, dbarker@waterboards.ca.gov

San Diego Baykeeper

Marco Gonzalez, marco@coastlawgroup.com

EHC

Laura Hunter, LauraH@environmentalhealth.org