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June 24, 2010

OUR FILE NO. 367420-3

David A. King, Esq.
Presiding Officer and Chairman
California Regional Water Quality Control Board
San Diego Region
9174 Sky Park Court, Ste 100
San Diego CA 92123

Re: ***Shipyard Sediment Site Cleanup Project and Tentative Cleanup and Abatement Order No. R9-2010-0002***
Response to June 17th Inquiries

Dear Mr. King:

In your June 17, 2010 letter, you request the Designated Parties (the "Parties") address two issues. First, you ask the Parties to address the appropriate period of time the February 18, 2010 Final Discovery Plan (the "Plan") should be extended. Second, you ask the Parties to comment upon the Cleanup Team's stated expectation that the Mediation Parties will agree to fund the proposed cleanup while they resolve liability and allocation issues among them. On behalf of the Parties listed below as signatories to this letter, the Parties respond to your inquiries as follows:

Final Discovery Plan Comments

The Parties agree with the Cleanup Team that the discovery deadlines in the Plan should be extended, and that such an extension would not prejudice any party to these proceedings. But the Parties believe that the revised discovery deadlines should be based on defined benchmarks in the California Environmental Quality Act ("CEQA") process for the final Cleanup and Abatement Order ("CAO"), rather than a fixed period of 120 days. Tying discovery deadlines to the CEQA process is logical because the "project" will be better defined and explained through the CEQA process and in the resulting Environmental Impact Report ("EIR"). The Parties will not know whether or to what extent they are agreeable to the final CAO (and therefore, can waive discovery) until after the CEQA process has been completed, including the submission of public comments and responses by the Regional Board and an analysis of proposed mitigation measures. It therefore makes sense for the discovery period to coincide with the CEQA process, so that the parties may take any discovery they believe is necessary as a result of the CEQA process, or waive discovery entirely. Doing so would also reduce the likelihood that further discovery extensions would be sought from the Presiding Officer as the CEQA process plays out, and avoid a scenario where parties may be forced to propound protective discovery, which ultimately proves to be unnecessary, as a result of uncertainty caused by the pending CEQA process.

Providing for the discovery to coincide with the CEQA process would not delay the Regional Board's review and approval of a CAO or the implementation of site remediation. As noted by the Cleanup Team, the Regional Board will not be able to consider adoption of a CAO until after the CEQA process has been completed, and the CEQA process "will control the time when a public hearing on the merits of the CAO can take place . . . ." Motion to Extend Discovery Deadlines at p. 6, (*citing Fort Mojave Indian Tribe v. Cal. Dept. of Health Srvcs.*, 38 Cal. App. 4th 1574, 1601 (1995)). Further, the Cleanup Team has indicated that an EIR will not be ready for certification by the Regional Board for at least 280 days, or approximately April 2011, so there is no need for discovery to be completed by August 23, 2010 (the original date in the February 18, 2010), or within 120 days thereof.

Accordingly, the Parties request that the remaining discovery deadlines be set to match the following CEQA process benchmarks:

Discovery Deadline	CEQA Process Benchmark
Expert and non-expert witness designations on cleanup levels and liability issues due at 5 p.m.	Close of public comment on the Draft EIR
Expert counter-designations due at 5 p.m.	15 days after close of public comment on the Draft EIR
Close of discovery at 5 p.m.	30 days prior to public hearing to certify the EIR, and adopt the CAO and DTR

In the alternative, should the Presiding Officer disagree with this approach, the Parties request that the discovery deadlines be extended by at least 280 days, to allow more time to complete the CEQA process, and so that the close of discovery would not occur in the midst of year-end holidays, as it would if a 120-day extension were granted (which would lead to a close of discovery on December 21, 2010). None of the CEQA consultants interviewed anticipated the CEQA process taking less than 280 days to conclude.

Commitment to Fund the Remediation

As you know, the Parties collectively have spent thousands of hours collecting and analyzing data that ultimately will be contained in the final CAO and corresponding Draft Technical Report ("DTR"). While the initial CAO and DTR were issued in December 2009, considerable supplemental effort has been required to assist the Cleanup Team in preparing documents that can meet the rigors and scrutiny of public review.

At the request of the Cleanup Team, the Parties began several months ago to search for qualified and experienced CEQA consultants to perform and evaluate remedial alternatives and biological impacts in an EIR. The process of identifying and interviewing experienced non-conflicted consultants took months to accomplish, as the Parties cast a wide conflict shadow that was difficult to overcome. The Cleanup Team has, however, informed the Parties that later this week, CEQA consultants likely will be chosen. The Parties have already committed to fund the CEQA process, and also are covering the oversight costs of Regional Board staff in connection with the site cleanup.

As all who have participated in a CEQA review know, it takes a substantial amount of time to prepare and shepherd to conclusion an EIR. The CEQA consultants interviewed by the Cleanup Team and the Parties estimate that it will take at least 40 weeks to obtain final approval of the EIR. Remediation of the NASSCO and BAE shipyards could commence shortly thereafter, subject to completion of the necessary permitting processes.

The Parties as well as two other entities, including the San Diego Unified Port District, are now focusing on the federal lawsuit filed in October 2009. The Parties are beginning discovery in the federal lawsuit and have committed to completing discovery and the mediation process with mediator Tim Gallagher, Esq. at or about when the CEQA process is expected to conclude.

A number of the Parties, including the United States Navy and the City of San Diego, given statutory and other requirements. are unable to commit at present to an allocation of responsibility for remediation costs. The Navy and City's allocation dilemma leads to a domino effect on the other Parties, causing an allocation agreement to be presently unobtainable, and it is not feasible or realistic to expect only some of the Parties to fully fund the remediation before an allocation agreement is reached.

Specifically, with regard to the Navy, the Assistant United States Attorney representing the Department of the Navy in this matter cannot "agree to fund the proposed cleanup" or otherwise make a binding commitment to admit liability for a portion of the cost of the cleanup as mentioned by the Presiding Officer in his June 17, 2010 Order. As an initial matter, the ability of any federal officer to commit the expenditure of funds is strictly limited. The Antideficiency Act prohibits "[m]aking or authorizing an expenditure from, or creating or authorizing an obligation under, any appropriation or fund in excess of the amount available in the appropriation or fund unless authorized by law" as well as "[i]nvolving the government in any obligation to pay money before funds have been appropriated for that purpose, unless otherwise allowed by law." 31 U.S.C. § 1341(a)(1)(A),(B). An officer or employee who violates the Antideficiency Act "shall be subject to appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office." 31 U.S.C. §§ 1349(a), 1518. In addition, an officer or employee who "knowingly and willfully" violates any of the three provisions cited above "shall be fined not more than $5,000, imprisoned for not more than 2 years, or both." 31 U.S.C. §§ 1350, 1519.

The question of whether the Navy is responsible for a proportionate share of the cleanup cost is pending in the district court litigation. City of San Diego v. National Steel and Shipbuilding Company et al., 09CV2275. Within the context of that litigation and the mediation which has been under way for several months, the Navy anticipates that an allocation will be made and it is likely that the Navy will agree to a settlement of its responsibility by agreeing to contribute to the cost of the proposed cleanup. However, there are significant limitations on the authority of counsel to enter into a compromise settlement.

Attorneys for the United States cannot legally make any commitments to expend federal funds in the settlement of litigation without obtaining the approval of appropriate officials within the Department of Justice and the concurrence of the appropriate officials within the client agency. Control of litigation on behalf of the United States, including settlement authority, is vested in the Attorney General of the United States. In actions against the Department of the Navy, the Secretary of the Navy has authority to concur in or consent to settlement on behalf of that agency. The Attorney General has delegated settlement authority to other officials within the Department of Justice, including United States Attorneys. See 28 C.F.R. §§ 0.160 et seq. However, for amounts in excess of $2,000,000.00, the approval of the Deputy Attorney General or Associate Attorney General (the two most senior officials below the Attorney General) must be obtained.

Counsel for the United States expects that any allocated share of the cost of the proposed cleanup will very likely require approval by the Deputy Attorney General or Associate Attorney General. The process of obtaining such approval involves several levels of review within the Department and will require extensive analysis and briefing based upon a full investigation of the claims and defenses raised in the litigation. Concurrence from the highest levels in the Department of the Navy will also be required. Due to these circumstances, counsel cannot commit the United States to an agreement to fund even a portion of the proposed cleanup at this time.

As to the City, it cannot commit to agree to fund a proposed cleanup at this time. First, prior to entering into any such agreement, the City must follow very strict municipal law procedures, beginning with City Council approval. It is not expected that City Council approval to fund the proposed cleanup can be obtained for an Order that is not yet final. Second, the City believes that there are multiple factual subject areas directly impacting the City's liability for which the City needs to conduct discovery in the federal action.

As seen from the Navy and City examples, several of the Parties indicate that limited discovery will greatly assist them in gathering the data and information required to determine allocation issues. After gathering the required information, the Navy, City and the other parties will be in much more knowledgeable positions than presently exists enabling them to fully evaluate their respective allocation positions. Moreover, it is clear that discovery involving the Port, who has

not been participating in the mediation for months, also will be needed before an allocation can be reached that includes all responsible parties.

While the Parties cannot now commit to fund the proposed cleanup until they resolve liability and allocation issues for the reasons cited above, the Parties are committed to reaching an agreed upon allocation by the time the CEQA process is concluded and the Regional Board has approved the CAO. Furthermore, the Parties anticipate that funding should be available at that time so that the remediation can commence shortly after the Regional Board approves the final CAO.

We trust that our letter fully addresses the issues you raise. If, however, you feel you require additional information from the undersigned, please let us know and we will endeavor to provide you with what you need.

Respectfully submitted,

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