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File No. 048876-0002

February 24, 2012

VIA EMAIL AND U.S. MAIL

Frank Melbourn
San Diego Regional Water Quality Control Board
9174 Sky Park Court, Suite 100
San Diego, California 92123-4340

Re: San Diego Shipyard Sediment Site – Notice of Public Hearing for Tentative Cleanup and Abatement Order No. R9-2012-0024 and Tentative Resolution No. R9-2012-0025

Dear Mr. Melbourn:

Designated Party National Steel and Shipbuilding Company (“NASSCO”) submits the following comments regarding the revised Tentative Cleanup and Abatement Order No. R9-2012-0024 (“CAO”) and Tentative Resolution No. R9-2012-0025 (“EIR”).¹

A. The Regional Board Should Not Delete The Language Indicating That Cleanup Of The Remedial Footprint Will Restore Any Injury, Destruction, Or Loss Of Natural Resources

In the revised order, the panel proposes deleting the Regional Board staff’s finding that “[c]leanup of the remedial footprint will restore any injury, destruction, or loss of natural resources;” however, there has been no finding to the contrary, nor is there substantial evidence

¹ Pursuant to the Presiding Officer’s instruction in the Notice of Public Hearing, NASSCO’s comments herein address the revisions to the Tentative CAO, Draft Technical Report, and Final Environmental Impact Report issued on February 13, 2012; however, NASSCO reiterates and preserves all comments and arguments previously made in these proceedings. In the event that the San Diego Regional Water Quality Control Board (the “Regional Board”) proposes any material changes to the panel’s recommendation, NASSCO also reserves its right to complete the administrative process delineated in the Final Discovery Plan with respect to such material changes, including rights to conduct discovery, to cross-examine witnesses, and to submit rebuttal evidence, comments, and initial and final briefs, subject to revised deadlines to be set by the Regional Board or its designated Presiding Officer.

(or *any* evidence) in the record indicating that cleanup of the remedial footprint will fail to restore any such alleged impairments to natural resources. Accordingly, the Cleanup Team's finding should not be disturbed.

B. There Is No Evidence Indicating That Sediments At NASSCO Are Causing The Bay's Narrative Water Quality Objective For Toxicity Not To Be Attained

In the revised order, the panel proposes adding a finding that site pollutants are "causing the Bay's narrative water quality objective for toxicity to not be attained;" however, there is no evidence indicating that sediments at NASSCO are toxic. To the contrary, the record is clear that sediments at NASSCO generally meet reference conditions with respect to toxicity.

First, not a single sediment sampling location at NASSCO had "high" toxicity, and the majority of toxicity tests met background reference conditions for *every* station. *See* DTR, Table 18-9.

Second, the Regional Board previously used multiple lines of evidence under the "triad" approach for determining exceedances of toxicity to aquatic life in its 303(d) listing process. *See* Draft Technical Report ("DTR"), Appendix 12. Applying the triad approach to the NASSCO site, the CAO concluded that only a single station at NASSCO – NA19 – was likely impaired for the aquatic life beneficial use. *See* DTR, Table 18-1. Even assuming that station NA19 is likely impaired (which NASSCO disputes), the water body segment at NASSCO would still not be listed as impaired for toxicity under the 303(d) policy. As NASSCO presented at the hearing in November, the 303(d) policy allows for 3-6 exceedances before a water body segment is deemed to be impaired; however, the Cleanup Team alleged only one exceedance at the NASSCO site.

Moreover, there is no evidence that site-related chemicals (as compared to physical disturbances or other factors) are causing any apparent benthic effects, and there is overwhelming evidence in the record that there is no correlation between concentrations of site chemicals and toxicity.

Finally, based on the direct measurements of the health of aquatic life at NASSCO, sediment conditions are not "causing the Bay's narrative water quality objective for toxicity to not be attained." All stations at NASSCO (52 out of 52 tests) met reference conditions for benthic community health according to the Cleanup Team. *See* DTR, Table 18-13, and NASSCO opening presentation at 10.

Accordingly, the revised finding is not supported by the record, and should be rejected.

C. The Regional Board's Oversight Costs Should Be Addressed Separately From The Adoption Of The CAO And EIR

Pursuant to revised Finding 41 of the CAO, the Regional Board now seeks to recover an array of oversight costs in excess of \$1,885,848; however, these claims were added to the Tentative CAO late in the process—without providing the Designated Parties an opportunity to brief the issue—and have not been adequately supported by the Cleanup Team to date. For

example, while the Regional Board staff has provided some invoices supporting its claims, the documentation provided does not satisfy the requirements of sections 13304 and 13365, as described below. Moreover, the Regional Board seeks to recover substantial costs related to the digitization and indexing of the voluminous administrative record, even though many of the documents included were not relevant to assessing the impacts to beneficial uses at the site (or related to the site at all), and NASSCO previously objected to such costs as unreasonable before they were incurred.

Further, certain of the claims for oversight costs may be time-barred, and the Regional Board staff may otherwise be estopped from recovering the oversight costs due to failure to comply with applicable processes for cost-recovery, including semi-annual billing. The agency's invoices date back as much as a decade and many of them were never properly issued.

In order to ensure that the parties have a full and fair opportunity to vet the oversight costs claimed by the Regional Board, NASSCO respectfully requests that the Regional Board (1) revise Finding 41 to indicate only that the Regional Board intends to seek oversight costs, and (2) hold a separate hearing to determine the extent to which the Regional Board has incurred recoverable oversight costs, including the specific amounts that the Regional Board seeks to recover. If the costs are found to meet the applicable substantive and procedural legal standards for recovery, NASSCO agrees to fund its pro rata share.

1. The Regional Board Must Specify The Oversight Costs For Which It Seeks Recovery, And Demonstrate That Such Expenditures Were Actually Incurred And Reasonable

To recover oversight costs, the Regional Board must provide sufficient documentation that the claimed costs were "*reasonable* costs actually incurred in cleaning up the waste, abating the effects of the waste, supervising cleanup or abatement activities, or taking other remedial action," as required under Water Code sections 13304 and 13365 (emphasis added). Under the plain terms of Water Code sections 13304 and 13365, the Regional Board may not recover any amount without first providing the bill, and a daily detail of work performed and time spent by each employee and contractor employee sufficient to prove that the expenditure was "reasonable." *Id.* Section 13365 further provides that such invoices must be "issued not less than semi-annually," and that the agency must provide copies of time records and other materials supporting each invoice within thirty days, upon request of the discharger.

While the Regional Board staff has provided some invoices supporting its claims, the documentation provided to date is incomplete in many respects, and does not satisfy the requirements of sections 13304 and 13365. Specifically, many of the invoices provided do not permit an evaluation of whether the listed costs were reasonably incurred because they do not contain any description of what tasks were performed. For example, the Cleanup Team, to support its claims for unreimbursed staff oversight costs, provided a table indicating the number of hours each staff member worked each fiscal year, and the corresponding hourly rate, but no description of the tasks performed. Indeed, there is no evidence that the time was even spent on this matter or another site. Moreover, while the Cleanup Team cites "budget constraints" as the reason why these costs were not claimed previously, it provides no explanation indicating why

budget constraints prevented it from making a timely claim for these costs. Likewise, certain OEHHA invoices provided by the Cleanup Team also fail to provide any description of the work performed, referring only to a State Water Resources Control Board Work Transmittal Form that does not appear to have been included in the Cleanup Team's supporting documentation.

2. Oversight Costs Related To Digitization Of The Administrative Record Are Not Reimbursable Under The California Water Code

NASSCO also objects to the Regional Board's recovery of costs relating to the digitization and indexing of the voluminous set of documents that it claims constitutes the administrative record. As NASSCO made clear when this expense was proposed *more than five years ago*, it is neither fair nor reasonable for the Regional Board to spend, and seek recovery of, enormous sums of money to scan and index *130 linear feet* of documents, most of which bear, at best, only a tangential relationship to the alleged impacts of shipyard sediments on beneficial uses of San Diego Bay. No party requested scanning of those documents, and there was no need to do so.

Under Water Code section 13304, recoverable costs are limited to those which are "reasonable." In the absence of any published court case or State Board opinion interpreting the meaning of "reasonable" recoverable costs under section 13304(c)(1), the term must be ascribed its plain meaning.²

NASSCO continues to believe that it is excessive and unreasonable to require the parties to pay to archive and index such a large, overbroad collection of documents, most of which have no bearing on whether site sediments adversely impact aquatic life, aquatic wildlife, or human health, or even relate to the site at all. This is especially true considering that the State Board and/or Regional Board already planned to undertake a pilot project to index many, or all, of the Regional Board's existing files. To the extent the indexing falls under the State Board's Document Imaging and Services Project -- a statewide imaging project not directly related to the shipyard matter -- such indexing would have taken place regardless of the Tentative CAO, and is not properly charged to the parties. Accordingly, NASSCO renews its objection to these costs, and will dispute any attempt by the Regional Board or State Board to seek reimbursement for costs associated with the Document Imaging Services Project.

² *People v. Johnson*, 28 Cal. 4th 240, 244 (2002) ("Because the statutory language is generally the most reliable indicator of [statutory] intent, we look first at the words themselves, giving them their usual and ordinary meaning and construing them in context."). Webster's Third New International Dictionary defines "reasonable" as "1 . . . b: being or remaining within the bounds of reason: not extreme: not excessive . . ." Likewise, Black's Law Dictionary, Ninth Edition (2009) defines "reasonable" as "1. fair, proper, or moderate under the circumstances."

3. Oversight Costs More Than Three Years Old Are Time-Barred

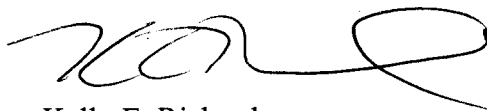
NASSCO is also concerned that a number of costs claimed by the Regional Board are time-barred. For the first time, the Regional Board seeks reimbursement for costs incurred as far back as 2002, without complying with the procedural requirements (including the issuance of timely semi-annual invoices) set forth in Water Code section 13365. Section 338 of the California Code of Civil Procedure provides a three year limitations period for cost recovery actions under Water Code section 13304; accordingly, NASSCO objects to costs over three years old as time-barred.

The amounts and backup information supporting the Regional Board's claimed oversight costs were not provided to the Designated Parties until November 2, 2011—only seven days before the hearing was scheduled to begin and after the deadline for comments on the Tentative CAO and Draft Technical Report had passed. Accordingly, to ensure that the Designated Parties have an opportunity to evaluate the Regional Board's claimed oversight costs without unnecessarily delaying the CAO process, NASSCO respectfully requests that the Regional Board hold a separate hearing to address the oversight costs claimed by the Regional Board.

Thank you in advance for your consideration of these important matters.

Respectfully submitted,

LATHAM & WATKINS LLP



Kelly E. Richardson
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 **February 24, 2012**, I served the following document described as:

**NASSCO'S COMMENTS ON TENTATIVE CLEANUP AND ABATEMENT
ORDER NO. R9-2012-0024 AND TENTATIVE RESOLUTION NO. R9-2012-0025**

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

BY ELECTRONIC MAIL

Upon written agreement by the parties, the above-described document was transmitted via electronic mail to the parties noted below on **February 24, 2012**.

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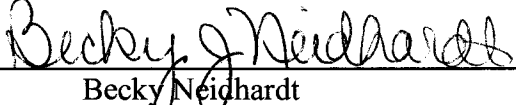
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I declare that I am employed in the office of a member of the Bar of, or permitted to practice before, this Court at whose direction the service was made and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **February 24, 2012**, at San Diego, California.



Becky Neidhardt