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Item 5

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Re: San Diego Regional Water Quality Control Board Cleanup and Abatement Order R9-2012-0024 – Response to City of San Diego’s 3-27-14 Correspondence

Dear Chairman Abarbanel, Regional Board Members, and Mr. Gibson:

On behalf of National Steel and Shipbuilding Company (“NASSCO”), this letter responds to correspondence from counsel for the City of San Diego (“City”), dated March 27,

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2014, regarding the San Diego Regional Water Quality Control Board's request for information concerning the status of the Shipyard Sediment Site under Cleanup and Abatement Order No. R9-2012-0024 ("Order").

As you know, NASSCO has been working cooperatively with the Regional Board for years to investigate and remediate the Shipyard Sediment Site ("Site"). Immediately following the adoption of the Order in March 2012, NASSCO undertook and funded *all* of the pre-remedial activities required to facilitate the South Yard cleanup and maintain the dischargers' compliance with the Order, at significant cost—including, without limitation, development of the required plans and progress reports, securing the necessary permits, development of the remedial design, and bidding and contracting the work. Further, in reliance on (i) settlement agreements with the United States Navy ("Navy") and the San Diego Unified Port District ("Port District"), (ii) anticipated funding from the City, and (iii) certain orders issued by the Court staying discovery in the pending federal litigation regarding allocation of cleanup costs under the Order, NASSCO commenced remediation of the South Yard of the Site on schedule in September 2013, and successfully completed the same on March 24, 2014¹.

Throughout the duration of the response, NASSCO has carried essentially all of the costs for investigation, oversight, and remediation, which have been substantial. By contrast, the City *did not contribute a dime towards the remediation of the Site until December 2013, more than a year and a half after the Order was issued, and months after cleanup was required to begin*. In addition, the City remains the lone party that refuses to accept any responsibility for cleanup of the South Yard, despite its discharges of pollutants directly to the site for more than a century. Every other party liable for the South Yard has accepted responsibility and committed to do its part to ensure cleanup. By contrast, the City is actively opposing the settlements entered by NASSCO and the Navy, and NASSCO and the Port District. The City also is the largest obstacle to moving forward with cleanup at the North, as it has refused to contribute any funding toward the North Yard remediation, refused to settle claims related to the North Yard, and also is actively opposing settlements reached by the majority of North parties that would result in funding cleanup of the remaining areas required by the Order.

The City argues that its opposition to the other South Parties' settlements and failure to timely fund the project should be disregarded because it has decided, belatedly, to pay a fraction of remedial costs subject to a reservation of rights. However, the City overlooks the fact that it refused to fund remedial costs until long after cleanup was underway, and still has not funded its full share of investigation and oversight costs. Moreover, the City's opposition to the other parties' settlements has, at best, delayed funding for the South Yard cleanup, requiring NASSCO to fund a grossly disproportionate share of the costs upfront -- more than \$16 million dollars -- in order to maintain compliance with the Order for all dischargers (including the City), and, at worst, threatens to derail such funding altogether. NASSCO had to front the Navy's and Port District's fair shares of the cleanup costs—the payment of which is contingent upon Court approval of the settlements—because of the City's opposition to the settlements. The City's

¹ Contractors remain on site and are in the process of demobilizing.

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recalcitrance should not be rewarded simply because NASSCO has acted responsibly to advance the cleanup in spite of the City's behavior.² The City ignores the fact that if NASSCO and the other South Parties had obstructed like the City, the remediation would never even have started. As a named discharger in the Order, the City is jointly and severally liable for its implementation, and should fully honor its obligations instead of impeding the other parties' earnest compliance efforts.

I. THE CITY IS THE LONE HOLD-OUT AT THE SOUTH YARD, AND THE LARGEST OBSTACLE TO CLEANUP IN THE NORTH YARD

A. Despite Bearing Significant Responsibility For The Site, The City Refused To Contribute Any Remediation Costs Until December 2013—Long After Remediation Was Required To Begin

The City is the *only south party* that has not paid, or agreed to pay, its share of investigation, oversight, and cleanup costs for the South Yard remediation.³ Moreover, although the Order was adopted in March 2012, and required significant planning, permitting, and design prior to the start of remediation, the City did not even *seek* authorization to fund *any* share of costs until September 24, 2013, and did not pay a dime towards remedial costs until December 11, 2013 (and then only subject to a reservation of rights to pursue further litigation to pay less than its mediated share). The City only reluctantly agreed to make belated and incomplete contributions after being apprised by the dischargers that continued obstruction would prevent the cleanup from moving forward and place the City at significant risk of noncompliance penalties, and after receiving a letter from this Water Board directing the City to cooperate. *See* Letter from David Gibson, Executive Officer to Counsel for Named Dischargers, dated September 18, 2013 ("My staff has reviewed the City of San Diego's meeting agendas going back to the time the CAO was adopted, and it appears that the City Council has not been briefed on, nor discussed the CAO in either open or closed session since its adoption. We can only assume the City and those of you who have not settled your differences over funding and implementing the CAO intend to violate its directives and are recalcitrant.").

² The City's letter argues that the Regional Board should take no action against the City simply because the cleanup has proceeded in the face of the City's recalcitrance. To the contrary, the City's actions have placed the project at risk on numerous occasions, and nearly caused the project to be aborted mid-stream, when the City's failure to make payments caused the remediation contractors to warn that they would be required to stop work unless the City finally paid its share of the costs incurred.

³ The City is a named discharger, and its discharge of raw, untreated sewage directly into the shipyards for over 40 years is a primary source of contamination in the sediments. In addition, as landlord and "steward" of the bay prior to approximately 1960, the City allowed its historic industrial tenants to pollute the bay for its own economic benefit, and, to this day, it continues to discharge contaminants to the site via its municipal separate storm sewer system, which have occurred for more than a century directly into the South Yard.

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When, on September 24, 2013, the City Council finally adopted a resolution authorizing the City to pay up to \$6,451,000 in remediation costs for cleanup, NASSCO was led to believe that the City intended to fund its fair share of the cleanup, as the other parties are now doing, or have agreed to do. In reliance on the City's commitment, NASSCO's settlements with the other south parties, and certain orders issued by the Court staying discovery in the litigation, NASSCO began the remediation of the South Yard—a significant financial commitment, estimated to cost tens of millions of dollars. Had NASSCO not done so, all of the parties, including the City, could have been found in violation of the Order, and the tens of thousands of tons of sediment removed from the Site thus far would still be in the Bay. Notwithstanding City Council authorization, the City still did not make any payment towards the remediation until mid-December 2013, long after cleanup was underway—putting the cleanup at risk on multiple occasions because the contractors performing the remediation, many of which are small businesses, were not being paid in full. These contractors were compelled to appear at City Council hearings on November 5, 2013 and December 10, 2013 to plead for the City to make the payments that the City Council directed its staff to make.

While the City has since begun paying a portion of the invoices for remediation efforts, which NASSCO appreciates, it has done so subject to a reservation of rights to litigate its allocated share, seeking to pay less than its mediated share that was reached after years of mediation before Timothy Gallagher and discovery in the Regional Board proceeding and federal lawsuit. In addition, there are other significant costs that the City **still has not paid (and refuses to pay)**, such as its full share of investigation and oversight costs related to the cleanup, which amount to over \$1 million. Moreover, the City's refusal to cooperate and meet its obligations under the Order extends beyond the dischargers. The City has taken the same approach in connection with its involvement with the State Board. In September 2013, the City Council authorized the City to pay for past agency oversight costs in the amount of \$261,000; however, NASSCO understands that the City still has not paid that amount to the State. Unfortunately, the City appears to be taking a similarly obstructive approach to the North Yard, at the risk of delaying or derailing the remainder of the required cleanup.

B. The City's Active Opposition Of The Other Parties' Settlements Is Placing The Cleanup At Risk

The Navy and Port District have agreed to pay their fair shares of the South Yard cleanup costs in settlements with NASSCO; however, such payments are contingent upon Court approval of the settlement agreements, which has been delayed, and potentially jeopardized, as a result of the City's opposition. The City is the only party opposing the settlements. Solely because of the City's opposition, NASSCO has been carrying the Navy and Port District's respective shares of the investigation, design, and cleanup costs, a commitment representing more than \$16 million dollars, in order to maintain compliance with the Order for all parties, including the City, while also benefitting the environment.

BAE Systems has entered settlements with the Navy and SDG&E, and has asked the Court to approve these settlements, but the City also is opposing these settlements, creating similar funding problems for the North Yard which may prevent that remediation from taking place on schedule.

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The court is set to hear motions by NASSCO, the Navy, and the Port District to approve the settlements on April 24, 2014. We expect that the City will continue to be the only party to oppose the settlements regarding the South Yard.⁴ If the Court sides with the City, the entire remediation will be placed in jeopardy. Although the cleanup at the South Yard is essentially complete, the City's recalcitrance places a timely North cleanup at risk, as **the City has not yet committed to funding the North cleanup more than two years after the Order was issued, and is seeking to block other parties' efforts to fund that portion of the cleanup by actively opposing all of the settlements.** Contrary to the City's assertions in its letter, the City has no valid reason for thwarting any of these settlements, since, as set forth in the briefings shared with the Regional Board, the Court's approval of these settlements would **not** establish the City's share, or prejudice the City's present effort (however unfortunate) to pay less than its mediated share through continued litigation. Because the City is a named discharger, and is enjoying the benefits of compliance with the Order based on NASSCO's efforts, it is only fair that the City contribute its share of the response costs that made such compliance possible, and cease impeding the efforts of the other parties to fund.

C. The City Has Been Invited To Contribute To The Cleanup On Numerous Occasions, And Has Been Kept Informed Of Cleanup Activities

Lastly, the City complains of a lack of control over the project, and claims that it has not been kept abreast of project developments. NASSCO has invited the City to contribute to the project on numerous occasions but the City has refused to do so, belying its asserted interest in participating. Further, the City should recognize that its decision to avoid any funding until months after remediation was required to begin, and did begin (despite its obligations under the Order), is what caused its perceived lack of control over the project. NASSCO would have welcomed timely funding and participation by the City, but the City was not willing to do either. Moreover, notwithstanding the City's lack of participation, the City has been kept fully abreast of project developments through the receipt of monthly invoices, access to project documents on Geotracker, regular conversations with counsel, and several site visits to the South Yard by City wastewater department staff during mobilization and remediation activities. NASSCO has never refused, or even opposed, any site visits by the City during the project.

It is unfortunate that the City's lawyers appear to prefer litigation in favor of settling on mediated terms. Such litigation will unnecessarily divert City resources towards litigation and away from remediation, and also risks delaying remediation or impeding its completion, as discussed above. As a named discharger and steward of the bay, it is well-past time for the City to work cooperatively to clean up the Site, as directed by the Regional Board. NASSCO therefore respectfully requests that the Regional Board take any available steps to urge the City to reconsider its position, and, at a minimum, withdraw its oppositions to the settlements between parties that have agreed to fund their share of the cleanup costs and are working cooperatively to ensure compliance with the Order. Additionally, the Regional Board should

⁴ Contrary to the City's assertion in its letter, Campbell Industries and the Port District filed statements of *non*-opposition to these settlements.

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make clear that, if any portion of the remediation is delayed due to the City's actions, fines will be directed only at those parties who have failed to accept responsibility and promote the cleanup.

Thank you for your attention to these important matters, and we look forward to discussing these issues further on April 9.

Very truly yours,



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